

# ELECTORAL EVIDENCE

*Peter Nicolas\**

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\* William L. Dwyer Endowed Chair in Law and Adjunct Professor of Gender, Women, & Sexuality Studies, University of Washington. I wish to thank Judy Davis, Erica Koscher, Sherry Leysen, and Ingrid Mattson for their valuable research assistance, and Helen A. Anderson, Steve Calandrillo, Mary D. Fan, Maureen A. Howard, Edward J. Imwinkelried, Laird Kirkpatrick, Anita Krug, Lisa M. Manheim, and Jessica West for their valuable feedback.

## ABSTRACT

*Each year, millions of Americans cast votes for specific candidates or on specific ballot measures. Each such vote generates potential “electoral evidence,” the admissibility of which may be the subject of dispute in subsequent litigation. The evidence may take various forms, including the marked ballot itself, a voter’s testimony regarding her vote, or her written or oral statements regarding her vote.*

*Electoral evidence is most commonly offered in litigation over the election outcome itself, with the parties seeking to determine how certain individuals voted to resolve a close election. However, its potential relevance is not limited to such proceedings. It may also be substantively relevant in a case in which the voter is alleged to have discriminated against someone, or to prove potential juror or witness bias against a party. While election contests for specific candidates only provide insight into a voter’s general political leanings that is only marginally relevant to prove discriminatory purpose or bias in most instances, votes cast in recent years on gay and transgender rights, affirmative action, religious freedom, tort reform, and abortion provide insight into a voter’s views about discrete categories of persons that is far more probative of such matters.*

*The admissibility of electoral evidence has been given piecemeal consideration in judicial opinions, but has not received comprehensive attention in any judicial opinion or in the scholarly literature. This Article is the first comprehensive examination of the evidentiary issues that arise when a party seeks to offer electoral evidence in judicial proceedings. It identifies three dangers associated with admitting electoral evidence: its trustworthiness; the individual and societal interests in protecting ballot secrecy; and the risk of unfair prejudice. It demonstrates that these dangers are addressed in a fragmentary and incomplete fashion by existing evidentiary rules. Relying on social science research about the veracity of voters in recounting their votes as well as the history behind the development of the right to ballot secrecy, this Article concludes that courts and policy makers should be cautious about deeming electoral evidence admissible and should allow it only in limited circumstances.*

## INTRODUCTION

Although nationwide elections for President occur only once every four years, voters go to the polls multiple times each year in the United States to elect over half a million other federal, state, and local officials<sup>1</sup> as well as to

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1. See JENNIFER L. LAWLESS, BECOMING A CANDIDATE: POLITICAL AMBITION AND THE DECISION TO RUN FOR OFFICE 33 (2012).

cast votes on numerous ballot measures. Each time a person votes—or attempts to vote—in an election, she generates potential “electoral evidence,” the admissibility of which may be the subject of dispute when offered in subsequent judicial proceedings. Such evidence can take various forms, including the marked ballot itself,<sup>2</sup> the voter’s own testimony of how she voted (or intended to vote) in the election,<sup>3</sup> the voter’s written or oral statements to others regarding her actual or intended vote,<sup>4</sup> the testimony of a third person who observed the voter marking her ballot,<sup>5</sup> a ballot “selfie” posted by the voter on social media,<sup>6</sup> or other circumstantial evidence of how the person voted.<sup>7</sup>

Typically, such evidence has been offered in litigation involving a contest over the outcome of the very election that generated the electoral evidence. Most frequently, such litigation involves a close election contest coupled with an allegation that some individuals—sufficient in number to impact the election result—unlawfully voted in the election, with the parties seeking to prove the tenor of the votes cast unlawfully in an effort to determine the outcome of the election.<sup>8</sup> For example, the candidates in the 1977 mayoral election in Ann Arbor, Michigan were separated by a single vote, and the losing candidate sought to compel seventeen individuals who voted in the election but who did not actually reside in the city to disclose how they voted.<sup>9</sup> Similarly, in the 2004 gubernatorial election in Washington, the margin of victory was only 129 votes, and there was evidence that nearly 1,400 convicted felons who had been stripped of their voting rights had illegally participated in the election.<sup>10</sup>

Alternatively, electoral evidence may be offered in election contests in which some of the ballots have been lost, stolen, destroyed,<sup>11</sup> or tampered with;<sup>12</sup> votes have been improperly recorded (such as where a voting machine malfunctions);<sup>13</sup> or when necessary to interpret an ambiguously

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2. See, e.g., *Pennington v. Hare*, 62 N.W. 116, 117 (Minn. 1895).

3. See, e.g., *Doss v. Chambers*, 188 S.W. 260, 262 (Tex. Civ. App. 1916).

4. See, e.g., *Lauer v. Estes*, 53 P. 262, 263 (Cal. 1898).

5. See, e.g., *People ex rel. Williams v. Cicott*, 16 Mich. 283, 313 (1868) (opinion of Christiancy, J.), *overruled in part* by *Petrie v. Curtis*, 196 N.W.2d 761 (Mich. 1972).

6. See generally *Rideout v. Gardner*, 838 F.3d 65, 67 (1st Cir. 2016).

7. See, e.g., *Moore v. Sharp*, 41 S.W. 587, 590 (Tenn. 1897), *overruled by* *Brown v. Hows*, 40 S.W.2d 1017 (Tenn. 1931).

8. See, e.g., *Belcher v. Mayor of Ann Arbor*, 261 N.W.2d 56, 57 (Mich. Ct. App. 1977).

9. See *id.*

10. See *In re Coday*, 130 P.3d 809, 810–12 (Wash. 2006) (en banc); Gregory Roberts, *Judge Upholds Gregoire’s Election; Rossi Won’t Appeal*, SEATTLE POST-INTELLIGENCER REPORTER (June 5, 2005, 10:00 PM) <http://www.seattlepi.com/local/article/Judge-upholds-Gregoire-s-election-Rossi-won-t-1175262.php>.

11. See, e.g., *Dixon v. Orr*, 4 S.W. 774, 776 (Ark. 1887).

12. See, e.g., *Wilburn v. Galloway*, 179 S.W.2d 540, 542 (Tex. Civ. App. 1944).

13. See, e.g., *Helm v. State Election Bd.*, 589 P.2d 224, 226–27 (Okla. 1979).

marked ballot.<sup>14</sup> Finally, electoral evidence may be offered in a case in which some individuals were wrongfully prevented from voting in the election.<sup>15</sup>

However, the relevance of electoral evidence is not limited solely to cases involving contests over the election results themselves. Rather, such evidence is potentially relevant in proceedings wholly unrelated to resolving election disputes. This is both because an individual's general voting record and her votes cast on discrete ballot initiatives reveal valuable information about her, and because the rules of evidence broadly define relevance to include anything that has even slight probative value.<sup>16</sup>

Substantively, electoral evidence is most clearly relevant in a case alleging discrimination on the basis of political affiliation.<sup>17</sup> For example, evidence that a supervisor always—or nearly always—voted for Democratic candidates would be relevant in an employment discrimination case in which the supervisor is accused of unlawfully firing someone because of the employee's visible political support of Republican candidates. Electoral evidence would also be relevant—albeit with far less probative force—in cases involving discrimination on some basis other than political affiliation. For example, an employee who alleges that she was fired from her job because she is transgender might contend that her supervisor's consistent votes in favor of Republican candidates—who tend overwhelmingly to oppose transgender rights<sup>18</sup>—is relevant in determining whether the supervisor acted with discriminatory intent.

Electoral evidence is also probative and thus potentially admissible for the purpose of revealing potential juror or witness bias against a party. For example, if a party in a politically charged case is a high-profile figure associated with a political party, evidence of potential jurors' political leanings is relevant in assessing whether they can be impartial.<sup>19</sup> Similarly, if a party to an action is associated with a political party, evidence of the political leanings of a witness who testifies at the trial can be highly probative in assessing her potential bias for or against that party.<sup>20</sup> Indeed, in the modern, highly partisan political environment, the relevance of such evidence to prove bias seems particularly acute.

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14. See, e.g., *Davis v. State ex rel. Wren*, 12 S.W. 957, 960 (Tex. 1889).

15. See, e.g., *Rubens v. Hodges*, 837 S.W.2d 465, 466 (Ark. 1992).

16. See FED. R. EVID. 401; *United States v. Holmes*, 413 F.3d 770, 773 (8th Cir. 2005).

17. See, e.g., *Vinci v. Quagliani*, 889 F. Supp. 2d 348, 348 (D. Conn. 2012); *D'Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352, 1353 (D.N.J. 1995).

18. See Daniel Cox & Robert P. Jones, *Majority of Americans Oppose Transgender Bathroom Restrictions*, PUBLIC RELIGION RESEARCH INSTITUTE (Mar. 10, 2017), <https://www.prii.org/research/lgbt-transgender-bathroom-discrimination-religious-liberty/>.

19. See, e.g., *Wagner v. Jones*, 928 F. Supp. 2d 1084, 1101–03 n.20 (S.D. Iowa 2013).

20. See, e.g., *Henderson v. Dreyfus*, 191 P. 442, 453 (N.M. 1919).

Yet, for a number of reasons, the relevance of electoral evidence outside of contests regarding the election results themselves has received scant attention in judicial opinions or in the academic literature. First, although evidence of a person's general political leanings is highly relevant in a case in which the person is accused of political affiliation discrimination, causes of action for such discrimination are relatively rare<sup>21</sup> and limited in scope.<sup>22</sup> Second, although such evidence can be highly probative in determining juror or witness bias in cases in which a party and a juror or witness have strongly opposing or matching political leanings, the number of scenarios in which a party's political affiliations are likely to be known to potential jurors or witnesses so as to raise bias concerns are likely few and far between. Third, because the probative link between a person's general political preferences and her willingness to discriminate against a person for a more targeted reason—such as due to her sexual orientation, gender identity, religion, or other characteristic—is a tenuous one, parties are unlikely to offer and courts are unlikely to admit such evidence under those circumstances.

However, while the votes cast by an individual in traditional election contests for specific candidates only provide insight into her general political leanings that may be of marginal relevance in most cases, her votes cast in discrete election contests in recent decades involving such hot-button issues as gay<sup>23</sup> and transgender rights,<sup>24</sup> race-based affirmative action,<sup>25</sup> religious freedom,<sup>26</sup> tort reform,<sup>27</sup> and abortion rights<sup>28</sup> provide

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21. See, e.g., *Rare "Political Activity Discrimination" Lawsuit Sent to Trial*, 13 No. 21 CAL. EMP. L. LETTER 9 (2004).

22. In most jurisdictions, the cause of action is available only against public employers, not private ones. See, e.g., KY. REV. STAT. § 18A.140 (2010). Only a handful of states prohibit private discrimination on the basis of political affiliation. See, e.g., CAL. LAB. CODE § 1102 (1937); D.C. CODE § 32-408 (2008); P.R. LAWS ANN. tit. 29, § 146.

23. See, e.g., *California Proposition 8, the "Eliminates Right of Same-Sex Couples to Marry" Initiative (2008)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_8\\_the\\_%22Eliminates\\_Right\\_of\\_Same-Sex\\_Couples\\_to\\_Marry%22\\_Initiative\\_\(2008\)](https://ballotpedia.org/California_Proposition_8_the_%22Eliminates_Right_of_Same-Sex_Couples_to_Marry%22_Initiative_(2008)) (last visited Sept. 17, 2017) (amending California constitution to prohibit same-sex marriage).

24. See, e.g., *City of Houston Anti-Discrimination HERO Veto Referendum (November 2015)*, BALLOTPEDIA, [https://ballotpedia.org/City\\_of\\_Houston\\_Anti-Discrimination\\_HERO\\_Veto\\_Referendum\\_Proposition\\_1\\_\(November\\_2015\)](https://ballotpedia.org/City_of_Houston_Anti-Discrimination_HERO_Veto_Referendum_Proposition_1_(November_2015)) (last visited Sept. 17, 2017) (veto referendum targeting ordinance prohibiting sexual orientation and gender identity discrimination).

25. See, e.g., *Michigan Civil Rights Amendment, Proposal 2 (2006)*, BALLOTPEDIA, [https://ballotpedia.org/Michigan\\_Civil\\_Rights\\_Amendment\\_Proposal\\_2\\_\(2006\)](https://ballotpedia.org/Michigan_Civil_Rights_Amendment_Proposal_2_(2006)) (last visited Oct. 1, 2016) (amending Michigan constitution to prohibit race-based preferences in public university admissions).

26. See, e.g., *Oklahoma Public Money for Religious Purposes, State Question 790 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Oklahoma\\_Public\\_Money\\_for\\_Religious\\_Purposes\\_State\\_Question\\_790\\_\(2016\)](https://ballotpedia.org/Oklahoma_Public_Money_for_Religious_Purposes_State_Question_790_(2016)) (last visited Sept. 17, 2017) (defeated proposal that would have amended Oklahoma constitution to permit government to use public resources for the benefit of religion or religious institutions).

27. See, e.g., *Texas Limit on Damages in Medical Lawsuits, Proposition 12 (2003)*, BALLOTPEDIA, [https://ballotpedia.org/Texas\\_Limit\\_on\\_Damages\\_in\\_Medical\\_Lawsuits\\_](https://ballotpedia.org/Texas_Limit_on_Damages_in_Medical_Lawsuits_)

insight into a voter's views about discrete categories of persons that may be of greater relevance and that are likely to garner judicial attention in the near future.

Although electoral evidence can be relevant and thus potentially admissible in both election contests and in other types of judicial proceedings, it nonetheless raises three concerns that should give courts and policy makers alike pause in deeming it admissible. First, electoral evidence—particularly when it comes in the form of testimony by the voter herself or evidence of her out-of-court oral or written statements regarding the tenor of her vote—is of dubious trustworthiness.<sup>29</sup> Particularly when her vote in favor of a particular candidate or ballot initiative is out-of-step with the politics of her social and work circles, a desire not to be treated as an outcast may impel her to inaccurately recount her vote.<sup>30</sup> Second, admitting electoral evidence undermines the right to ballot secrecy, which furthers not only voters' individual interests<sup>31</sup> but also societal interests in preventing vote buying, voter intimidation, and other historical practices that led to the enactment of laws ensuring a right to vote by secret ballot.<sup>32</sup> Finally, although electoral evidence is relevant and thus potentially admissible in a wide swath of cases, in many such cases there is a significant risk that the evidence may be overvalued or misused by the trier of fact.

These three risks associated with admitting electoral evidence are addressed by the rules of evidence, but in a fragmentary and incomplete fashion. The most significant evidentiary obstacles are two different types of privileges, both of which are at least partially grounded in constitutional guarantees: the political vote privilege, which protects against disclosure of lawfully cast votes,<sup>33</sup> and the privilege against self-incrimination, which protects against disclosure of unlawfully cast votes.<sup>34</sup> Other evidentiary

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Proposition\_12\_(September\_2003) (last visited Sept. 17, 2017) (amending Texas constitution to authorize legislature to limit damages in certain types of tort actions).

28. See, e.g., *Mississippi Life Begins at the Moment of Fertilization Amendment, Initiative 26 (2011)*, [BALLOTPEDIA](https://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment_Initiative_26_(2011)), [https://ballotpedia.org/Mississippi\\_Life\\_Begins\\_at\\_the\\_Moment\\_of\\_Fertilization\\_Amendment\\_Initiative\\_26\\_\(2011\)](https://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment_Initiative_26_(2011)) (last visited Sept. 17, 2017) (defeated initiative to amend Mississippi constitution to define life as beginning at the moment of fertilization).

29. See, e.g., *Lauer v. Estes*, 53 P. 262, 263 (Cal. 1898); *Pennington v. Hare*, 62 N.W. 116, 117 (Minn. 1895); *In re Harper*, 456 S.E.2d 878, 881 (N.C. Ct. App. 1995).

30. See, e.g., *Smith v. Thomas*, 54 P. 71, 72 (Cal. 1898); Richard J. Powell, *Social Desirability Bias in Polling on Same-Sex Marriage Ballot Measures*, 41 AM. POL. RES. 1052, 1054–56 (2013).

31. See proposed FED. R. EVID. 507 advisory committee's note; CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 5:50 (4th ed. 2017).

32. See *D'Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352, 1358–59 (D.N.J. 1995); *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 631 (Mass. 1982); *In re Orsatti*, 598 A.2d 1341, 1343–44 (Pa. Commw. Ct. 1991).

33. See, e.g., *ALA. R. EVID. 506*; *Taylor v. Pile*, 391 P.2d 670, 673 (Colo. 1964).

34. See, e.g., *Montoya v. Ortiz*, 175 P. 335, 337–38 (N.M. 1918); *Oliphint v. Christy*, 299 S.W.2d 933, 939 (Tex. 1957).

bases for excluding electoral evidence include the rule against hearsay,<sup>35</sup> the best evidence rule,<sup>36</sup> and unfair prejudice.<sup>37</sup> Yet despite all of these potential evidentiary roadblocks, some electoral evidence is still potentially admissible under current law.

Although electoral evidence raises important evidentiary and constitutional issues, its admissibility has received only limited, piecemeal attention in judicial opinions and virtually none in the scholarly literature. This Article is thus the first comprehensive examination of the admissibility of electoral evidence. Part I of this Article defines the phrase “electoral evidence” and identifies in detail the various ways in which it is potentially relevant under the Federal Rules of Evidence and their state law counterparts. Part II identifies three major risks associated with admitting electoral evidence: its trustworthiness, its negative impact on the individual and societal interests in protecting ballot secrecy, and its danger of unfairly prejudicing judicial proceedings. Part III demonstrates that existing evidentiary principles—including privilege, hearsay, the best evidence rule, and exclusion on the ground of unfair prejudice—address these concerns, but in a fragmentary and incomplete fashion. Part IV contends that existing evidentiary principles thus fail adequately to protect both the integrity of judicial proceedings and the interest in ballot secrecy by allowing for the admission of electoral evidence and proposes reform that addresses these concerns in a comprehensive fashion. This Article concludes that electoral evidence is relevant and thus potentially admissible in numerous scenarios, many of which are as yet unrecognized in judicial opinions. However, relying on traditional evidentiary principles reinforced by social science research about the veracity of voters in recounting their votes, as well as the history behind the development of the right to ballot secrecy, this Article concludes that courts and policy makers should be cautious about deeming electoral evidence admissible and should allow it only in limited circumstances.

## I. ELECTORAL EVIDENCE: DEFINITION AND RELEVANCE

To assess the risks associated with admitting electoral evidence and the doctrinal and policy-related rationales for its exclusion from judicial proceedings, it is important to identify the potential scope of the problem this Article seeks to resolve. Accordingly, Part I.A provides a brief overview of the various methods of voting in the United States today. That

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35. See FED. R. EVID. 802; *Lauer v. Estes*, 53 P. 262, 263 (Cal. 1898); *City of Beardstown v. City of Virginia*, 76 Ill. 34, 47 (1875).

36. See FED. R. EVID. 1002; *Pullen v. Mulligan*, 561 N.E.2d 585, 607–08 (Ill. 1990); *Helm v. State Election Bd.*, 589 P.2d 224, 234 (Okla. 1979).

37. See FED. R. EVID. 403.

overview provides the backdrop for defining the phrase “electoral evidence.” Part I.B next delineates with precision the various methods by which a litigant can seek to directly or indirectly prove the tenor of someone’s vote. Finally, Part I.C identifies the myriad ways in which such evidence is potentially relevant both for substantive and impeachment purposes.

### A. *Overview of Voting Methods in the United States*

To fully understand the range of possible forms of electoral evidence—as well as some of the rationales that might justify its exclusion—it is important to understand how voting methods have evolved in the United States. From the inception of our nation until the late nineteenth century, the exclusive method of voting in the United States was by way of paper ballots that were marked and counted by hand<sup>38</sup> in elections that were *not* conducted by secret ballot.<sup>39</sup> States did not initially regulate the form of the ballot, leading advocates for competing political parties and groups to create preprinted ballots listing the names of their preferred candidates.<sup>40</sup> Often, these ballots were printed on brightly colored paper or contained other distinctive marks that could be recognized from a distance.<sup>41</sup> This state of affairs led to rampant instances of vote buying and voter coercion.<sup>42</sup> Because the preprinted ballots were recognizable from a distance, a person seeking to bribe someone to vote a given way could monitor and confirm that the voter carried through with the promised act.<sup>43</sup> For similar reasons, employers in favor of a particular candidate or ballot initiative could pressure their employees to vote in a particular way by watching them cast their ballots.<sup>44</sup> A person approaching the ballot box with a distinctly identified ballot could likewise be physically blocked or harassed by supporters of the opposing candidate or party.<sup>45</sup>

These instances of vote buying and coercion led states to adopt the so-called Australian ballot.<sup>46</sup> Under the Australian ballot system, voters mark

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38. See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711, 1718 (2005).

39. See *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring). This state of affairs was inherited from England, which did not introduce the secret ballot until 1872. See *Burson v. Freeman*, 504 U.S. 191, 202 (1992).

40. See *Reed*, 561 U.S. at 226; *Burson*, 504 U.S. at 200; *Metheny v. Pickel*, 141 N.E. 762, 764 (Ill. 1923); Tokaji, *supra* note 38, at 1718.

41. See *Reed*, 561 U.S. at 226; *Burson*, 504 U.S. at 200.

42. See *Reed*, 561 U.S. at 226–27; Tokaji, *supra* note 38, at 1718.

43. See *Reed*, 561 U.S. at 226–27; *Burson*, 504 U.S. at 200–01.

44. See *Reed*, 561 U.S. at 226.

45. See *id.* at 226–27.

46. See *id.*; *Burson*, 504 U.S. at 203–04.

their choices in secret on an official, uniform ballot printed by the government at public expense that lists all the candidates and ballot proposals and that is distributed only at the polling place itself.<sup>47</sup> That system, developed in Australia in 1856,<sup>48</sup> was first adopted in the United States in 1888,<sup>49</sup> and by 1896 it was adopted by almost ninety percent of the states.<sup>50</sup> Although most jurisdictions that adopted the Australian ballot made the vote truly secret by making it impossible for even election officials to trace a ballot to a particular individual,<sup>51</sup> there were exceptions. For a period of time, some states required that the official ballots be individually numbered so that, in the event of an election contest involving a dispute over the right of certain people to vote in the election, their individual ballots could be identified and invalidated.<sup>52</sup>

Over time, hand-counted paper ballots have been eclipsed by four other methods of voting, and today fewer than two percent of votes are cast in this fashion.<sup>53</sup> Concerns over tampering with paper ballots as well as difficulties with interpreting voter intent led to the invention in 1892 of mechanical-lever voting machines.<sup>54</sup> However, voting machines, while not easily tampered with, began to malfunction with increased frequency as the machines aged, and the absence of a paper record made it impossible to reconstruct the election in the event of a malfunction.<sup>55</sup> In 1964, punch-card ballots were introduced, which require voters to use a stylus to punch through perforations in the card corresponding to particular candidates and ballot choices.<sup>56</sup> These have the advantage over paper ballots of increased accuracy in counting votes because they are machine rather than hand-counted, and they have an advantage over mechanical-lever voting machines in that there is a paper trail, but they come with the risk that the voter's intent will not be accurately reflected—as evidenced in the 2000 U.S. presidential election—if the chads<sup>57</sup> are not fully removed or if they

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47. See *Burson*, 504 U.S. at 202; Tokaji, *supra* note 38, at 1718–19.

48. See Tokaji, *supra* note 38, at 1718.

49. See *Reed*, 561 U.S. at 227; *Burson*, 504 U.S. at 203; *Barsky v. United States*, 167 F.2d 241, 249 n.28 (D.C. Cir. 1948).

50. See *Reed*, 561 U.S. at 227; *Burson*, 504 U.S. at 204–05.

51. See, e.g., *McGrane v. County of Nez Perce*, 112 P. 312, 314 (Idaho 1910); *Williams v. Stein*, 38 Ind. 89, 95–96 (1871); *Brisbin v. Cleary*, 1 N.W. 825, 826 (Minn. 1879).

52. See *Willis v. Crumbly*, 268 S.W.3d 288, 294–97 (Ark. 2007); *Womack v. Foster*, 8 S.W.3d 854, 864–68 (Ark. 2000); *Ex parte Oppenstein*, 233 S.W. 440, 443 (Mo. 1921).

53. See Tokaji, *supra* note 38, at 1719.

54. See *id.*; Trenton I. Weaver, *E-Nie, Me-Nie, Mi-Ne-Vote: How to Encourage Internet Voting Innovation*, 12 I/S: J.L. & POL'Y FOR INFO. SOC'Y 327, 332 (2016).

55. See Tokaji, *supra* note 38, at 1719; Weaver, *supra* note 54, at 332–33.

56. See Tokaji, *supra* note 38, at 1719–20; Weaver, *supra* note 54, at 333.

57. Chads are the perforated parts of the ballot that the voter is supposed to punch through to mark her choice. See *Bush v. Gore*, 531 U.S. 98, 105 (2000).

are punched in the wrong place due to misalignment.<sup>58</sup> In the 1980s, states began to use optical-scan ballots, by which voters mark their preferences by filling in an oval or otherwise marking a paper ballot that is machine-counted.<sup>59</sup> These have the same advantages as punch-card ballots, along with the additional advantage that some jurisdictions allow voters to use a machine to check their ballots before putting them in the ballot box to ensure that no stray marks or accidents have resulted in an under- or over-vote for any office or ballot question.<sup>60</sup> Finally, starting in the 1970s, some jurisdictions introduced direct record electronic voting machines (DREs), whereby voters use a touch screen or something similar to indicate their votes, and their votes are recorded electronically.<sup>61</sup> This method is a modern version of the mechanical-lever voting machine and generally shares its lack of a paper record, which is a disadvantage in the event of a machine malfunction.<sup>62</sup> However, some DREs are designed to create a voter-verified paper audit trail (VVPAT), meaning that they print out a paper record that the voter can review to confirm that her vote has been correctly recorded, with the paper record being saved by election officials in the event that the machine malfunctions or there is otherwise a need to examine individually cast ballots.<sup>63</sup>

### B. *The Definition of Electoral Evidence*

The first and perhaps most obvious type of electoral evidence is the marked ballot itself. Imagine that there is a very close election contest that turns on an interpretation of the intent of a handful of voters. In jurisdictions that use any form of paper-based voting—including hand-counted paper ballots, punch-card ballots, and optical-scan ballots—a paper record of the ballot exists for each cast vote, and thus the trier of fact can examine the marked or punched paper ballots themselves to determine voter intent.<sup>64</sup> In a jurisdiction that uses DREs to record votes, the electronic record of each individual voter's virtual ballot is stored in the

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58. See Tokaji, *supra* note 38, at 1720–21; Weaver, *supra* note 54, at 333.

59. See Tokaji, *supra* note 38, at 1721–22; Weaver, *supra* note 54, at 333–34.

60. See Tokaji, *supra* note 38, at 1721–22; Weaver, *supra* note 54, at 334.

61. See Tokaji, *supra* note 38, at 1722; Weaver, *supra* note 54, at 334–35.

62. See Tokaji, *supra* note 38, at 1724.

63. See *Crowley v. Nevada ex rel. Nev. Sec'y of State*, 678 F.3d 730, 732 n.1 (9th Cir. 2012); Joshua F. Clowers, *I E-Vote, U I-Vote, Why Can't We All Just Vote?!: A Survey of the Changing Face of the American Election*, 42 GONZ. L. REV. 61, 70 (2006).

64. See, e.g., *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 623–25 (Mass. 1982) (punch-card ballot); *Pennington v. Hare*, 62 N.W. 116, 117 (Minn. 1895) (hand-counted paper ballot); *Spaeth v. Kendall*, 801 P.2d 591, 592–93 (Mont. 1990) (optical-scan ballot).

machine and thus serves as an analogue to the ballot itself,<sup>65</sup> and those electronic records can be individually printed after the election in the event of a dispute.<sup>66</sup> In those DRE jurisdictions that use VVPAT, the printout serves as a duplicate copy of the virtual ballot in paper form that can be examined in the event of a dispute over the outcome of the election.<sup>67</sup> Mechanical-lever voting machines create no such individual records, and there is thus no analogue to the “ballot itself” in such jurisdictions.<sup>68</sup>

Although the “ballot itself” may typically be characterized as the “best” or most superior method of proving how someone voted,<sup>69</sup> for two different reasons, such evidence is not always available. First, for elections in which mechanical-lever voting machines are used, there is no record of individually cast votes and thus nothing analogous to the “ballot itself.”<sup>70</sup> Second, even if individually marked ballots exist in paper form or can be recreated from electronic data, they may be of no utility if—as is typically the case—there is no way to connect the ballots to specific individuals.<sup>71</sup> Thus, for example, if what is at issue in the recount is not the decryption of an ambiguously marked ballot but instead the voiding of the votes of individuals who illegally participated in the election, examination of the ballots themselves will bear no fruit, thus requiring resort to other types of evidence to determine how the relevant individuals voted in the election.<sup>72</sup> Third, even if a paper ballot or its functional equivalent was initially cast, it may have been lost, stolen, destroyed,<sup>73</sup> or tampered with<sup>74</sup> such that it, as a practical matter, is not available.

In these contexts, case law has thus deemed it necessary to recognize other ways to prove how specific individuals voted in any given election contest. One source of such electoral evidence is from the voter herself, who of course has firsthand knowledge of the tenor of her vote. This might include the voter’s own firsthand testimony regarding how she voted<sup>75</sup> or

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65. See, e.g., *Wexler v. Anderson*, 452 F.3d 1226, 1229 (11th Cir. 2006); *Banfield v. Aichele*, 51 A.3d 300, 305 (Pa. Commw. Ct. 2012); *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 4–6 (Tex. 2011).

66. See *Crowley*, 678 F.3d at 732.

67. See *id.*; *Nguyen v. Nguyen*, 70 Cal. Rptr. 3d 753, 757 (Cal. Ct. App. 2008).

68. See, e.g., *City of Little Rock v. Henry*, 345 S.W.2d 12, 14 (Ark. 1961); *Kuznik v. Westmoreland Cty. Bd. of Comm’rs*, 902 A.2d 476, 482–84, 500–01 (Pa. 2006); *Oliphint v. Christy*, 299 S.W.2d 933, 938 (Tex. 1957); *Jeanne S. Zaino & Jeffrey T. Zaino, The Changing Landscape of Election Disputes*, 59 DISP. RESOL. J. 11, 15 (2004).

69. See *Pullen v. Mulligan*, 561 N.E.2d 585, 607–08 (Ill. 1990); *Helm v. State Election Bd.*, 589 P.2d 224, 234 (Okla. 1979).

70. See *supra* text accompanying note 68.

71. See *supra* text accompanying notes 51–52.

72. See *Crabb v. Orth*, 32 N.E. 711, 712 (Ind. 1892).

73. See, e.g., *Dixon v. Orr*, 4 S.W. 774, 776 (Ark. 1887).

74. See, e.g., *Wilburn v. Galloway*, 179 S.W.2d 540, 542 (Tex. Civ. App. 1944).

75. See, e.g., *Doss v. Chambers*, 188 S.W. 260, 262 (Tex. Civ. App. 1916).

intended to vote<sup>76</sup> in the election, or it might be her out-of-court written or oral statements to others regarding the tenor of her vote<sup>77</sup> (or how she intended to vote)<sup>78</sup> that are offered into evidence. In the modern era, it might include the voter posting a ballot “selfie”—a photograph of her completed ballot—on social media.<sup>79</sup>

It is also possible that a third person may have firsthand knowledge of how a specific individual voted and testifies directly to what she observed. Perhaps the third person watched the voter fill out and cast her ballot, either because the third person was another voter or an election worker who improperly looked over the voter’s shoulder (or at the completed ballot itself) at a polling place<sup>80</sup> or—in a state such as Washington,<sup>81</sup> Oregon,<sup>82</sup> or Colorado<sup>83</sup> where voting is done almost entirely by mail—the voter showed the third person the completed ballot before placing it in the mail.<sup>84</sup> Alternatively, perhaps the third person helped the voter fill out the ballot because the voter had a disability requiring the assistance of another person.<sup>85</sup> Moreover, if an effort is made to prove not the tenor of a specific individual’s vote, but rather to confirm the outcome of an election for which the ballots have subsequently been lost, stolen, or destroyed, it may be necessary to resort to the testimony or written records of those who counted the ballots or the testimony of those who witnessed the count take place.<sup>86</sup>

Finally, in the absence of or in addition to direct evidence of how a person voted, a party may offer circumstantial evidence of that fact.<sup>87</sup> In the days of distinctive preprinted ballots produced by competing candidates and factions, this included evidence that a person was observed picking up and casting such a ballot.<sup>88</sup> Moreover, although people do not always vote

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76. See, e.g., *Gervais v. Rolfe*, 187 P. 899, 900 (Mont. 1920).

77. See, e.g., *Lauer v. Estes*, 53 P. 262, 263 (Cal. 1898).

78. See, e.g., *Moore v. Sharp*, 41 S.W. 587, 590 (Tenn. 1897), *overruled by* *Brown v. Hows*, 40 S.W.2d 1017 (Tenn. 1931).

79. See generally *Crookston v. Johnson*, 841 F.3d 396, 400 (6th Cir. 2016); *Rideout v. Gardner*, 838 F.3d 65, 67 (1st Cir. 2016).

80. See, e.g., *Rhyan v. Johnson*, 2 N.E.2d 902, 903 (Ill. 1936); *Widick v. Ralston*, 197 S.W.2d 261, 267 (Ky. 1946); *People ex rel. Williams v. Cicott*, 16 Mich. 283, 313 (1868) (opinion of Christiancy, J.) *overruled in part by* *Petrie v. Curtis*, 196 N.W.2d 761 (Mich. 1972).

81. See WASH. REV. CODE § 29A.40.010 (2013).

82. See OR. REV. STAT. § 254.465 (2007).

83. See COLO. REV. STAT. § 1-7.5-104 (2016).

84. See, e.g., *Cicott*, 16 Mich. at 313.

85. See, e.g., *Lane v. Bailey*, 75 P. 191, 195 (Mont. 1904).

86. See *Dixon v. Orr*, 4 S.W. 774, 776 (Ark. 1887); *Kinder v. Sch.* Dist. No. 126, 123 P. 610, 611 (Wash. 1912).

87. See *Powers v. Harten*, 167 N.W. 693, 695 (Iowa 1918); *White v. Slama*, 130 N.W. 978, 979–80 (Neb. 1911); *Montoya v. Ortiz*, 175 P. 335, 338 (N.M. 1918).

88. See, e.g., *Tunks v. Vincent*, 51 S.W. 622, 624 (Ky. 1899); *Wilkinson v. McGill*, 64 A.2d 266, 273 (Md. 1949); *People ex rel. Boyer v. Teague*, 11 S.E. 665, 679–81 (N.C. 1890).

in accordance with their party affiliations, such information is routinely deemed to provide presumptive circumstantial evidence of whom an individual likely voted for.<sup>89</sup> Other examples of circumstantial evidence of how a particular individual voted include the relationship between the voter and either the candidates or the supporters of particular candidates or ballot initiatives,<sup>90</sup> her general statements of support for particular candidates or initiatives,<sup>91</sup> as well as evidence that the voter signed a petition to place a particular candidate or issue on the ballot.<sup>92</sup>

### C. *The Relevance of Electoral Evidence*

The threshold for determining the admissibility of evidence—electoral or otherwise—is relevance.<sup>93</sup> Under the Federal Rules of Evidence and their state law counterparts, evidence that is not relevant is inadmissible, while evidence that is relevant is presumptively admissible unless subject to exclusion pursuant to some other evidentiary rule.<sup>94</sup> The definition of relevance contains two separate requirements, materiality and probative worth, both of which must be satisfied.<sup>95</sup> Whether the evidence is offered to prove a material fact—or one that is “of consequence in determining the action”—turns on whether that fact is legally significant under the governing substantive law at issue in the case.<sup>96</sup> Assuming that it is, the probative worth requirement is a liberal one<sup>97</sup> that rarely serves as a barrier to admissibility.<sup>98</sup> To be sufficiently probative to satisfy the probative worth requirement, evidence need only have “any tendency” to make a

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89. See, e.g., *Gribble v. Willeford*, 546 N.E.2d 994, 999 (Ill. App. Ct. 1989); *Tunks*, 51 S.W. at 624; *Dowling v. Orleans Par. Democratic Comm.*, 102 So. 2d 755, 763 (La. 1958); *Wilkinson*, 64 A.2d at 273; *In re Murphy*, 243 A.2d 832, 835–36 (N.J. Super. Ct. App. Div. 1968); *Moore v. Sharp*, 41 S.W. 587, 590 (Tenn. 1896), *overruled by* *Brown v. Hows*, 40 S.W.2d 1017 (Tenn. 1930).

90. See, e.g., *Widmayer v. Davis*, 83 N.E. 87, 92 (Ill. 1907); *Sorenson v. Sorenson*, 59 N.E. 555, 556 (Ill. 1901); *Dowling*, 102 So. 2d at 755; *In re Murphy*, 243 A.2d at 835–36; *Moore*, 41 S.W. at 590; *Beauregard v. Gunnison City*, 160 P. 815, 819 (Utah 1916).

91. See, e.g., *Moore*, 41 S.W. at 590.

92. See, e.g., *Canales v. City of Alviso*, 474 P.2d 417, 421–23 (Cal. 1970).

93. See *Seidman v. Am. Airlines, Inc.*, 923 F.2d 1134, 1139 (5th Cir. 1991); *Koloda v. Gen. Motors Parts Div.*, 716 F.2d 373, 375 (6th Cir. 1983).

94. See FED. R. EVID. 402; *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 298 (7th Cir. 1990); *United States v. Beechum*, 582 F.2d 898, 907 n.7 (5th Cir. 1978); see also JACK B. WEINSTEIN & MARGARET A. BERGER, 6 WEINSTEIN’S FEDERAL EVIDENCE T-30–T-33 (Joseph M. McLaughlin ed., 2d ed. 2009) (setting forth analogous state law counterparts).

95. See generally PETER NICOLAS, EVIDENCE: A PROBLEM-BASED AND COMPARATIVE APPROACH 6 (3d rev. ed. 2014).

96. *Id.*; *United States v. Shomo*, 786 F.2d 981, 985 (10th Cir. 1986).

97. See *Tennard v. Dretke*, 542 U.S. 274, 284–85 (2004); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993); *United States v. Boros*, 668 F.3d 901, 907 (7th Cir. 2012).

98. See *Boros*, 668 F.3d at 907 (citing *Tennard*, 542 U.S. at 285) (“A party faces a significant obstacle in arguing that evidence should be barred because it is not relevant, given that the Supreme Court has stated that there is a ‘low threshold’ for establishing that evidence is relevant.”).

material fact “more or less probable than it would be without the evidence.”<sup>99</sup> Thus, any incremental effect<sup>100</sup> an item of evidence has, “however slight,”<sup>101</sup> in determining a material fact suffices to satisfy the requirement of relevancy.<sup>102</sup>

Under this liberal standard for determining relevancy, there are at least three major ways in which electoral evidence can be deemed relevant. First, such evidence may be substantively relevant in litigation over the outcome of the very election that generated the electoral evidence. Second, it may be substantively relevant in civil or criminal litigation wholly unrelated to the election that generated the electoral evidence because it reveals valuable insight into a given party’s general or specific political mindset that might shed light on whether she acted with a legally significant discriminatory purpose or motivation. Finally, it might be relevant for the purpose of revealing potential juror or witness bias against a party. These three bases for deeming electoral evidence relevant are considered in turn below.

### 1. *Substantive Relevance in Election Contests*

Electoral evidence is most clearly relevant in cases in which there is a dispute over the outcome of the very election that generated the electoral evidence. Such cases involve a close election contest coupled with one of the following six allegations: participation in the election by illegal voters;<sup>103</sup> lost, stolen, or destroyed ballots;<sup>104</sup> tampering with the ballots;<sup>105</sup> improper recording of votes (such as when a voting machine malfunctions);<sup>106</sup> ambiguously marked ballots;<sup>107</sup> or wrongfully preventing some individuals from voting in the election.<sup>108</sup>

The most frequently encountered scenario in which electoral evidence is offered in judicial proceedings contesting the result of an election is when there is an allegation that some voters—sufficient in number to impact the election result—have voted illegally in the election. A voter’s participation in an election may be deemed illegal because she was not

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99. FED. R. EVID. 401 (emphasis added).

100. *See* United States v. Certified Envtl. Servs., Inc., 753 F.3d 72, 90 (2d Cir. 2014).

101. *United States v. Holmes*, 413 F.3d 770, 773 (8th Cir. 2005).

102. This is because it is not the individual evidentiary force of each piece of evidence that must satisfy the requisite standard of proof, but only the collective force of all evidence offered to prove a particular point. *See* FED. R. EVID. 401 advisory committee’s note (“A brick is not a wall . . .”); *United States v. Kemp*, 500 F.3d 257, 295 (3d Cir. 2007).

103. *See, e.g., Belcher v. Mayor of Ann Arbor*, 261 N.W.2d 56, 57 (Mich. Ct. App. 1977).

104. *See, e.g., Dixon v. Orr*, 4 S.W. 774, 776 (Ark. 1887).

105. *See, e.g., Wilburn v. Galloway*, 179 S.W.2d 540, 542 (Tex. Civ. App. 1944).

106. *See, e.g., Helm v. State Election Bd.*, 589 P.2d 224, 226–27 (Okla. 1979).

107. *See, e.g., Davis v. State ex rel. Wren*, 12 S.W. 957, 960 (Tex. 1889).

108. *See, e.g., Rubens v. Hodges*, 837 S.W.2d 465, 466 (Ark. 1992).

registered (or not properly registered) to vote;<sup>109</sup> voted multiple times in the same election;<sup>110</sup> was a convicted felon who had lost her voting rights;<sup>111</sup> was not a U.S. citizen;<sup>112</sup> did not reside in the relevant jurisdiction;<sup>113</sup> was underage;<sup>114</sup> voted in a partisan primary without having registered with that party;<sup>115</sup> was bribed to vote a particular way in the election;<sup>116</sup> or voted using the name of a dead person or other voter.<sup>117</sup> To be sure, many such cases are from an earlier era when election controls were less stringent than they are today. For example, during the Prohibition Era—when towns were voting on whether to be “wet” or “dry”—the alcohol industry and other interested organizations would seek to win such elections by bribing people to vote a particular way or bringing nonresidents in to illegally vote in the elections.<sup>118</sup> However, these concerns also arise in modern-day elections. In the 2004 gubernatorial election in Washington State, for example, the margin of victory was only 129 votes, yet there was evidence that a far greater number of persons had voted illegally, including 1,392 convicted felons, 6 people who voted twice, and 19 people who cast votes using the names of dead people.<sup>119</sup>

The second type of election contest in which electoral evidence is relevant is when there is a dispute over the outcome of the election and the original ballots have been lost, stolen, or destroyed.<sup>120</sup> In such a case, it may be necessary to resort to the testimony of the voters themselves and

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109. See *People ex rel. Boyer v. Teague*, 11 S.E. 665, 670 (N.C. 1890).

110. See *Widmayer v. Davis*, 83 N.E. 87, 91 (Ill. 1907); *State v. Harris*, 52 Vt. 216, 222 (1879).

111. See *Huggins v. Superior Court*, 788 P.2d 81, 82 (Ariz. 1990); *City of Newport v. Smith*, 367 S.W.2d 742, 743 (Ark. 1963); *Canales v. City of Alviso*, 474 P.2d 417, 419 (Cal. 1970); *Widmayer*, 83 N.E. at 91; *Medrano v. Gleinser*, 769 S.W.2d 687, 689 (Tex. App. 1989).

112. See *Willis v. Crumbly*, 268 S.W.3d 288, 290 (Ark. 2007); *Tate-Smith v. Cupples*, 134 S.W.3d 535, 537 (Ark. 2003); *Campbell v. Ramsey*, 92 P.2d 819, 832 (Kan. 1939); *Horton v. Sullivan*, 86 A. 314, 316 (R.I. 1913); *Savage v. Umphries*, 118 S.W. 893, 898 (Tex. Civ. App. 1909).

113. See *Canales*, 474 P.2d at 419; *Taylor v. Pile*, 391 P.2d 670, 672 (Colo. 1964); *Widmayer*, 83 N.E. at 90; *Campbell*, 92 P.2d at 832; *Little v. Alexander*, 80 S.W.2d 32, 34 (Ky. 1934); *Belcher v. Mayor of Ann Arbor*, 261 N.W.2d 56, 57 (Mich. Ct. App. 1977); *Montgomery v. Dormer*, 79 S.W. 913, 913 (Mo. 1904); *Lane v. Bailey*, 75 P. 191 (Mont. 1904); *Montoya v. Ortiz*, 175 P. 335, 336 (N.M. 1918); *Rubuenog v. Aldan*, 2010 MP 1 (N. Mar. I. 2010) (per curiam); *Savage*, 118 S.W. at 898.

114. See *Kreitz v. Behrensmeyer*, 17 N.E. 232, 248 (Ill. 1888); *Miracle v. Robbins*, 231 S.W.2d 18, 21 (Ky. 1950); *Savage*, 118 S.W. at 898.

115. See *Huggins*, 788 P.2d at 82; *In re Orsatti*, 598 A.2d 1341, 1343–44 (Pa. Commw. Ct. 1991); *Abbott v. Hunhoff*, 491 N.W.2d 450, 451 (S.D. 1992).

116. See *Canales*, 474 P.2d at 419.

117. See *Rhodes v. Driver*, 64 S.W. 272, 275 (Ark. 1901).

118. See, e.g., *Hanson v. Village of Adrian*, 148 N.W. 276, 277 (Minn. 1914); *Beauregard v. Gunnison City*, 160 P. 815, 816 (Utah 1916).

119. See sources cited *supra* note 10.

120. See *Dixon v. Orr*, 4 S.W. 774, 776 (Ark. 1887); *Young v. Deming*, 33 P. 818, 818–19 (Utah 1893); *Kinder v. Sch. Dist. No. 126*, 123 P. 610, 610–11 (Wash. 1912).

the election officials who tallied the original results in an effort to resolve the outcome of the election.<sup>121</sup>

The third type of election contest in which electoral evidence is relevant is when there is a contest over the election result coupled with an allegation that the ballots themselves have been tampered with such that they do not, in fact, reflect the actual votes cast.<sup>122</sup> Claims of this sort were most recently raised in the 2016 presidential election, with allegations that foreign governments may have hacked DRE voting systems to benefit Donald Trump.<sup>123</sup> In such a scenario, resort to other types of evidence—such as the testimony of the individuals who actually voted in the election (or, in the case of DRE voting systems, the backup paper trail)—may occur in an effort to resolve the election.<sup>124</sup>

The fourth type of election contest in which electoral evidence is relevant is when there was some defect in the voting process that resulted in a failure to properly record the votes of some portion of the electorate. Examples include a malfunctioning mechanical-lever voting machine,<sup>125</sup> a mistake or other imperfection in printed paper, punch-card, or optical-scan ballots,<sup>126</sup> or some other defect in the voting process.<sup>127</sup> Under these scenarios, parties have offered the testimony of the voters or other electoral evidence in an effort to determine the election outcome.<sup>128</sup>

The fifth type of election contest in which electoral evidence is relevant is when a voter's intent is ambiguous and it is difficult to determine how to count her vote. In an earlier day, when ballot secrecy was lacking and thus a ballot could be tied to a particular voter, intent could be proven by resort to testimony from the voter herself.<sup>129</sup> In more modern times, this is done by inspecting the paper ballots in an effort to interpret the voter's intent, as

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121. See sources cited *supra* note 120.

122. See *McDonald v. Wood*, 24 So. 86, 87–88 (Ala. 1898); *Arrington v. Ladd*, 56 S.W.2d 166, 167–68 (Ark. 1932); *Metheny v. Pickel*, 141 N.E. 762, 764 (Ill. 1923); *Kuffel v. Wood*, 137 N.E. 786, 787 (Ill. 1922); *Kreitz v. Behrensmeyer*, 17 N.E. 232, 243–44 (Ill. 1888); *Strebin v. Lavengood*, 71 N.E. 494, 498–99 (Ind. 1904); *People ex rel. Deister v. Wintermute*, 86 N.E. 818, 819 (N.Y. 1909); *In re Zupsic*, 670 A.2d 629, 631 (Pa. 1996); *Wilburn v. Galloway*, 179 S.W.2d 540, 542 (Tex. Civ. App. 1944).

123. See OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, ICA 2017-01D, BACKGROUND TO "ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS": THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION (2017).

124. See sources cited *supra* notes 123–24.

125. See, e.g., *Kirby v. Wood*, 558 S.W.2d 180, 181 (Ky. 1977); *In re Moffat*, 361 A.2d 74, 75–78 (N.J. Super. Ct. App. Div. 1976); *Deister*, 86 N.E. at 819; *Helm v. State Election Board*, 589 P.2d 224, 226–27 (Okla. 1979).

126. See, e.g., *Babnew v. Linneman*, 740 P.2d 511, 512 (Ariz. Ct. App. 1987) (voters given the wrong paper ballot).

127. See, e.g., *State ex rel. Beu v. Lockwood*, 165 N.W. 330, 330–33 (Iowa 1917).

128. See sources cited *supra* notes 125–27.

129. See *Kreitz v. Behrensmeyer*, 17 N.E. 232, 249–51 (Ill. 1888); *McKinnon v. People ex rel. Malzacher*, 110 Ill. 305, 306 (Ill. 1884); *Davis v. State ex rel. Wren*, 12 S.W. 957, 960 (Tex. 1889).

was famously attempted in the contested 2000 election between George W. Bush and Al Gore.<sup>130</sup>

The final type of election contest in which electoral evidence is relevant is one in which the outcome is close and some individuals—sufficient in number to impact the outcome of the election—were unlawfully prevented from voting or registering to vote. Thus, whether due to malfeasance on the part of election officials or due to an error in the voting records, certain people may have been wrongfully turned away at the polls.<sup>131</sup> Alternatively, they may have formally been permitted to cast a ballot but—as a result of error on the part of an election official in a polling place containing paper ballots and machines for people voting in multiple jurisdictions—they were given the wrong ballots or were directed to a machine that did not include the option to vote in the particular contest at issue, thus effectively disenfranchising them.<sup>132</sup> In such a scenario, voter testimony or other electoral evidence is relevant to prove how the individual would have voted if given the opportunity to do so.<sup>133</sup>

Without question, in any of these scenarios, electoral evidence—whether in the form of voter testimony regarding how she voted or intended to vote or in some other direct or circumstantial form—would be probative in trying to prove the actual tenor of the person’s vote, seemingly making the question of relevancy a straightforward one. Yet, as indicated above, the definition of relevance also requires that the evidence be offered to prove or disprove a *material* fact as defined by the underlying substantive law.<sup>134</sup> Thus, for example, if there is an allegation that some individuals voted illegally in an election, evidence of how they voted is relevant only if the underlying substantive law requires proof of how they *actually* voted. In some jurisdictions—those that follow the “direct evidence” approach—such evidence is unquestionably material. Under this approach, when there is proof of illegally cast votes, the court hears evidence—primarily voter testimony regarding who they voted for—in an effort to determine the proper outcome of the election.<sup>135</sup>

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130. See *Bush v. Gore*, 531 U.S. 98, 105–08 (2000).

131. See, e.g., *Briscoe v. Between Consol. Sch. Dist.*, 156 S.E. 654, 656 (Ga. 1931); *Pennington v. Hare*, 62 N.W. 116, 117 (Minn. 1895); *Plouzek v. Saline Cty. Reorganization Comm.*, 148 N.W.2d 919, 920–21 (Neb. 1967); *Martin v. McGarr*, 117 P. 323, 324 (Okla. 1910); *Pawlowski v. Thompson*, 264 N.W. 723, 723–24 (S.D. 1936).

132. See, e.g., *Babnew v. Linneman*, 740 P.2d 511, 512 (Ariz. Ct. App. 1987); *Rubens v. Hodges*, 837 S.W.2d 465, 466 (Ark. 1992).

133. See sources cited *supra* notes 131–32.

134. See *supra* text accompanying notes 95–96.

135. See *Rubuenog v. Aldan*, 2010 MP 1, 13–16 (N. Mar. I. 2010) (per curiam); *Carlson v. Oconto Cty. Bd. of Canvassers*, 623 N.W.2d 195, 198–99 (Wis. Ct. App. 2000); Harv. L. Rev. Ass’n, *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1155, 1157–61 (2006). In jurisdictions that follow the “direct evidence” approach, the underlying substantive election law typically does not empower courts to set aside an election, and so even if there are allegations of illegal

However, not all jurisdictions in the United States follow the “direct evidence” approach. Two other common approaches include the “proportional approach” and the “elimination of uncertainty” approach.<sup>136</sup> Under the “proportional approach,” when there is proof of illegal votes in specific precincts, the court will simply deduct illegal votes from the vote totals of each candidate in proportion to the total votes received by each candidate in the precincts where illegal votes were cast, without any attempt to figure out who the illegal voters actually voted for.<sup>137</sup> Under the “elimination of uncertainty” approach, if the total number of illegal votes exceeds the winner’s margin of victory, the court will simply order a new election, without any attempt to figure out the tenor of the illegally cast votes.<sup>138</sup> Clearly, it is only if a jurisdiction follows the “direct evidence” approach, and not one of the other approaches, that electoral evidence calculated to prove how specific individuals voted is material and thus relevant. Accordingly, application of the relevance standard in this context requires in each case an examination of the underlying substantive election law.

Similarly, when people have been unlawfully prevented from voting, whether their testimony or other evidence of how they would have voted is deemed relevant turns on the underlying substantive election law. As in the case of illegally cast votes, some jurisdictions follow the “direct evidence” approach, in which case such electoral evidence is material and thus relevant.<sup>139</sup> Yet other jurisdictions deem such evidence immaterial, declaring the remedy in such a case to be invalidation of the election if enough voters were excluded to change the result (the “elimination of uncertainty approach”),<sup>140</sup> and still others let the election stand, deeming the appropriate remedy to be criminal prosecution of those interfering with the right of certain persons to vote.<sup>141</sup>

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voting, in the face of uncertainty regarding how those individuals voted, the (albeit tainted) election results stand. *See* *Brannon v. City of Coeur d’Alene*, 292 P.3d 234, 245 (Idaho 2012); *Jaycox v. Varnum*, 226 P. 285, 289 (Idaho 1924).

136. *See* sources cited *supra* note 135.

137. *See id.*

138. *See id.* Some states follow a hybrid approach. *See* *Akaka v. Yoshina*, 935 P.2d 98, 100–01 (Haw. 1997); *In re Murphy*, 243 A.2d 832, 834–35 (N.J. Super. Ct. App. Div. 1968); *Reese v. Duncan*, 80 S.W.3d 650, 663 (Tex. App. 2002).

139. *See, e.g.,* *Plouzek v. Saline Cty. Reorganization Comm.*, 148 N.W.2d 919, 920–21 (Neb. 1967).

140. *See, e.g.,* *Rubens v. Hodges*, 837 S.W.2d 465, 467–68 (Ark. 1992); *Hammill v. Valentine*, 373 S.E.2d 9, 10 (Ga. 1988); *Taggart v. Phillips*, 249 S.E.2d 245, 246 (Ga. 1978); *Briscoe v. Between Consol. Sch. Dist.*, 156 S.E. 654, 656 (Ga. 1931); *In re Harper*, 456 S.E.2d 878, 881 (N.C. Ct. App. 1995); *Martin v. McGarr*, 117 P. 323, 327 (Okla. 1910); *Pawlowski v. Thompson*, 264 N.W. 723, 723–24 (S.D. 1936).

141. *See, e.g.,* *Pawlowski*, 264 N.W. at 723–24.

In sum, assuming that the underlying substantive election law at issue in the case deems it legally significant to determine how certain individuals voted, electoral evidence offered to prove that point in an election contest will nearly always satisfy the basic evidentiary gateway requirement of relevance. Accordingly, such evidence will be presumptively admissible unless subject to exclusion by some other evidentiary principle.

## 2. *Substantive Relevance in Other Types of Cases*

While electoral evidence is most obviously relevant in cases involving contests over the election results themselves, its relevance is not limited to such cases. An individual's voting record—when considered in light of the liberal standard for relevance set forth above<sup>142</sup>—can also provide valuable evidence of whether a party acted with the requisite discriminatory intent in a variety of different types of civil or criminal litigation.

The need to prove discriminatory purpose arises with some frequency in two different types of cases. The first are civil cases in which someone is accused of discriminating against a given person in employment, housing, public accommodations, or for some other purpose because of the alleged victim's race, sex, sexual orientation, or other characteristic. In such cases, not only is direct evidence of animus on that basis relevant; rather, under the liberal standard for relevance, any indirect evidence that sheds light on the defendant's alleged discriminatory intent is also relevant.<sup>143</sup> For example, in a case in which a university is accused of discriminating against an employee because of her sex, evidence that her supervisor expressed negative views towards "women's issues"—such as by making negative comments about "Women's Studies" and refusing to approve courses with a focus on gender—is relevant in attempting to prove discriminatory intent.<sup>144</sup>

The second are criminal cases in which someone stands accused of committing a crime with a specific discriminatory purpose, say, because of the victim's race, sex, sexual orientation, or other characteristic. In such cases—because it is difficult to find direct evidence of the defendant's specific motivation—courts deem relevant indirect evidence that helps shed light on the defendant's discriminatory purpose.<sup>145</sup> For example, in a case in which a defendant is accused of committing a racially motivated hate

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142. See *supra* text accompanying notes 93–102.

143. See *Notari v. Denver Water Dep't*, 971 F.2d 585, 590 (10th Cir. 1992).

144. See, e.g., *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1343 (9th Cir. 1981); *Kraemer v. Franklin & Marshall Coll.*, No. CIV.A. 95-0020, 1995 WL 672523, at \*1–2 (E.D. Pa. 1995).

145. See *generally* *Wisconsin v. Mitchell*, 508 U.S. 476, 489–90 (1993).

crime, evidence of racist literature found in the defendant's home is relevant in helping to establish discriminatory intent.<sup>146</sup>

Outside the context of election contests themselves, electoral evidence is most clearly relevant in an employment discrimination case alleging discrimination on the basis of political affiliation.<sup>147</sup> Such causes of action can be grounded in the First Amendment,<sup>148</sup> a statute,<sup>149</sup> or both<sup>150</sup> and require as an element of the underlying cause of action proof “that the plaintiff and defendant have opposing political affiliations.”<sup>151</sup> Thus, for example, evidence that a supervisor always voted for Democratic candidates would be relevant in an employment discrimination case in which the supervisor is accused of unlawfully firing someone because of the employee's visible political support of Republican candidates and causes.<sup>152</sup>

Electoral evidence would also arguably be relevant—although with far less probative force—in cases involving discrimination on some basis other than political affiliation. For example, an employee who alleges that she was fired from her job because she is transgender might contend that her supervisor's consistent votes in favor of Republican candidates—who tend overwhelmingly to oppose transgender rights<sup>153</sup>—is relevant in determining whether the supervisor acted with discriminatory intent. Similarly, an employee who alleges that she was fired from her job because she is an evangelical Christian might contend that her boss's consistent votes in favor of Democratic candidates—who tend to oppose the policy preferences of evangelical Christians<sup>154</sup>—is likewise relevant. Although the probative force is admittedly far weaker than in the context of a political affiliation claim, the evidentiary threshold for relevance is a low one under the Federal Rules of Evidence and their state law counterparts, making such evidence potentially admissible.

Although theoretically relevant and thus potentially admissible in a large swath of cases, for two reasons, the admissibility of electoral

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146. See, e.g., *United States v. Allen*, 341 F.3d 870, 885–88 (9th Cir. 2003).

147. See, e.g., *Vinci v. Quagliani*, No. 3:08-cv-01935, 2010 WL 1792762, at \*1 (D. Conn. May 4, 2010); *D'Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352, 1353 (D.N.J. 1995).

148. See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 72 (1990); *Branti v. Finkel*, 445 U.S. 507, 513–17 (1980).

149. See P.R. LAWS ANN. tit. 29, § 146 (2013); D.C. CODE § 32-408 (2008).

150. See *D'Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352, 1353 (D.N.J. 1995).

151. See, e.g., *Flores-Silva v. McClintock-Hernandez*, 710 F.3d 1, 4 (1st Cir. 2013) (quoting *Torres-Santiago v. Municipality of Adjuntas*, 693 F.3d 230, 236 (1st Cir. 2012) (additional citation omitted)).

152. It was in this context that the only federal court decision regarding the existence of a federal political vote privilege was decided. See *D'Aurizio*, 899 F. Supp. at 1353.

153. See, e.g., sources cited *supra* note 18.

154. Emma Green, *Democrats Have a Religion Problem*, THE ATLANTIC (Dec. 29, 2016), <https://www.theatlantic.com/politics/archive/2016/12/democrats-have-a-religion-problem/510761/>.

evidence outside of contests regarding the election results themselves has received scant attention in judicial opinions. First, although evidence of a person's general political leanings is highly relevant in a case in which the person is accused of discrimination on the basis of political affiliation, such causes of action are relatively rare<sup>155</sup> and limited in scope.<sup>156</sup> Second, because the probative link between a person's general political preferences and her willingness to discriminate against a person for a more targeted reason—such as due to her sexual orientation, religion, or other characteristic—is a tenuous one, parties are unlikely to offer electoral evidence for such purposes. Even if they do, courts—while acknowledging its arguable probative value—are likely to exclude such evidence under Federal Rule 403 or its state law counterparts, which allow for the exclusion of admittedly relevant evidence when its probative value is substantially outweighed by such dangers as the trier of fact giving the evidence undue weight relative to its true probative force or otherwise misusing the evidence.<sup>157</sup>

However, while votes cast in traditional election contests for specific candidates only provide insight into general political leanings that may be of marginal relevance in most cases, votes cast in discrete election contests in recent decades involving such hot-button issues as gay<sup>158</sup> and transgender rights,<sup>159</sup> race-based affirmative action,<sup>160</sup> religious freedom,<sup>161</sup> tort reform,<sup>162</sup> and abortion rights<sup>163</sup> provide insight into a voter's views about discrete categories of persons that are likely to be of greater relevance in a larger number of cases. For this reason, the admissibility of electoral evidence is likely to garner greater judicial attention in the near future. For example, that a supervisor voted in favor of a state ballot initiative prohibiting same-sex marriage may have substantial probative value in determining whether his decision to fire a gay employee was based on anti-gay animus. Similarly, evidence that a defendant voted in favor of a ballot initiative requiring a transgender person to use the bathroom associated with his or her gender assigned at birth would be probative in determining her state of mind when accused of committing a "hate crime" by assaulting a transgender person while she was using the bathroom that is instead associated with her gender identity. That a supervisor voted in favor

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155. *See supra* note 21.

156. *See supra* note 22.

157. *See* FED. R. EVID. 403; FED. R. EVID. 403 advisory committee's note.

158. *See, e.g.*, sources cited *supra* note 23.

159. *See, e.g.*, sources cited *supra* note 24.

160. *See, e.g.*, sources cited *supra* note 25.

161. *See, e.g.*, sources cited *supra* note 26.

162. *See, e.g.*, sources cited *supra* note 27.

163. *See, e.g.*, sources cited *supra* note 28.

of a state constitutional amendment prohibiting race-based affirmative action in public university admissions is probative in determining whether she acted with racial bias against an African-American employee. Similarly, that a supervisor voted against a ballot initiative allowing school vouchers to be used at parochial schools is probative in determining whether her decision to fire a Catholic employee was related to religious bias.

To be sure, even in these examples involving modern ballot initiatives about discrete issues, the mere fact that the defendant voted a particular way is hardly ironclad proof that she acted with discriminatory intent in another context. After all, one can simultaneously hold a belief that same-sex marriage is wrong and that gay employees should be free from discrimination in the workplace. Similarly, one can legitimately oppose both affirmative action programs and discrimination against African-Americans in the employment context. Yet it is also surely the case that opposing same-sex marriage makes it at least somewhat more likely that one harbors more general anti-gay bias, and that opposing affirmative action makes it somewhat more likely that one harbors animus toward racial minorities, at least enough to pass muster under the liberal standard of relevancy set forth in the Federal Rules of Evidence and their state law counterparts. Moreover, the probative force of such evidence is certainly greater than the more indirect inferences drawn from a voter's support for Democratic and Republican candidates discussed above. Accordingly, in light of the liberal standard of relevancy embodied in the rules of evidence—coupled with the fact that exclusion of evidence under Federal Rule 403 and its state law counterparts is warranted only when the probative force of evidence is *substantially* outweighed by such risks as the jury overvaluing or otherwise misusing the evidence<sup>164</sup> and is thus tilted in favor of admissibility<sup>165</sup>—it is likely that in the near future courts will deem such evidence admissible in civil and criminal cases requiring proof of discriminatory intent.

### 3. *Relevance for Impeachment Purposes*

Electoral evidence is potentially relevant and thus admissible not only for the substantive purposes recounted above, but also for the purpose of revealing potential juror or witness bias against a party. Under the Federal Rules of Evidence and their state law counterparts, when a witness gives testimony that is unfavorable to a party—particularly the accused in a criminal case—the party is generally afforded a fair opportunity to impeach

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164. See FED. R. EVID. 403.

165. See, e.g., *United States v. Hearst*, 563 F.2d 1331, 1348–49 (9th Cir. 1977).

the witness on the ground that she is biased against the party, with the concept of “bias” broadly construed.<sup>166</sup> The U.S. Supreme Court has held that “[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.”<sup>167</sup> Indeed, in criminal cases, that construction of relevance has constitutional underpinnings grounded in the Sixth Amendment’s Confrontation Clause.<sup>168</sup> For similar reasons, proof of potential juror bias against a party is likewise relevant and, in criminal cases, the right to probe into such potential bias through the voir dire process is grounded in the Sixth Amendment’s right to an impartial jury.<sup>169</sup>

Electoral evidence—both in the form of votes cast for partisan offices and those cast for specific ballot measures—can be highly probative for the purpose of revealing potential juror or witness bias against a party.<sup>170</sup> With respect to witnesses, for example, if one party to a civil action is a supporter of Republican candidates and policies, evidence that a witness testifying against her at trial is a die-hard Democrat who is aware of the party’s political leanings is relevant in assessing the witness’s credibility. Similarly, in the case of potential jurors, if a party in a politically charged criminal case is a high-profile Republican—such as when former White House aide Scooter Libby stood trial on charges of lying to federal investigators about leaking the identity of a CIA operative<sup>171</sup>—evidence of a potential juror’s political leanings is relevant in assessing whether she can be impartial.<sup>172</sup> Or in a case in which a politically conservative plaintiff is suing her employer for discriminating against her on the basis of political affiliation, the political leanings of a potential juror are likewise relevant in determining whether or not she can be impartial.<sup>173</sup> Indeed, the more politically charged the underlying case itself, the more probative will be the

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166. See *United States v. Abel*, 469 U.S. 45, 49–51 (1984); *Davis v. Alaska*, 415 U.S. 308, 315–20 (1974).

167. *Abel*, 469 U.S. at 52.

168. See *id.* at 50.

169. See *Morgan v. Illinois*, 504 U.S. 719, 729–30 (1992).

170. See *Connors v. United States*, 158 U.S. 408, 411–16 (1895); *United States v. Gonzalez-Quezada*, 108 F.3d 1386 (9th Cir. 1997); *United States v. Goland*, 959 F.2d 1449, 1454 (9th Cir. 1992); *Harrington v. City of Portland*, No. 87-516-FR, 1990 WL 15688, at \*1 (D. Or. Feb. 8, 1990); *Kyle v. State*, 366 P.2d 961, 966 (Okla. Crim. App. 1961); *Wallace v. State*, No. 03-03-00150, 2004 WL 1403492, at \*6 (Tex. App. June 24, 2004); *Butler v. State*, No. 01-94-00756, 1995 WL 416892, at \*7–8 (Tex. App. July 13, 1995); ROGER PARK & TOM LININGER, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 6.2 (2016).

171. See *Politics out Front as Libby Jury Selection Begins*, NBC NEWS, Jan. 16, 2007, <http://www.nbcnews.com/id/16638924/ns/politics/t/politics-out-front-libby-jury-selection-begins/#.WC9T8k0zWDY>.

172. See, e.g., *Wagner v. Jones*, 928 F. Supp. 2d 1084, 1101–03, 1102 n.20 (S.D. Iowa 2013).

173. See *id.*

underlying political leanings of the witness or prospective juror vis-à-vis those of a party to the case,<sup>174</sup> although—given the liberal standard of relevancy under the rules of evidence—such evidence still carries probative force even when the underlying substantive case is relatively mundane.

As in the case of electoral evidence offered for substantive purposes in cases involving allegations of discriminatory intent, more recent electoral contests involving votes on politically charged issues can provide more targeted insight into potential witness or juror bias in a variety of circumstances. Thus, for example, how a prospective juror voted on a failed ballot initiative to cap tort damages would have significant probative value in determining whether she could fairly determine a plaintiff's damages under controlling law.<sup>175</sup> In a criminal case, how a juror voted on a ballot initiative regarding the repeal or reinstatement of the death penalty would be relevant in trying to assess her suitability as a juror in a death penalty-eligible case.<sup>176</sup> In a criminal case involving a defendant who is a racial minority, how a juror voted on a ballot initiative that reflected racial bias would be relevant in assessing her potential bias against the accused.<sup>177</sup> Similarly, in assessing the veracity of a witness who testifies against an openly gay party, it would be relevant to the trier of fact that the witness has consistently voted against gay rights at the ballot box, particularly if the underlying case involves a related issue, such as a discrimination claim against an employer alleging anti-gay bias. Or, in a case in which the facts at trial would reveal that one of the parties procured an abortion, that a juror voted in favor of a personhood initiative declaring that life begins at conception would be probative in determining her potential bias against that party.

Finally, electoral evidence is also relevant for the purpose of impeaching a witness who testifies by means of a prior inconsistent statement regarding the tenor of her vote. Consider, for example, an electoral contest in which an illegal voter is asked how she voted in the election. Suppose that she indicates that she voted in favor of the Democratic candidate in the contest at issue. Evidence that she in fact voted in favor of the Republican candidate—in the form of earlier statements she wrote or made to third persons—would be relevant to impeach her

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174. See *Rose v. Sheedy*, 134 S.W.2d 18, 19 (Mo. 1939); *Henderson v. Dreyfus*, 191 P. 442, 453 (N.M. 1919); *Territory of New Mexico v. Lynch*, 133 P. 405, 407–08 (N.M. 1913).

175. See, e.g., *Thomas v. Hardwick*, 231 P.3d 1111, 1114–15, 1114 n.4 (Nev. 2010).

176. See *People v. Stevens*, 158 P.3d 763, 772 (Cal. 2007); *People v. Farnam*, 47 P.3d 988, 1012 (Cal. 2002); *People v. Ochoa*, 966 P.2d 442, 488 (Cal. 1998).

177. See *People v. Wells*, 149 Cal. App. 3d 721, 726 (1983).

credibility as a witness and in turn would help the trier of fact assess whether to deduct her vote from the Democratic candidate's vote tally.<sup>178</sup>

## II. THE DANGERS OF ELECTORAL EVIDENCE

As demonstrated in Part I, electoral evidence will often be deemed relevant and thus presumptively admissible for a variety of substantive purposes as well as for the purpose of impeaching witnesses and potential jurors for bias. Yet, while satisfying the low standard for presumptive admissibility under the Federal Rules of Evidence and their state law counterparts, admitting electoral evidence is not without its risks.

Specifically, electoral evidence raises three concerns that should give courts and policy makers pause in considering whether to admit it. First, electoral evidence—particularly when it comes in the form of testimony by the voter herself or evidence of her out-of-court oral or written statements regarding the tenor of her vote—is of dubious trustworthiness.<sup>179</sup> Second, admitting electoral evidence undermines the common law,<sup>180</sup> statutory,<sup>181</sup> and constitutional<sup>182</sup> rights to ballot secrecy, which further not only voters' individual interests<sup>183</sup> but also societal interests in preventing vote buying, voter intimidation, and other historical practices that led to the enactment of laws ensuring a right to vote by secret ballot.<sup>184</sup> Finally, there is a substantial risk that electoral evidence may be overvalued or misused by the trier of fact, or that the very act of admitting such evidence may send the wrong message to jurors and society about the role of political affiliations in the judicial process. Although electoral evidence nearly always presents these three dangers, the relative risk it presents will vary in part depending upon the type of proceeding in which it arises. Thus, while the interest in ballot secrecy will be undermined in nearly every type of case, the risk of untrustworthiness is most acute in election contests, while

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178. See *Smith v. Thomas*, 54 P. 71, 71 (Cal. 1898). To introduce extrinsic evidence of the prior inconsistent statements, the witness must be afforded an opportunity to deny or explain them. See FED. R. EVID. 613(b). Because such statements are material to a substantive issue in the case, extrinsic evidence would not be barred by the collateral matter rule. See *United States v. Roulette*, 75 F.3d 418, 423 (8th Cir. 1996).

179. See, e.g., *Lauer v. Estes*, 53 P. 262, 263 (Cal. 1898); *Pennington v. Hare*, 62 N.W. 116, 117 (Minn. 1895); *In re Harper*, 456 S.E.2d 878, 881 (N.C. Ct. App. 1995).

180. See, e.g., *People ex rel. Boyer v. Teague*, 11 S.E. 665, 679–81 (N.C. 1890).

181. See sources cited *supra* note 31.

182. See, e.g., *Wood v. Kirby*, 566 S.W.2d 751, 753 (Ky. 1978) (citing KY. CONST. § 147); *Belcher v. Mayor of Ann Arbor*, 262 N.W.2d 1, 2 (Mich. 1978) (citing MICH. CONST. art. II, § 4).

183. See sources cited *supra* note 31.

184. See N.D. R. EVID. 506 explanatory note; *D'Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352, 1358–59 (D.N.J. 1995); *In re Orsatti*, 598 A.2d 1341, 1343–44 (Pa. Commw. Ct. 1991); *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 631 (Mass. 1982); *People ex rel. Williams v. Cicott*, 16 Mich. 283, 313–14 (Mich. 1868) (opinion of Campbell, J.).

the risk of overvaluing or misusing the evidence will be most acute in other types of proceedings.

A. *The Trustworthiness of Electoral Evidence*

The first risk associated with electoral evidence is its dubious trustworthiness when offered in the form of testimony by the voter herself or evidence of her out-of-court oral or written statements regarding the tenor of her vote. To be sure, in both of these instances the voter is recounting either to a court or to third persons an event about which the voter has undoubted firsthand knowledge. Indeed, save for the unusual instance in which someone else observed her cast her vote, she will often be the only person with such firsthand knowledge.

On the one hand, testimony by a voter in this circumstance should in theory be no different from the myriad other factual circumstances in which a witness might perjure herself, for which the remedy is typically not exclusion of the evidence but instead vigorous cross-examination and appropriate weighing by the trier of fact.<sup>185</sup> Moreover, when electoral evidence is offered in a case involving a contest over the very election itself, failing to admit it cuts against another important policy interest, that of accurately determining election outcomes.<sup>186</sup> Yet there are a number of qualities about electoral evidence in the form of voter testimony or voter statements to third persons that makes it far less trustworthy than other types of evidence.

First, one of the unusual qualities about admitting a voter's testimony regarding the tenor of her vote or her statements to third persons regarding the same is that—when resorted to—there is virtually never evidence of that fact independent of the voter's testimony or statement itself.<sup>187</sup> In other words, because ballots are no longer individually numbered and tied to specific voters, and because it is rare for a third party to observe a person actually cast her vote,<sup>188</sup> there is seldom other evidence that parties to a dispute can rely on to test the veracity of a voter who recounts her vote. Only if there are other types of indicia of how she might have voted—such

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185. See *State ex rel. Beu v. Lockwood*, 165 N.W. 330, 333 (Iowa 1917); *Olson v. Fleming*, 254 P.2d 335, 337 (Kan. 1953); *Trahan v. Simmons*, 2 So. 2d 575, 576 (Miss. 1941); *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939); *Doss v. Chambers*, 188 S.W. 260, 262 (Tex. Civ. App. 1916); *Savage v. Umphries*, 118 S.W. 893, 903 (Tex. Civ. App. 1909); *Carlson v. Oconto Cty. Bd. of Canvassers*, 623 N.W.2d 195, 199 (Wis. Ct. App. 2000).

186. See *Gantt v. Brown*, 142 S.W. 422, 425 (Mo. 1911).

187. See, e.g., *Pennington v. Hare*, 62 N.W. 116, 117 (Minn. 1895). Although a ballot selfie might be perceived as compelling evidence of how a person voted, that assumes that the ballot the person is depicted with is the one she actually cast and that the photograph has not otherwise been doctored.

188. See, e.g., *Kinder v. Sch. Dist. No. 126*, 123 P. 610, 611 (Wash. 1912).

as known party affiliation<sup>189</sup> or the voter's own contrary statements regarding the tenor of her vote to third persons<sup>190</sup>—is the trier of fact in any position to accurately weigh the voter's testimony. While this risk is theoretically present in other types of cases—a given crime, for example, such as a sexual assault, may have been witnessed only by the alleged perpetrator and victim—in no other category of case is the absence of evidence extrinsic of the testimony of a *single* person with an interest in the outcome of the proceeding the norm rather than the exception.<sup>191</sup>

Second, people are particularly likely to be untruthful when recounting how they voted in an election. Courts have noted, for example, that “it is no rare thing for a voter to cast her ballot in a different manner than he has indicated to one or the other of the candidates,”<sup>192</sup> and have even described the right to vote by secret ballot as providing voters with an implied “legal right of deceiving others as to the vote.”<sup>193</sup> Particularly when her vote in favor of a particular candidate or ballot initiative is out-of-step with the politics of her social and work circles—such as a vote in favor of Donald Trump or a ban on same-sex marriage in a politically liberal city—a desire not to be treated as a social pariah may impel a voter to inaccurately recount her vote.<sup>194</sup>

This instinctive judicial dubiousness of voter testimony or statements regarding the tenor of their votes is confirmed by what social scientists refer to as “social desirability bias,” which is defined as a tendency among people to “give answers they perceive to be socially desirable regardless of their own true positions.”<sup>195</sup> In the realm of voting, this phenomenon was first referred to as the “Bradley effect,” a reference to California's 1982 gubernatorial election.<sup>196</sup> In that election, Tom Bradley, an African-American candidate, narrowly lost to George Deukmejian despite being heavily favored in pre-election polls.<sup>197</sup> Some proportion of voters, not wanting to be perceived by others as racist—even by pollsters that they did not personally know—thus indicated they were voting for Bradley even though they intended to and did vote for Deukmejian.<sup>198</sup> Some believe that

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189. See sources cited *supra* note 89.

190. See *Kinder*, 123 P. at 611.

191. In contrast, in a case involving an unwitnessed sexual assault, the trier of fact has the opportunity to listen to and weigh the competing testimony of the accused and the victim along with any forensic evidence and evidence of the defendant's prior acts of sexual assault.

192. See *Laleman v. Bredesen*, 36 N.E.2d 727, 729 (Ill. 1941).

193. See *People ex rel. Williams v. Cicott*, 16 Mich. 283, 313 (1868) (opinion of Christancy, J.).

194. See, e.g., *Smith v. Thomas*, 54 P. 71, 72 (Cal. 1898).

195. See Powell, *supra* note 30, at 1054; accord Matthew J. Streb et al., *Social Desirability Effects and Support for a Female American President*, 72 PUB. OP. Q. 76, 78–80 (2008).

196. See Powell, *supra* note 30, at 1053.

197. See *id.*

198. See *id.*

the discrepancy between the pre-election polling and the outcome of the 2016 presidential election between Hillary Clinton and Donald Trump may have likewise been an instance of social desirability bias at play.<sup>199</sup> A similar discrepancy between pre-election polling and actual results has also been found with votes on sensitive social issues, such as same-sex marriage<sup>200</sup> and race-based affirmative action.<sup>201</sup> Due to the increasing social stigma associated with what are perceived to be expressions of “potentially discriminatory, insensitive, or unfavorable opinions related to topics such as gender, race, ethnicity, disabilities, and sexuality,” some voters may mask their true vote on ballot issues related to such matters in order to avoid being stigmatized.<sup>202</sup> Thus, the untrustworthiness of voter testimony or statements by a voter regarding the tenor of her vote differs from the general risks associated with witness testimony in that there is documented evidence of it in this specific context.<sup>203</sup>

The general untrustworthiness of a voter’s statements regarding the tenor of her vote set forth above is further exacerbated in four circumstances. The first three arise when the voter is asked to testify regarding the tenor of her vote in the very election at issue in the case itself, while the fourth situation arises when what is involved is not voter testimony but rather the voter’s out-of-court written or spoken statements to third persons.

First, as a general matter, the problem of untrustworthiness is enhanced when the voter testimony involves the very election contest that is at issue in the case. Having voted in the election, the individual clearly has some interest in the outcome of the contest, and—particularly when the vote margin is small—she is aware of the impact her testimony can have on the

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199. See, e.g., Allen Johnson, ‘Trump Effect’ May Have Been Part of Pollsters’ Downfall, NEWS & RECORD (Nov. 25, 2016), [http://www.greensboro.com/blogs/allen-johnson-trump-effect-may-have-been-part-of-pollsters/article\\_982a8280-b3af-5176-8f64-71eeacaa4b47.html](http://www.greensboro.com/blogs/allen-johnson-trump-effect-may-have-been-part-of-pollsters/article_982a8280-b3af-5176-8f64-71eeacaa4b47.html).

200. See Powell, *supra* note 30, at 1065–66.

201. See *Michigan Civil Rights Amendment, Proposal 2 (2016)*, BALLOTPEdia, [https://ballotpedia.org/Michigan\\_Civil\\_Rights\\_Amendment,\\_Proposal\\_2\\_\(2006\)](https://ballotpedia.org/Michigan_Civil_Rights_Amendment,_Proposal_2_(2006)) (last visited Oct. 1, 2016).

202. See Powell, *supra* note 30, at 1056; accord Streb, *supra* note 195, at 78–79. Social desirability bias is not necessarily unidirectional but rather depends upon the individual voter’s key social reference group. See Jeffrey R. Lax et al., *Are Survey Respondents Lying About Their Support for Same-Sex Marriage? Lessons from a List Experiment*, 80 PUB. OP. Q. 510, 521–23, 527 (2016). Thus, a religious conservative voter who supports same-sex marriage but who is active in a religious community that opposes it may falsely state her intent to vote against same-sex marriage, while a Democrat opposed to same-sex marriage might falsely state her intent to vote in favor of same-sex marriage. See *id.*

203. Although statements to pollsters are not under oath and thus not completely predictive of how someone might testify when under oath, a voter’s out-of-court oral or written statements regarding the tenor of her vote are likewise not under oath. Moreover, the research on social desirability bias demonstrates at the very least that it is more likely someone might testify falsely when inquiry into how they voted is at issue as contrasted with other types of matters. See Powell, *supra* note 30, at 1065.

outcome of the case.<sup>204</sup> Consider, for example, someone who in fact voted in the 2016 presidential election for either Jill Stein or Gary Johnson, but whose vote was not properly recorded due to a voting machine malfunction. Suppose further that the 2016 election was far closer—akin to the 2000 presidential election—and that the outcome of the electoral votes in that individual’s state would decide the presidential election. It may have been one thing to cast a protest vote for Stein or Johnson when the voter thought that Hillary Clinton was probably going to win, but post-election when the voter realizes that her testimony will either swing the election to Clinton or Trump, her perspective—and in turn, her characterization of her prior vote—may change.

Second, there is additional reason to be concerned about the trustworthiness of voter testimony in an election contest when it is not that of a legal voter whose vote the court seeks to clarify, but rather that of an illegal voter whose vote the court seeks to exclude. Just as with the legal voter, her participation in the election indicates an interest in its outcome. Moreover, to the extent that her illegal participation in the election was based on corrupt intent (as contrasted with mistake), her trustworthiness is more suspect.<sup>205</sup> Indeed, by falsely stating that she voted the opposite of how she actually did, she can double the effect of her vote, since if her testimony is accepted the court will not only be maintaining her vote in favor of her preferred candidate or position but also subtracting a vote from the opposing one.<sup>206</sup>

Third, even if one is willing to countenance testimony from actual voters—both legal and illegal—one might nonetheless be more skeptical of testimony from theoretical voters. Thus, courts routinely reject testimony by wrongfully excluded voters as to how they *would have* voted if they had been permitted to do so.<sup>207</sup> In such a circumstance, the danger that the voter might shade her testimony now that she knows the precise impact it would have on the outcome of the election is exacerbated by the speculative nature of her testimony. This is because instead of testifying about a known fact—how she actually voted—she is testifying about what she thinks she

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204. See *Metheny v. Pickel*, 141 N.E. 762, 766 (Ill. 1923); *Young v. Deming*, 33 P. 818, 820–21 (Utah 1893).

205. See generally *Van Winkle v. Crabtree*, 55 P. 831, 835 (Or. 1899).

206. See *Leach v. Johnson*, 313 N.E.2d 636, 642 (Ill. App. Ct. 1974); *In re Gen. Election of Nov. 5, 1991*, 605 A.2d 1164, 1186 (N.J. Super. Ct. Law Div. 1992); *In re Harper*, 456 S.E.2d 878, 881 (N.C. Ct. App. 1995); *Van Winkle*, 55 P. at 835; *State ex rel Bell v. Conness*, 82 N.W. 288, 290 (Wis. 1900).

207. See *Briscoe v. Between Consol. Sch. Dist.*, 156 S.E. 654, 656 (Ga. 1931); *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 630–31 (Mass. 1982); *People ex rel. Boyer v. Teague*, 11 S.E. 665, 680 (N.C. 1890); *Martin v. McGarr*, 117 P. 323, 327 (Okla. 1910); *Pawlowski v. Thompson*, 264 N.W. 723, 724 (S.D. 1936); *Ferguson v. Allen*, 26 P. 570, 573 (Utah 1891).

would have done if she had been able to vote, which may be colored in part by post-election events, including her knowledge of the close outcome.<sup>208</sup>

Fourth, even if one is willing to accept the risks described above when in-court voter testimony about the tenor of her vote is involved, there are additional risks associated with admitting the voter's out-of-court written or oral statements about the same. When a voter comes into court and testifies as to how she voted in an election, she is under oath and thus subject to the penalty of perjury for falsely testifying, and thus she has at least a theoretical incentive to testify truthfully.<sup>209</sup> But her out-of-court written or spoken hearsay statements are not made under similar circumstances, and thus there is even less assurance that she is speaking truthfully, since there is no legal consequence for making a false statement.<sup>210</sup> Moreover, when a witness is recounting the out-of-court oral statement of the voter, not only is the veracity of the voter suspect, but so potentially too is that of the witness recounting the voter's statement. To the extent that what is at issue in the underlying case is the outcome of a contested election, and to the extent that the witness has an interest in its outcome, her testimony regarding the voter's statement is suspect for the same reasons delineated above for testimony by the voter herself in such a proceeding.

### *B. The Interest in Ballot Secrecy*

As detailed above, the concept of a secret ballot was foreign to the common law and appeared nowhere in the United States prior to 1888.<sup>211</sup> Because the absence of a secret ballot led to rampant instances of vote buying and voter coercion, toward the tail end of the nineteenth century nearly all states adopted the secret ballot.<sup>212</sup> Indeed, numerous states enshrined the right to a secret ballot within their constitutions.<sup>213</sup> As will be demonstrated in Part III, many states implied from the statutory and constitutional rights to vote by secret ballot a corollary right of voters not to

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208. See *Briscoe v. Between Consol. Sch. Dist.*, 156 S.E. 654, 656 (Ga. 1931); *Whatley v. La Salle Par. Sch. Bd.*, 99 So. 603, 604 (La. 1924); *Pennington v. Hare*, 62 N.W. 116, 117 (Minn. 1895); *Martin v. McGarr*, 117 P. 323, 328 (Okla. 1910); cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (distinguishing between private causes of action for securities fraud under Rule 10b-5 by an actual purchaser misled by a prospectus and a potential purchaser that was dissuaded by a misleading prospectus).

209. See generally FED. R. EVID. advisory committee's introductory note to article VIII.

210. See *Lauer v. Estes*, 53 P. 262, 263 (Cal. 1898); *City of Beardstown v. City of Virginia*, 76 Ill. 34, 47-48 (1875).

211. See sources cited *supra* note 49.

212. See sources cited *supra* notes 46-50.

213. See, e.g., MICH. CONST. art. II, § 4; N.M. CONST. art. VII, § 1.

be compelled to disclose the tenor of their votes in judicial proceedings.<sup>214</sup> In addition, a number of states separately codified such a privilege.<sup>215</sup>

In recognizing such a privilege, courts in these states focused on both the individual and societal interests furthered by protecting ballot secrecy.<sup>216</sup> Thus, not only does it protect the privacy interests of the individual voter—allowing her to vote without the risk of later being subjected to “a kind of inquisitorial power unknown to the principles of our government and constitution”<sup>217</sup>—but it also protects the societal interest in ensuring that elections are the result of the free exercise of the franchise without the presence of voter intimidation and bribery.<sup>218</sup>

If secrecy in voting is limited to the point in time when the ballot is cast and not extended to encompass post-election inquiries, one of several things might happen that will undermine this societal interest. First, when a voter is asked to testify to the tenor of her vote, she may testify falsely because she does not want to disclose to those who may have bribed or pressured her to vote in a particular way that she actually exercised her franchise freely, thus raising the trustworthiness concerns set forth above.<sup>219</sup> Second, knowing that she may later be forced to disclose her vote in judicial proceedings and not wishing to perjure herself, she may not exercise her franchise freely—instead voting consistent with the pressures brought to bear on her—or she might opt not to cast a ballot at all, any of which would undermine the societal interest in free exercise of the franchise.<sup>220</sup>

Thus, where what is at issue is not anonymous electoral evidence—such as an ambiguously marked paper ballot that the court is asked to interpret—but rather electoral evidence regarding the tenor of a specific individual’s vote, admitting it in judicial proceedings undermines the right

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214. See *infra* note 237.

215. See *infra* note 235.

216. See *infra* note 218.

217. See *D’Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352, 1358–59 (D.N.J. 1995).

218. See *id.*; N.D. R. EVID. 506 explanatory note; *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 631 (Mass. 1982); *People ex rel. Williams v. Cicott*, 16 Mich. 283, 313–14 (1868) (opinion of Campbell, J.); *In re Zupsic*, 670 A.2d 629, 639 (Pa. 1996); *In re Orsatti*, 598 A.2d 1341, 1343–44 (Pa. Commw. Ct. 1991).

219. See *McCavitt*, 434 N.E.2d at 631; *Carabajal v. Lucero*, 158 P. 1088, 1092–93 (N.M. 1916).

220. See *D’Aurizio*, 899 F. Supp. at 1358–59; 8 J. WIGMORE, EVIDENCE § 2214, at 162–63 (McNaughton rev. ed. 1961). Critics of the instrumental justification for the privilege assume that the only risk of not recognizing it is the possibility that some timid individuals might be dissuaded from voting, a risk they perceive as far-fetched. See KENNETH W. GRAHAM, JR., 26 FED. PRAC. & PROC. EVID. § 5632 (1st ed. 2016). Yet, as demonstrated in Parts II.A and II.B, there also exists the risk that the person will participate in the election, but the trustworthiness of her testimony will be tainted as a result of the same external pressures that might dissuade some timid individuals from voting in the first instance.

to ballot secrecy which in turn undermines the societal interest in free exercise of the franchise.

### C. *The Misuse of Electoral Evidence*

As indicated above, the relevance of electoral evidence is greatest when offered in judicial contests over the very election itself. For example, if two candidates received exactly the same number of votes in an election and there was one person who voted illegally, her testimony regarding the tenor of her vote is not only relevant but—if believed by the trier of fact—seemingly decisive of the outcome of the election. Yet, it is exactly in such a setting that one of the risks associated with electoral evidence—its trustworthiness—is at its peak.

When instead electoral evidence is offered for some other substantive purpose—such as to show discriminatory intent in a civil or criminal case, or to impeach a witness or a potential juror for bias against a party—the risk of trustworthiness is reduced somewhat since the voter’s testimony will not impact the outcome of the election in which she voted. Yet, electoral evidence is far less probative when offered for such purposes than it is when offered to help determine the outcome of a specific election, since the evidence is open to different inferences. As a result, any increase in the trustworthiness of electoral evidence when offered outside of election contests is offset by the risk that the evidence may be misused or overvalued by the trier of fact.

For example, a person who votes against same-sex marriage may harbor general anti-gay bias, or she might simply have specific religious or other beliefs regarding marriage that color her view on that specific issue.<sup>221</sup> Similarly, a person who voted in favor of a state constitutional amendment to prohibit race-based affirmative action in public universities may harbor general bias against racial minorities, or she may simply have a philosophical objection to the practice of affirmative action.<sup>222</sup> Suppose, however, that the person is sued by two employees—one gay and one African-American—for allegedly discriminatory employment actions. Under the liberal theory of relevancy embodied in the Federal Rules of Evidence, evidence regarding the tenor of the person’s votes on those two ballot initiatives is presumptively admissible to prove—but hardly compelling or even persuasive evidence of—her alleged discriminatory mindset toward gays and African-Americans. Yet, there is a risk that jurors

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221. See generally *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting); *id.* at 2718 (Alito, J., dissenting).

222. See generally *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1634–38 (2014).

will make a measurement error in weighing its probative value, giving it undue weight, so much so that it might crowd out other, more direct evidence of what happened in the case.<sup>223</sup> Alternatively, there is a risk that jurors will intentionally misuse the electoral evidence, using it to punish a party who in their minds voted the “wrong way” on a sensitive political issue or in a particularly polarizing electoral race.<sup>224</sup>

Finally, there is a risk that merely countenancing the admission of how parties, witnesses, and potential jurors voted in elections to make somewhat far-fetched claims of bias sends a normalizing message to the public that one’s political preferences *should* bias judicial proceedings. Thus, while not issuing a blanket rejection of its use, the U.S. Supreme Court has cautioned against the free admission of a witness’s political leanings vis-à-vis those of a party, reasoning that “[t]he public should not be taught, by the mode in which trials of this character are conducted, that the prosecution of a crime . . . will be regarded by the court as, in effect, a prosecution of a political party to which the accused belongs.”<sup>225</sup>

### III. ELECTORAL EVIDENCE AND THE RULES OF EVIDENCE

Although relevant and thus presumptively admissible in a variety of circumstances, electoral evidence carries with it a number of risks, including its lack of trustworthiness, its undermining of the right to cast a secret ballot, and the risk that it will be overvalued or misused by the trier of fact. Unlike some other categories of evidence that are excluded due to the risk of being overvalued or misused and for other policy reasons—such as evidence of a sexual assault victim’s other sexual behavior<sup>226</sup> or evidence of subsequent remedial measures<sup>227</sup>—there is no single rule that addresses the admissibility of electoral evidence in a comprehensive fashion.

Instead, a number of discrete evidentiary rules of general application serve as potential roadblocks to admitting otherwise relevant electoral evidence. Chief among these are two different types of privileges, both of which are at least partially grounded in constitutional guarantees: the political vote privilege, which protects against disclosure of lawfully cast

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223. See NICOLAS, *supra* note 95, at 35–36 n.6.

224. Cf. *Old Chief v. United States*, 519 U.S. 172, 180–81 (1997).

225. See *Connors v. United States*, 158 U.S. 408, 415 (1895); cf. Peter Nicolas, “*They Say He’s Gay*”: *The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 848–49 (2003) (contending that the very act of deeming evidence of a person’s sexual orientation to be relevant for far-fetched purposes legitimizes a stigmatizing message about gays and lesbians).

226. See FED. R. EVID. 412.

227. See FED. R. EVID. 407.

votes,<sup>228</sup> and the privilege against self-incrimination, which protects against disclosure of unlawfully cast votes.<sup>229</sup> Other evidentiary bases for excluding electoral evidence include the rule against hearsay,<sup>230</sup> the best evidence rule,<sup>231</sup> and exclusion on the grounds of unfair prejudice.<sup>232</sup> Collectively, these individual evidentiary principles address, in piecemeal fashion, the dangers associated with admitting electoral evidence.<sup>233</sup> Yet, a variety of gaps contained in each of these doctrines—including their limited scope, the numerous exceptions to the privileges, the rule against hearsay, the best evidence rule, and the inconsistent and unpredictable application of the rule excluding evidence on the ground of unfair prejudice—mean that unreliable electoral evidence can still make its way before the trier of fact.

### A. State “Political Vote” Privileges

As detailed in Part I, in response to rampant instances of vote buying and coercion, states in the late nineteenth century revised their election apparatuses to ensure that voting was by secret ballot.<sup>234</sup> In some states, the right to vote by secret ballot was protected solely by legislative act,<sup>235</sup> while in others, the right was more robustly protected via provisions ensclosed into the states’ constitutions.<sup>236</sup>

Relying in some instances on such statutory and constitutional provisions and in other instances on general principles of common law, courts in over half of the states eventually recognized a privilege allowing voters to refuse in judicial proceedings to disclose the tenor of their votes cast via secret ballot in political elections.<sup>237</sup> These courts viewed the

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228. See, e.g., ALA. R. EVID. 506(b); Taylor v. Pile, 391 P.2d 670, 673 (Colo. 1964).

229. See, e.g., Montoya v. Ortiz, 175 P. 335, 337–38 (N.M. 1918); Oliphint v. Christy, 299 S.W.2d 933, 939 (Tex. 1957).

230. See FED. R. EVID. 802; Lauer v. Estes, 53 P. 262, 263 (Cal. 1898); City of Beardstown v. City of Virginia, 76 Ill. 34, 47 (1875).

231. See FED. R. EVID. 1002; Pullen v. Mulligan, 561 N.E.2d 585, 607–08 (Ill. 1990); Helm v. State Election Bd., 589 P.2d 224, 234 (Okla. 1979).

232. See FED. R. EVID. 403.

233. Although evidentiary objections are raised relatively infrequently during the jury selection process, strictly speaking, the Federal Rules of Evidence and their state law counterparts are applicable in such proceedings. See Thomas v. Hardwick, 231 P.3d 1111, 1113–14, 1114 n.4 (Nev. 2010); Watson v. State, 917 S.W.2d 65, 67 (Tex. App. 1996); TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION STRATEGY AND SCIENCE § 18:1 (3d ed. 2016).

234. See *supra* text accompanying notes 39–52.

235. See, e.g., O’Neal v. Simpson, 350 So. 2d 998, 1010 (Miss. 1977); Lane v. Bailey, 75 P. 191, 195–96 (Mont. 1904).

236. See, e.g., Bush v. Head, 97 P. 512, 514–15 (Cal. 1908); State v. Matlack, 64 A. 259, 265 (Del. Ct. Gen. Sess. 1905).

237. See Black v. Pate, 30 So. 434, 439 (Ala. 1901); Willis v. Crumbly, 268 S.W.3d 288, 296 (Ark. 2007); Bush, 97 P. at 514–15; Taylor v. Pile, 391 P.2d 670, 673 (Colo. 1964); Matlack, 64 A. at

privilege as a necessary corollary to the compulsory secret ballot, which in turn they characterized as designed to ensure the elector's vote will reflect her true preference and not be the result of undue influence.<sup>238</sup>

Today, twenty U.S. states and two U.S. territories, by statute or codified rule of evidence, recognize such a political vote privilege.<sup>239</sup> Another twenty-one states have judicial decisions on the books recognizing such a privilege,<sup>240</sup> all (or nearly all) of which have survived the codification of rules of evidence in those states.<sup>241</sup> Of the remaining nine

265; *Taggart v. Phillips*, 249 S.E.2d 245, 246 (Ga. 1978); *Pedigo v. Grimes*, 13 N.E. 700, 701 (Ind. 1887); *Powers v. Harten*, 167 N.W. 693, 695 (Iowa 1918); *Wood v. Kirby*, 566 S.W.2d 751, 753 (Ky. 1978); *Gainnie v. Druilhet*, 79 So. 212, 213 (La. 1918); *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 629–31 (Mass. 1982); *In re Opinion of the Justices*, 126 A. 354, 367 (Me. 1924); *Belcher v. Mayor of Ann Arbor*, 262 N.W.2d 1, 2 (Mich. 1978); *Ganske v. Indep. Sch. Dist. No. 84*, 136 N.W.2d 405, 408 (Minn. 1965); *O'Neal*, 350 So.2d at 1010; *Montgomery v. Dormer*, 79 S.W. 913, 915–16 (Mo. 1904); *Lane*, 75 P. at 195–96; *Dean v. Miller*, 76 N.W. 555, 556 (Neb. 1898); *Kiehne v. Atwood*, 604 P.2d 123, 126–27 (N.M. 1979) (citing N.M. CONST., art. VII, § 1); *Longo v. D'Apice*, 546 N.Y.S.2d 907, 908 (N.Y. App. Div. 1989); *People ex rel. Boyer v. Teague*, 11 S.E. 665, 679–81 (N.C. 1890); *Torkelson v. Byrne*, 276 N.W. 134, 138 (N.D. 1937); *In re Sugar Creek Local Sch. Dist.*, 185 N.E.2d 809, 815 (Ohio Ct. Com. Pls. 1962); *State ex rel. Heath v. Kraft*, 23 P. 663, 665 (Or. 1890); *In re Orsatti*, 598 A.2d 1341, 1343–44 (Pa. Commw. Ct. 1991); *Horton v. Sullivan*, 86 A. 314, 315 (R.I. 1913); *Abbott v. Hunhoff*, 491 N.W.2d 450, 453 (S.D. 1992); *Moore v. Sharp*, 41 S.W. 587, 589 (Tenn. 1897); *Oliphint v. Christy*, 299 S.W.2d 933, 939 (Tex. 1957); *Maynard v. Hammond*, 79 S.E.2d 295, 299 (W. Va. 1953); *State ex rel. Doerflinger v. Hilmantel*, 23 Wis. 422, 425–26 (1868); *Fugate v. Mayor of Buffalo*, 348 P.2d 76, 85–86 (Wyo. 1959); *see also Granados v. Rodriguez Estrada I*, 124 D.P.R. 1, 38 (P.R. 1989).

238. *See Black*, 30 So. at 439; *Teague*, 11 S.E. at 679; *Van Winkle v. Crabtree*, 55 P. 831, 835 (Or. 1899); 8 J. WIGMORE, EVIDENCE § 2214, at 162–63 (McNaughton rev. ed. 1961).

239. *See* LA. CODE EVID. art. 512 (1992); 12 OKLA. STAT. ANN. § 2507(A) (1978); S.D. CODIFIED LAWS § 19-19-506 (1979); TEX. R. EVID. 506; WISC. STAT. ANN. § 905.07 (West 1974); *see also* ALA. R. EVID. 506(a); ARK. R. EVID. 506(a); ARK. R. EVID. 507; CAL. EVID. CODE § 1050 (1965); DEL. R. EVID. 506(a); HAW. R. EVID. 507; IDAHO R. EVID. 506(a); 735 ILL. COMP. STAT. ANN. § 5/8-910 (1966); KAN. STAT. ANN. § 60-431 (1963); ME. R. EVID. 506(a); NEB. REV. STAT. § 27-507 (1975); NEV. REV. STAT. § 49.315 (1971); N.J. R. EVID. 513; N.M. R. EVID. 11-507; N.D. R. EVID. 506(a); P.R. STAT. tit. 32 § 29 (1979); V.I. CODE 5 § 857(a) (2011). In some of these states, the privilege is dually protected by statute and by the state constitution. *See, e.g., Abbott*, 491 N.W.2d at 453 (S.D. 1992).

240. *See Taylor*, 391 P.2d at 673; *Matlack*, 64 A. at 265; *Taggart*, 249 S.E.2d at 246; *Pedigo*, 13 N.E. at 701; *Powers*, 167 N.W. at 695; *Wood*, 566 S.W.2d at 753; *McCavitt*, 434 N.E.2d at 629–31; *Belcher*, 262 N.W.2d at 2; *Ganske*, 136 N.W.2d at 408; *O'Neal*, 350 So. 2d at 1010; *Montgomery*, 79 S.W. at 915–16; *Lane*, 75 P. at 195–96; *Longo*, 546 N.Y.S.2d at 908; *Teague*, 11 S.E. at 679–81; *In re Sugar Creek Local Sch. Dist.*, 185 N.E.2d at 815; *Heath*, 23 P. at 665; *In re Orsatti*, 598 A.2d at 1343–44; *Horton*, 86 A. at 315; *Moore*, 41 S.W. at 589; *Maynard*, 79 S.E.2d at 299; *Fugate*, 348 P.2d at 85–86.

241. Three of those states—Massachusetts, Missouri, and New York—have not codified their rules of evidence, and so the common law continues to control. *See* proposed MASS. R. EVID.; proposed MO. EVID. CODE; proposed N.Y. CODE OF EVID. Fourteen of those states have codified their rules of evidence and have not specifically included a political vote privilege, but they have adopted a general evidentiary rule recognizing common law privileges. *See* COLO. R. EVID. 501; CONN. CODE EVID. § 5-1; IND. R. EVID. 501; IOWA R. EVID. 501; MICH. R. EVID. 501; MINN. R. EVID. 501; N.C. R. EVID. 501; OHIO R. EVID. 501; OR. R. EVID. 514; PA. R. EVID. 501; R.I. R. EVID. 501; TENN. R. EVID. 501; W. VA. R. EVID. 501; WYO. R. EVID. 501. One of those states has codified its evidentiary privileges, but is silent on whether that list of privileges is exclusive or whether common law privileges continue to be recognized. *See* GA. STAT. § 24-5-501 (2014). The remaining three states have codified their evidentiary privileges and indicated that the codified list is exclusive unless, *inter alia*, the state constitution

states, courts in two, Arizona<sup>242</sup> and Utah,<sup>243</sup> have explicitly left the issue open, while the other seven—Florida, Maryland, New Hampshire, South Carolina, Vermont, Virginia, and Washington—have no cases or statutes addressing the issue. However, seven of these nine states have constitutional provisions guaranteeing a right to a secret ballot,<sup>244</sup> and the remaining two states have statutes guaranteeing the same<sup>245</sup> from which courts could derive a political vote privilege, in accordance with the many other states that have done so.<sup>246</sup> In addition, five of the nine states have a rule acknowledging the power of courts to recognize common law privileges that could similarly result in the recognition of such a privilege.<sup>247</sup> It thus seems likely that if the issue were addressed by courts in the remaining states, the result would be unanimous (or nearly so) recognition of the privilege nationwide.<sup>248</sup>

An analogous privilege likely exists at the federal level and governs when federal causes of action are involved.<sup>249</sup> When the Federal Rules of Evidence were originally proposed, they included a series of specific evidentiary privileges, including a political vote privilege with an exception for illegally cast votes.<sup>250</sup> In response to overwhelmingly negative criticism of the specific privileges proposed to be included in and excluded from the Federal Rules of Evidence—albeit none directed at the political vote privilege itself—Congress substituted in their place a general rule directing courts to determine the existence and scope of federal privileges by way of “[t]he common law—as interpreted by United States courts in the light of

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provides otherwise. *See* KY. R. EVID. 501; MISS. R. EVID. 501; MONT. R. EVID. 501. In one of those three states, the courts have explicitly derived the privilege from the state constitution, *see* *Wood v. Kirby*, 566 S.W.2d 751, 753 (Ky. 1978) (citing KY. CONST. § 147), and the other two states have constitutional provisions guaranteeing a right to a secret ballot that could be similarly construed. *See* MISS. CONST. art. XII, § 240; MONT. CONST. art. IV, § 1.

242. *See* *Huggins v. Superior Court*, 788 P.2d 81, 84 (Ariz. 1990); *Clay v. Town of Gilbert*, 773 P.2d 233, 240 (Ariz. Ct. App. 1989) (Fidel, J., specially concurring).

243. *See* *Cox v. Laycock*, 345 P.3d 689, 697 n.28 (Utah 2015).

244. *See* ARIZ. CONST. art. VII, § 1; FLA. CONST. art. VI, § 1; MD. CONST. art. I, § 1; S.C. CONST. art. II, § 1; UTAH CONST. art. IV, § 8; VA. CONST. art. II, § 3; WASH. CONST. art. VI, § 6.

245. *See* N.H. REV. STAT. § 659:37 (1955); VT. STAT. ANN. tit. 17, § 2504 (1977).

246. *See supra* note 237.

247. *See* ARIZ. R. EVID. 501; S.C. R. EVID. 501; UTAH R. EVID. 501; VT. R. EVID. 501(a); VA. SUP. CT. R. 2:501.

248. The remaining territories and the District of Columbia likewise have statutes and constitutional provisions from which such a privilege could be derived, or a general rule empowering courts to recognize common law privileges. *See* D.C. CODE § 1-1001.09(a) (2017); GUAM R. EVID. 501; 1 N. MAR. I. CODE § 6521 (2010).

249. When a state law cause of action is adjudicated in federal court, state privilege law governs. *See* FED. R. EVID. 501.

250. *See* proposed FED. R. EVID. 507.

reason and experience.”<sup>251</sup> Applying this standard, the only federal court to consider the matter to date has recognized a federal common law political vote privilege.<sup>252</sup>

The U.S. Supreme Court has identified several relevant factors in deciding whether or not to recognize a federal privilege under this standard. First, a court must assess the social benefits of recognizing the privilege and weigh those against the impact of excluding the evidence on the truth-seeking process.<sup>253</sup> Second, the court should determine the extent to which the privilege has been adopted by the states, with the privilege more likely to be recognized at the federal level if there is broad consensus for the privilege at the state level.<sup>254</sup> Third, inclusion of the privilege in the original draft of the Federal Rules of Evidence is a factor that weighs in favor of recognizing a privilege at the federal level, since most of the proposed privileges were restatements of the existing common law.<sup>255</sup> These factors all weigh in favor of recognition of a federal common law political vote privilege. First, as demonstrated in Part II, the privilege furthers the important social interest in free and fair elections.<sup>256</sup> Moreover, the cost of the privilege is minimal, since the alternative is very often not truthful but rather perjured testimony.<sup>257</sup> Second, there is a broad consensus among the states that such a privilege should exist, with at least forty-one states recognizing the privilege and no state explicitly rejecting the privilege.<sup>258</sup> Finally, the privilege was included in the originally proposed draft of the Federal Rules of Evidence.<sup>259</sup> For all of these reasons, it seems likely that if confronted with the question, other lower federal courts and the U.S. Supreme Court would likely recognize a federal common law political vote privilege.<sup>260</sup>

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251. See FED. R. EVID. 501; Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 512–15, 532–33 (1994).

252. See *D’Aurizio v. Borough of Palisades Park*, 899 F. Supp. 1352 (D.N.J. 1995).

253. See *Jaffee v. Redmond*, 518 U.S. 1, 8–12 (1996).

254. See *Jaffee*, 518 U.S. at 12–13; *Trammel v. United States*, 445 U.S. 40, 48–50 (1980); *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980).

255. See *Jaffee*, 518 U.S. at 14–15; *Gillock*, 445 U.S. at 367–68.

256. See *D’Aurizio*, 899 F. Supp. at 1358–59.

257. Cf. *Jaffee*, 518 U.S. at 11–12 (holding that absent a psychotherapist–patient privilege, conversations between patients and their psychotherapists would be chilled, and thus refusing to recognize privilege would not result in evidence that would aid the truth-seeking process); *In re Grand Jury Investigation*, 603 F.2d 786, 789 (9th Cir. 1979) (recognizing that the alternative to recognizing marital communications privilege may be perjured testimony).

258. See *supra* text accompanying notes 237–47; *D’Aurizio*, 899 F. Supp. at 1356–58.

259. See *D’Aurizio*, 899 F. Supp. at 1356.

260. Whether the privilege is separately grounded in the U.S. Constitution is a complex question that lower courts have left open. In contrast with state constitutions, the U.S. Constitution does not in terms refer to a right to a secret ballot. See *Smith v. Dunn*, 381 F. Supp. 822, 825 (M.D. Tenn. 1974). However, the right to a secret ballot and the corollary right not to disclose the tenor of one’s vote may

By recognizing a political vote privilege, these jurisdictions have taken a significant step in addressing the three risks associated with electoral evidence identified in Part II. First, the privilege calls for the exclusion of perhaps the most untrustworthy form of electoral evidence—testimony by the voter herself. Second, the very rationale many courts and policy makers invoke for recognizing the privilege—furthering the right to vote by secret ballot—assures that the individual and societal interests served by ballot secrecy are not undermined. Third, by presumptively excluding such testimony, the privilege assures that at least this form of electoral evidence is not misused or overvalued by the trier of fact.

Yet, within the jurisdictions that have recognized the political vote privilege by statute or judicial decision, there are generally three recognized exceptions to the privilege. First, virtually every jurisdiction extends the privilege only to legal voters, holding that those who participated in the election illegally are not entitled to invoke the privilege.<sup>261</sup> Second, most jurisdictions permit the voter herself to waive the

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be derivative of the First Amendment's guarantee of freedom of association, or it might be recognized as an unenumerated right under the doctrine of substantive due process. See *Anderson v. Mills*, 664 F.2d 600, 608 (6th Cir. 1981); *D'Aurizio*, 899 F. Supp. at 1359 n.5; *Libertarian Party of Tenn. v. Goins*, 793 F. Supp. 2d 1064, 1082–85 (M.D. Tenn. 2010). Those jurists who view historical practice as decisive in interpreting the U.S. Constitution conclude that our nation's long history without a secret ballot means that the right to so vote—and in turn any corollary right not to disclose the tenor of one's vote—is not constitutionally mandated. See *Doe v. Reed*, 561 U.S. 186, 224–27 (2010) (Scalia, J., concurring); *Socialist Workers Party v. Hechler*, 890 F.2d 1303, 1308 n.2 (4th Cir. 1989); *Barsky v. United States*, 167 F.2d 241, 249 n.28 (D.C. Cir. 1948); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659, 2676 n.27 (2015) (citing U.S. CONST. art. I § 4 cl. 1) (noting that the framers of the U.S. Constitution left the choice of whether to vote by secret ballot or not to the states). In contrast, those Justices who view the Constitution more fluidly have suggested otherwise. See *Sweezy v. New Hampshire*, 354 U.S. 234, 266 (1957) (Frankfurter, J., concurring) (“It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties either in a state or national election. . . . This is so, even though adequate protection of secrecy by way of the Australian ballot did not come into use till 1888. The implications of the United States Constitution for national elections and ‘the concept of ordered liberty’ implicit in the Due Process Clause of the Fourteenth Amendment as against the States . . . were not frozen as of 1789 or 1868, respectively.”); *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 419 (1950) (Frankfurter, J., concurring); see also *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (declaring that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry” and indicating that recent legal developments in the states are relevant); *G.A. Res. 217 (III) A*, Universal Declaration of Human Rights, art. 21(3) (Dec. 10, 1948) (recognizing a right to vote by secret ballot).

261. See ALA. R. EVID. 506(b); ALASKA. R. EVID. 507; ARK. R. EVID. 506(b); CAL. EVID. CODE § 1050 (1965); DEL. R. EVID. 506(b); HAW. R. EVID. 507; IDAHO R. EVID. 506(b); KAN. STAT. ANN. § 60-431 (1963); LA. STAT. ANN.-C.E. ART. 512; ME. R. EVID. 506(b)(1); NEB. REV. STAT. § 27-507 (1975); NEV. REV. STAT. § 49.315 (1971); N.J. R. EVID. 513; N.M. R. EVID. 11-507; N.D. R. EVID. 506(b); 12 OKLA. STAT. ANN. tit. 12, 2507(B) (West 1936); P.R. LAWS ANN. tit. 32, app. IV § 29 (1954); S.D. CODIFIED LAWS § 19-19-506 (1967); TEX. R. EVID. 506; 5 V.I. CODE § 857(b) (2011); WISC. STAT. ANN. § 905.07; *D'Aurizio*, 899 F. Supp. at 1361; *Taylor v. Pile*, 391 P.2d 670, 673 (Colo. 1964); *Mansfield v. Scully*, 29 A.2d 444, 449 (Conn. 1942); *Pedigo v. Grimes*, 13 N.E. 700, 701 (Ind. 1887); *Tunks v. Vincent*, 51 S.W. 622, 624 (Ky. 1899); *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 630 (Mass. 1982); *Belcher v. Mayor of Ann Arbor*, 262 N.W.2d 1, 2 (Mich. 1978); *Ganske v. Indep. Sch. Dist. No. 84*, 136 N.W.2d 405, 408 (Minn. 1965); *O'Neal v. Simpson*, 350 So. 2d 998,

privilege either expressly at trial or through her conduct prior to trial.<sup>262</sup> Finally, a handful of jurisdictions have created an exception to the privilege when disclosure is compellable pursuant to state election laws.<sup>263</sup> Each of these exceptions, while accompanied by reasoned justifications, has the effect of reintroducing, at least in part, the dangers associated with electoral evidence.

In deeming the political vote privilege inapplicable to illegal voters,<sup>264</sup> courts reason that since the purpose of the privilege is to maintain the purity of the ballot box by ensuring that people cast their votes unimpeded by improper influences calculated to thwart the free exercise of the franchise, that policy would not be furthered—and indeed would be undermined—were it to be invoked to shield efforts by dishonest people to defeat the will of the people by voting illegally.<sup>265</sup> Indeed, allowing it to be invoked under those circumstances, they reason, would tend to promote fraud and encourage corruption.<sup>266</sup> Jurisdictions split on how they define illegality, with some narrowly defining it to include only situations in which the voter acted in bad faith and not when the illegality of her vote was due, say, to a good faith mistake on her part,<sup>267</sup> while other

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1010–11 (Miss. 1977); *Montgomery v. Dormer*, 79 S.W. 913, 915–16 (Mo. 1904); *Longo v. D’Apice*, 546 N.Y.S.2d 907, 908 (App. Div. 1989); *People ex rel. Boyer v. Teague*, 11 S.E. 665, 679 (N.C. 1890); *In re Sugar Creek Local Sch. Dist.*, 185 N.E.2d 809, 815 (Ohio Ct. Com. Pls. 1962); *State ex rel. Heath v. Kraft*, 23 P. 663, 665 (Or. 1890); *Horton v. Sullivan*, 86 A. 314, 315 (R.I. 1913); *Moore v. Sharp*, 41 S.W. 587, 589 (Tenn. 1897); *Fugate v. Mayor of Buffalo*, 348 P.2d 76, 85–86 (Wyo. 1959).

262. See ALA. R. EVID. 510(a); ALASKA R. EVID. 510; ARK. R. EVID. 510; CAL. EVID. CODE § 1050 (1965); DEL. R. EVID. 510; HAW. R. EVID. 511; IDAHO R. EVID. 510; KAN. STAT. ANN. § 60-437 (1963); LA. STAT. ANN. C.E. ART. 502(A); ME. R. EVID. 510; NEB. REV. STAT. § 27-511 (1975); NEV. REV. STAT. § 49.385 (1971); N.J. R. EVID. 530; N.M. R. EVID. 11-511; N.D. R. EVID. 510; 12 OKLA. STAT. ANN. tit. 12, § 2511 (West 1936); P.R. LAWS ANN. tit. 32, app. IV, § 33, 34; S.D. CODIFIED LAWS § 19-19-510 (1967); 5 V.I. CODE § 861 (2011); WISC. STAT. ANN. § 905.11; N.D. R. EVID. 506, explanatory note; TEX. R. EVID. 511; *Lane v. Bailey*, 75 P. 191, 195–96 (Mont. 1904); *Longo*, 546 N.Y.S.2d at 908; *Teague*, 11 S.E. at 679; *Helm v. State Election Bd.*, 589 P.2d 224, 234 (Okla. 1979); *Kraft*, 23 P. at 665; *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939); *Fugate*, 348 P.2d at 85–86; 8 J. WIGMORE, EVIDENCE § 2214, at 164 (McNaughton rev. ed. 1961); cf. *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 981 N.E.2d 345, 356–57 (Ill. 2012) (attorney–client privilege).

263. See ALA. R. EVID. 506(b); ARK. R. EVID. 506(b); DEL. R. EVID. 506(b); IDAHO R. EVID. 506(b); ME. R. EVID. 506(b)(2); N.D. R. EVID. 506(b); S.D. COD. L. § 19-19-506; 5 V.I. CODE § 857(b).

264. Whether someone voted illegally is a preliminary question of fact for the court to decide in determining the applicability of the privilege. See *Black v. Pate*, 30 So. 434, 439 (Ala. 1901). In the face of uncertainty, a presumption that the person voted legally—and thus that the privilege is applicable—typically governs. See *id.*; *In re Levens*, 702 P.2d 320, 325 (Kan. 1985).

265. See *Black v. Pate*, 30 So. 434, 439 (Ala. 1901); *Mansfield*, 29 A.2d at 449; *Buckingham v. Angell*, 87 N.E. 285, 286 (Ill. 1909); *McCavitt*, 434 N.E.2d at 630; *Van Winkle v. Crabtree*, 55 P. 831, 835 (Or. 1899); *Abbott v. Hunhoff*, 491 N.W.2d 450, 453 (S.D. 1992); 8 J. WIGMORE, EVIDENCE § 2214, at 163 (McNaughton rev. ed. 1961).

266. See *Willis v. Crumbly*, 268 S.W.3d 288, 296–97 (Ark. 2007); *Montoya v. Ortiz*, 175 P. 335, 338 (N.M. 1918); *Teague*, 11 S.E. at 679; *Kraft*, 23 P. at 665; *Tunks*, 51 S.W. at 624; *Horton*, 86 A. at 315.

267. See *Huggins v. Superior Court*, 788 P.2d 81, 84 (Ariz. 1990); *Mahaffey v. Barnhill*, 855 P.2d 847, 850–51 (Colo. 1993) (en banc); *McCavitt*, 434 N.E.2d at 630–31; *Belcher*, 262 N.W.2d at 2.

jurisdictions define it broadly to include even situations in which the individual inadvertently voted unlawfully.<sup>268</sup>

Yet while these courts are undoubtedly correct that the exception for illegally cast votes does little to undermine the purposes behind ballot secrecy laws,<sup>269</sup> the exception still risks the admission of untrustworthy testimony. Indeed, to the extent that who is involved is an illegal voter in the narrow sense of having acted with evil intent, the risks that she will testify falsely in an effort to further disrupt the outcome of the election are even more pronounced.<sup>270</sup> Nor is such an exception necessary for courts to resolve election contests in which illegal votes were cast. One state, Illinois, lacks an exception for illegal voters.<sup>271</sup> When illegal votes are determined to have been cast, courts in that state instead look to circumstantial evidence—such as the party affiliation of the individuals at issue—as a way to determine how they likely voted when eliminating their illegal votes, or if the circumstantial evidence is inconclusive, courts throw out the election, or at least the vote in a given precinct.<sup>272</sup> Excluding the compelled testimony of the illegal voters does not undermine the goal of accurately determining the outcome of such elections because the evidence that would otherwise be compelled would likely be untrustworthy and thus might even undermine that goal.<sup>273</sup>

As for the exception to the privilege allowing the voter herself to waive the privilege and testify, courts characterize the privilege as personal<sup>274</sup> to the voter<sup>275</sup> and reason that while allowing her to invoke it fully effectuates

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268. See *Van Winkle*, 55 P. at 835; *In re Campbell*, 15 Pa. D. 607, 608 (Pa. Ct. Quarter Sess. 1905); *State ex rel. Doerflinger v. Hilmantel*, 23 Wis. 422, 425–26 (1868).

269. In those jurisdictions that define illegal voter broadly to encompass those who acted in good faith, the exception also to some extent undermines the purposes behind ballot secrecy laws.

270. See *supra* text accompanying notes 199–200.

271. See 735 ILL. COMP. STAT. ANN. § 5/8-910 (1986); *Gribble v. Willeford*, 546 N.E.2d 994, 999 (Ill. App. Ct. 1989).

272. See *Gribble*, 546 N.E.2d at 999.

273. See *id.* One treatise describes the political vote privilege as a “phantom” one, reasoning that the testimony covered by it is only relevant in cases involving illegal voters, in which case this exception applies. See GRAHAM, *supra* note 220. Yet, as demonstrated above, this limited view of the relevance of electoral evidence is incorrect, even within the context of election contests.

274. Because the privilege is personal to the voter, in a case in which a question is asked of a prospective juror or a non-party witness (such as a voter in a case involving a dispute between two political candidates), the privilege can only be invoked by the voter herself, *not* the parties to the action. See N.D. R. EVID. 506 explanatory note; *Dennis v. Chilton County*, 68 So. 889, 890 (Ala. 1915); *People v. Ochoa*, 966 P.2d 442, 488 (Cal. 1998); *Eggers v. Fox*, 52 N.E. 269, 270 (Ill. 1898); *State ex rel. Beu v. Lockwood*, 165 N.W. 330, 333 (Iowa 1917); *Kiehne v. Atwood*, 604 P.2d 123, 128 (N.M. 1979); *Torkelson v. Byrne*, 276 N.W. 134, 138–40 (N.D. 1937); *Wickham v. Coyner*, 20 Ohio C.D. 765, 774 (Ohio Cir. Ct. 1900); *State ex rel. Heath v. Kraft*, 23 P. 663, 665 (Or. 1890); *Ex parte Henry*, 126 S.W.2d 1, 2 (Tex. 1939); *State ex rel. Hopkins v. Olin*, 23 Wis. 309, 319 (1868).

275. See *Black v. Pate*, 30 So. 434, 439 (Ala. 1901); *State v. Matlack*, 64 A. 259, 265 (Del. Ct. Gen. Sess. 1905); *Strebin v. Lavengood*, 71 N.E. 494, 499 (Ind. 1904); *Lockwood*, 165 N.W. at 333; *Kiehne*, 604 P.2d at 127–28; *Torkelson*, 276 N.W. at 138; *Helm v. State Election Bd.*, 589 P.2d 224,

her right to exercise a secret ballot, her voluntary testimony furthers the competing societal interest in accurately resolving contested election disputes.<sup>276</sup> However, courts in some jurisdictions have declined to give voters the power to waive the privilege.<sup>277</sup> These courts recognize that allowing such waivers potentially undermines the court's ability to accurately resolve the dispute. In addition to the risks that the voluntary testimony will be untrustworthy because the voter's personal interest in the outcome of the election may cause her to fabricate her testimony or because she will be pressured by her employer or associates to testify in a particular way,<sup>278</sup> if only some voters volunteer to testify but not others, the testimony—even if truthful—may present the court with a distorted view of the electorate's preferences.<sup>279</sup> These courts also recognize a variety of ways in which voluntary individual waiver undermines the interest in ballot secrecy. First, they question whether the waiver is truly voluntary, reasoning that once it is known that waiver is possible, voters can be bribed or intimidated by those with an interest in the outcome to exercise the waiver.<sup>280</sup> Second, they characterize the interest as not an individual but rather a societal one in safeguarding the integrity of elections, and thus do not view the individual voter as empowered to waive it.<sup>281</sup> Third, even if viewed as an individual right, when what is involved is a small precinct in which, say, all but one voter have voluntarily waived their right to ballot secrecy and disclosed the tenor of their votes, that testimony—when coupled with the known results—is tantamount to forcibly waiving the individual right of the remaining voter.<sup>282</sup>

Finally, a handful of jurisdictions include an exception to the privilege that applies when disclosure is compellable pursuant to the state's election laws.<sup>283</sup> Recognition of the privilege in conjunction with this exception to some extent addresses the third risk associated with electoral evidence,

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232–33 (Okla. 1979); *Kochersperger v. Hargrave*, 6 Pa. C. 510, 514 (Pa. Ct. Quarter Sess. 1888); *Kaufmann v. La Crosse City Bd. of Canvassers*, 98 N.W.2d 422, 424 (Wis. 1959).

276. See, e.g., *Lane v. Bailey*, 75 P. 191, 195–96 (Mont. 1904). Such a scenario might occur when, for example, a voting machine failed, or the ballots were accidentally lost or destroyed in a given precinct. See, e.g., *Dixon v. Orr*, 4 S.W. 774, 776 (Ark. 1887).

277. See *Wood v. Kirby*, 566 S.W.2d 751, 753 (Ky. 1978); *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 630–31 (Mass. 1982); *Gallegos v. Miera*, 215 P. 968, 970–71 (N.M. 1923); *In re Zupsic*, 670 A.2d 629, 639 (Pa. 1996).

278. See *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 631 (Mass. 1982); *Carabajal v. Lucero*, 158 P. 1088, 1092–93 (N.M. 1916).

279. See *Kirby v. Wood*, 558 S.W.2d 180, 182 (Ky. 1977); *accord* *Major v. Barker*, 35 S.W. 543, 543–44 (Ky. 1896).

280. See *In re Zupsic*, 670 A.2d at 639; *In re Orsatti*, 598 A.2d 1341, 1343–44 (Pa. Commw. Ct. 1991).

281. See *McCavitt*, 434 N.E.2d at 631.

282. See *In re Gen. Election of Nov. 4, 1975*, 71 Pa. D. & C.2d 83, 92–93 (Pa. Ct. Com. Pl. 1975).

283. See sources cited *supra* note 256.

because the net effect would be to compel the testimony only in those cases in which it is highly probative—namely, election contests—and not when it is offered for some marginally relevant purpose but carries a substantial risk of being misused or overvalued by the trier of fact. However, as demonstrated in Part II, the scenario in which electoral evidence is most relevant, election contests, is also the scenario in which the risk of untrustworthiness is likely at its zenith.

### *B. Other Evidentiary Bases for Excluding Electoral Evidence*

The political vote privilege is perhaps one of the most significant barriers to admitting electoral evidence. Yet, as demonstrated in Part III.A.1, a number of commonly recognized exceptions to the privilege result in the admission of electoral evidence that is untrustworthy, undermines the right to a secret ballot, and is subject to the risk of being misused or overvalued by the trier of fact. Moreover, separate and apart from these concerns, the political vote privilege itself—even in the absence of its exceptions—bars only the admission of one type of electoral evidence, namely, testimony from the voter herself.<sup>284</sup> It thus serves as no barrier to admitting other types of electoral evidence that might possess similar or greater risks, such as admitting the voter's out-of-court statements regarding the tenor of her vote.

This Part considers a variety of other evidentiary principles that together address some but not all categories of evidence left unaffected by the political vote privilege. These include the privilege against self-incrimination, the rule against hearsay, the best evidence rule, and exclusion on the grounds of unfair prejudice.

#### *1. Privilege Against Self-Incrimination*

As demonstrated above, virtually every jurisdiction in the United States that has recognized a political vote privilege excepts from its scope those who voted illegally in the election.<sup>285</sup> As argued therein, compelling an illegal voter to disclose the tenor of her vote introduces the risk that the proceedings will be polluted with untrustworthy testimony. However, while unprotected by the political vote privilege, an illegal voter can resist compelled testimony regarding her illegal vote by invoking the privilege against self-incrimination.

Because there are typically criminal sanctions associated with voting illegally in an election, a voter can invoke the privilege against self-

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284. See *infra* text accompanying notes 313–318.

285. See *infra* text accompanying note 288.

incrimination to avoid answering questions regarding her participation in the election.<sup>286</sup> Yet, the scope of the privilege in this context is narrow in a number of ways. First, as with the political vote privilege generally, the privilege against self-incrimination is a personal one that can be waived by the voter if she wishes to testify.<sup>287</sup> Second, strictly speaking, the privilege as a general rule protects only the *fact* of the person's illegal vote and not the tenor of her vote. Thus, although she cannot be compelled to state *whether* she voted or not, if she admits that she voted in the election, the privilege against self-incrimination does not allow her to resist testifying as to the tenor of her vote,<sup>288</sup> save for the narrow circumstance in which the tenor of one's vote is itself an element of a charged crime.<sup>289</sup> Third, it is possible that someone will be deemed to be an illegal voter—such that the political vote privilege will be inapplicable—yet that her illegal participation in the election was in good faith such that she lacks criminal intent, in which case the privilege against self-incrimination likewise will be inapplicable.<sup>290</sup> Fourth, an individual's act of voting may have been unlawful, but state law may impose no criminal sanctions for the offense, in which case the privilege against self-incrimination will likewise be inapplicable.<sup>291</sup> Finally, a number of states have statutory or constitutional provisions declaring that the privilege against self-incrimination cannot be invoked by an illegal voter in a trial of a contested election, but avoid a

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286. See LA. STAT. ANN.-C.E. art. 512 comment; ME. R. EVID. 506 advisers' note; Black v. Pate, 30 So. 434, 439 (Ala. 1901); Huggins v. Superior Court, 788 P.2d 81, 83 (Ariz. 1990); *Ex parte Senior*, 19 So. 652, 657 (Fla. 1896); Sorenson v. Sorenson, 59 N.E. 555, 556 (Ill. 1901); Scholl v. Bell, 102 S.W. 248, 256 (Ky. 1907); Tunks v. Vincent, 51 S.W. 622, 624 (Ky. 1899); Wilkinson v. McGill, 64 A.2d 266, 273 (Md. 1949); Gardner v. Bd. of Sch. Dist. No. 6, 226 N.W. 895, 896 (Mich. 1929); Ganske v. Indep. Sch. Dist. No. 84, 136 N.W.2d 405, 408 (Minn. 1965); Hubbard v. McKey, 193 So. 2d 129, 131 (Miss. 1966); Harris v. Stewart, 193 So. 339, 344 (Miss. 1940); Kiehne v. Atwood, 604 P.2d 123, 128 (N.M. 1979); Montoya v. Ortiz, 175 P. 335, 338 (N.M. 1918); *People ex rel. Boyer v. Teague*, 11 S.E. 665, 679 (N.C. 1890); *In re Sugar Creek Local Sch. Dist.*, 185 N.E.2d 809, 815–16 (Ohio 1962); Baggett v. State Election Bd., 501 P.2d 817, 825 (Okla. 1972) (Jackson, J., specially concurring); Granados v. Rodriguez Estrada I, 124 D.P.R. 1, 38 (P.R. 1989); Moore v. Sharp, 41 S.W. 587, 589–90 (Tenn. 1897); Oliphint v. Christy, 299 S.W.2d 933, 939 (Tex. 1957); *State ex rel. Hopkins v. Olin*, 23 Wis. 309, 318 (1868).

287. See *Sorenson*, 59 N.E. at 556. Because it is personal to the individual illegal voter, it cannot be invoked by another person, such as one of the two candidates in a contested election. See, e.g., *Babnew v. Linneman*, 740 P.2d 511, 515–16 (Ariz. Ct. App. 1987); *Eggers v. Fox*, 52 N.E. 269, 270 (Ill. 1898); *Hanson v. Village of Adrian*, 148 N.W. 276, 277 (Minn. 1914); *Teague*, 11 S.E. at 679–80.

288. See *Babnew*, 740 P.2d at 516; *Eggers*, 52 N.E. at 270; *Powers v. Harten*, 167 N.W. 693, 695 (Iowa 1918); *Gardner*, 226 N.W. at 896; *Montoya*, 175 P. at 338; *In re Sugar Creek Local Sch. Dist.*, 185 N.E.2d at 815–16; 8 J. WIGMORE, EVIDENCE § 2214, at 164 (McNaughton rev. ed. 1961).

289. For example, if a person stands accused of being bribed or bribing someone to vote in a particular way in the election, evidence regarding the tenor of her vote would be potentially incriminating and thus encompassed by the privilege.

290. See *Clay v. Town of Gilbert*, 773 P.2d 233, 240 (Ariz. Ct. App. 1989) (Fidel, J., specially concurring); *Berg v. Veit*, 162 N.W. 522, 523 (Minn. 1917); *In re Sugar Creek Local Sch. Dist.*, 185 N.E.2d at 816.

291. See *Vansant v. McPherson*, 159 S.W. 630, 632 (Ky. 1913); *Heitzman v. Voiers*, 159 S.W. 625, 629 (Ky. 1913).

constitutional infirmity by granting the voter immunity from prosecution for the act of illegal voting.<sup>292</sup> In sum, although the privilege against self-incrimination plugs some of the holes created by the illegal voter exception to the political vote privilege, for a variety of reasons, a voter's testimony may not be protected by either privilege.

## 2. *The Rule Against Hearsay*

Under the Federal Rules of Evidence and their state law counterparts, the general rule is that hearsay—defined as a person's out-of-court oral, written, or nonverbal statement—is not admissible if offered into evidence to prove the truth of the matter asserted in the statement.<sup>293</sup> Thus, for example, if Person A says to Person B when they run into each other at a store, "I saw Person C shoot Person D," then unless an exception to the rule against hearsay applies, Person B is barred from testifying to what Person A said if it is offered in a judicial proceeding—such as an assault or murder trial—to prove the fact that Person C shot Person D.

On the flip side, if a statement is offered for some reason other than to prove the truth of the matter asserted in the statement, it falls outside of the definition of hearsay and thus is potentially admissible unless barred by some other rule of evidence.<sup>294</sup> Stated somewhat differently, "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay."<sup>295</sup> Thus, in the previous example, if there was a judicial proceeding in which it was relevant to prove that Person A has the physical ability to speak, or the ability to speak English, it would not be hearsay, since it is not being offered to prove the truth of the matter asserted in the statement (that Person C shot Person D), but rather for some other purpose.<sup>296</sup> Similarly, if the very uttering or writing of the out-of-court statement is legally significant—such as words of defamation, contract, or threats—they are treated as non-hearsay "verbal acts."<sup>297</sup> Furthermore, if a witness has made an out-of-court written or oral statement and subsequently gives testimony in court that is inconsistent with that prior statement, the prior inconsistent statement is admissible for the non-hearsay

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292. See *Ex parte Bullen*, 181 So. 498, 500 (Ala. 1938); *People v. Turpin*, 112 P. 539, 542 (Colo. 1910); *In re Second State Senatorial Election*, 27 Phila. Co. Rptr. 68, 82–83 (Pa. Ct. Com. Pl. 1994); *Beauregard v. Gunnison City*, 160 P. 815, 816–18 (Utah 1916).

293. See FED. R. EVID. 801(a), (c); FED. R. EVID. 802.

294. See FED. R. EVID. 801(c) advisory committee's note.

295. See *id.*

296. See, e.g., *United States v. Reynolds*, 715 F.2d 99, 102 (3d Cir. 1983).

297. See FED. R. EVID. 801(c) advisory committee's note; CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:18 (4th ed. 2017).

purpose of impeaching her credibility as a witness.<sup>298</sup> In that circumstance, the out-of-court statement is not relevant for the truth of the matter asserted therein, but rather for the fact that there is inconsistency between what the witness says at one moment and what she says at another moment, and thus sheds light on her credibility as a witness.<sup>299</sup>

At first glance, when a person gets on the stand and testifies that she voted a particular way—or a third person testifies that she observed a person mark her ballot in a particular way—there might appear to be a hearsay problem. After all, voting often involves an out-of-court written marking on some form of paper ballot that, in effect, is a written statement, “I vote for Candidate X for Office Y.” It would thus seem that whether the testimony comes from the voter herself or a third person who observed her mark the ballot, both involve reference to an out-of-court statement. However, the act of voting, like the act of writing out and signing a contract or making defamatory or threatening statements, is a verbal act, in that the very writing of the words is legally significant.<sup>300</sup> Thus, testimony as to how the voter marked her ballot—whether conveyed via testimony from the voter herself<sup>301</sup> or someone who observed her cast it<sup>302</sup>—is not hearsay.

Similarly, if a voter gets on the stand and testifies that she voted for Candidate A, evidence that she said or wrote out of court that she voted for Candidate B would not necessarily be excluded as hearsay. Instead, it could be admissible for the non-hearsay purpose of impeaching her credibility by means of a prior inconsistent statement.<sup>303</sup>

But suppose that what is offered is instead evidence that Voter Z asserted orally or in writing that she voted for a particular candidate, say by telling her friend “I voted for Candidate X in yesterday’s election,” or posting a similar statement on Facebook.<sup>304</sup> If such an out-of-court written or oral statement is offered into evidence to prove the tenor of her vote, say, in an election contest in which Voter Z is alleged to be an illegal voter,

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298. FED. R. EVID. 801(d)(1); FED. R. EVID. 801(d) advisory committee’s note; FED. R. EVID. 801(d)(1)(A) advisory committee’s note.

299. See MUELLER & KIRKPATRICK, *supra* note 297, at § 8:19.

300. See *Local 512, Warehouse & Office Workers’ Union v. NLRB*, 795 F.2d 705, 713 n.4 (9th Cir. 1986), *abrogated on other grounds by Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

301. See *Robinson v. McAbee*, 222 P. 871, 874–75 (Cal. Dist. Ct. App. 1923); *Wood v. Carroll Cty. Election Comm’n*, 1986 WL 5474, at \*2 (Tenn. May 12, 1986) (citing *Moore v. Sharp*, 41 S.W. 587, 590 (Tenn. 1897)).

302. See *Kennelly v. Gates*, 406 S.W.2d 351, 356–57 (Tex. App. 1966).

303. See *Smith v. Thomas*, 54 P. 71, 71 (Cal. 1898).

304. A ballot selfie posted on social media without any text can constitute hearsay. See DAVID F. BINDER, *HEARSAY HANDBOOK* § 1:6, at 1–7 (4th ed. 2015) (“[I]t is possible for a photograph, particularly one that is posed . . . to be hearsay. This is so if the photograph is assertive in nature, and is offered to prove the truth of the assertion depicted.”).

it would be subject to exclusion on hearsay grounds because it is being offered into evidence to prove the truth of the matter asserted therein, namely, that she in fact voted for that particular candidate.<sup>305</sup> Under this circumstance, the statement would be inadmissible unless it falls within an exception to the hearsay rule.

Only one state—New Jersey—has a specific hearsay exception for voter statements. Under that exception, if the voter is unavailable to testify, her out-of-court statements regarding the tenor of her vote are admissible.<sup>306</sup> Accordingly, when offered in federal proceedings or in any other state, resort must be had to one of the general exceptions to or exemptions from the hearsay rule.<sup>307</sup> These various exceptions and exemptions are recognized because of a belief that evidence falling within them possesses sufficient circumstantial guarantees of trustworthiness to justify dispensing with the hearsay rule in discrete circumstances.<sup>308</sup>

The most likely applicable exception is that for an opposing party's statement. A statement is not treated as hearsay if it is the statement of a party to a proceeding and the statement is offered against that party.<sup>309</sup> Thus, for example, if a supervisor is sued for discriminating against an employee because he is gay, the supervisor's out-of-court statements that she voted in favor of one or more ballot initiatives that can be characterized as anti-gay can be offered into evidence against her without violating the hearsay rule.

Admitting hearsay statements becomes more challenging, however, in cases in which a voter is not a formal party to a suit, such as in election contests. In a handful of nineteenth and early twentieth century cases, some courts held that a voter statement regarding the tenor of her vote should be admissible as an opposing party's statement in election contests as well, based on the fiction that the contending parties to the suit are not actually

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305. See *Lauer v. Estes*, 53 P. 262, 263 (Cal. 1898); *Lowe v. Weltner*, 164 S.E.2d 919, 924 (Ga. Ct. App. 1968); *City of Beardstown v. City of Virginia*, 76 Ill. 34, 47 (1875); *Stewart v. Rose*, 72 S.W. 271, 272 (Ky. 1903); *Tunks v. Vincent*, 51 S.W. 622, 624 (Ky. 1899); *People ex rel Williams v. Cicott*, 16 Mich. 283, 313 (1868) (opinion of Christianity, J.); *Dean v. Miller*, 76 N.W. 555, 557 (Neb. 1898); *Moore v. Sharp*, 41 S.W. 587, 590 (Tenn. 1897); *Beauregard v. Gunnison City*, 160 P. 815, 820 (Utah 1916).

306. See N.J. R. EVID. 804(b)(7). The exception also encompasses statements regarding the individual's qualifications to vote and the fact of their vote. See *id.*

307. The word "exemption" refers to those statements deemed "not hearsay" by Federal Rule of Evidence 801(d), while the word "exception" refers to those statements recognized as such by Federal Rules of Evidence 803, 804, and 807. Molly D. McPartland, *An Analysis of Facebook "Likes" and Other Nonverbal Internet Communication Under the Federal Rules of Evidence*, 99 IOWA L. REV. 445, 457 n.93 (2013). The difference is a semantic rather than a practical one. See Sam Stonefield, *Rule 801(d)'s Oxymoronic "Not Hearsay" Classification: The Untold Backstory and a Suggested Amendment*, 5 FED. CTS. L. REV. 1, 51–53 (2011).

308. See FED. R. EVID. 803 advisory committee's note; FED. R. EVID. 804(b) advisory committee's note.

309. See FED. R. EVID. 801(d)(2)(A).

the competing candidates but rather the challenged voters and the losing candidate.<sup>310</sup> But most courts and commentators have rejected this characterization, and thus this exception will ordinarily be unavailable when a voter is not a formal party to a suit.<sup>311</sup> Courts have also rejected admitting such statements under the hearsay exception for statements against interest, reasoning that without knowledge of how the voter actually voted (and thus what her true interest is), it is impossible to characterize her statements that she voted for a particular candidate as being for or against her interest.<sup>312</sup>

However, under narrow circumstances, at least six other exceptions to and exemptions from the hearsay rule may pave the way to admitting a voter's hearsay statements regarding the tenor of her vote in proceedings to which she is not a party. First, if what is involved is not a backward-looking statement recounting how the individual voted, but instead a forward-looking statement regarding how she *intends* to vote, it would be admissible as a statement of intent under the hearsay exception for state of mind.<sup>313</sup> Second, if a voter testifies that she voted a particular way, and she has previously testified inconsistently under penalty of perjury at a trial, hearing, or other proceeding or in a deposition, the latter would be admissible under the hearsay exemption for prior inconsistent statements.<sup>314</sup> Third, if a voter testifies that she voted a particular way, and her credibility is attacked by, for example, suggesting that her testimony is tainted by a recent improper influence or motive, her prior out-of-court statements that are consistent with her in-court testimony are admissible under the exemption for prior consistent statements.<sup>315</sup> Fourth, if a testifying voter is asked how she voted in an election and she cannot recall, her earlier recorded recollection of how she voted can be read into evidence under the hearsay exception for recorded recollections.<sup>316</sup> Fifth, if the voter is unavailable to testify as a witness, but she previously gave testimony as a

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310. See *People ex rel. Smith v. Pease*, 27 N.Y. 45, 52, 59–60 (1863) (Davies, J.); *State ex rel. Hallam v. Lally*, 114 N.W. 447, 448 (Wis. 1908); *State ex rel. Hopkins v. Olin*, 23 Wis. 309, 319 (1868); CONG. GLOBE, 35th Cong., 1st Sess. 2318, 2321 (1858).

311. See *Lauer v. Estes*, 53 P. 262, 264 (Cal. 1898); *City of Beardstown v. City of Virginia*, 76 Ill. 34, 47–48 (Ill. 1875); *Gilleland v. Schuyler*, 9 Kan. 569, 582–84 (1872); *Dean v. Miller*, 76 N.W. 555, 557 (Neb. 1898); *Hill v. Howell*, 127 P. 211, 215 (Wash. 1912); 8 J. WIGMORE, EVIDENCE §§ 1712, 1713, at 82, 86 (McNaughton rev. ed. 1961).

312. See 8 J. WIGMORE, EVIDENCE §§ 1712, 1713, at 82, 86 (McNaughton rev. ed. 1961)

313. See FED. R. EVID. 803(3); *Moore v. Sharp*, 41 S.W. 587, 590 (Tenn. 1897); 8 J. WIGMORE, EVIDENCE §§ 1713, 1725, at 87, 129–39 (McNaughton rev. ed. 1961); see generally *Shepard v. United States*, 290 U.S. 96, 105–06 (1933).

314. See FED. R. EVID. 801(d)(1)(A).

315. See FED. R. EVID. 801(d)(1)(B).

316. See FED. R. EVID. 803(5). The voter would need to testify that the recorded recollection was made when her memory regarding the tenor of her vote was fresh and that it was accurately recorded when made. See *id.*

witness at a trial, hearing, or deposition regarding the tenor of her vote, that testimony can be offered against a party who had an opportunity and similar motive to develop the testimony in the earlier proceeding.<sup>317</sup> Sixth, if the voter made a statement regarding the tenor of her vote at the very moment she was voting or immediately thereafter—such as by posting the tenor of her vote on social media by way of a ballot selfie or otherwise—that statement could be admitted as a present sense impression.<sup>318</sup>

In sum, although the hearsay rule presents a modest barrier to the admission of certain types of electoral evidence, its impact is limited for two reasons. First, because the definition of hearsay is narrow, a variety of different types of electoral evidence are unaffected by the hearsay rule. And second, there are numerous exceptions to and exemptions from the hearsay rule that, at least under certain factual circumstances, pave the way to admitting even those types of electoral evidence that meet the definition of hearsay.

### 3. *The “Best Evidence” Rule*

As demonstrated in Part II.B.2, when an effort is made to prove the tenor of someone’s vote by means of the voter’s own testimony or the testimony of a third party who observed her casting her vote, the proffered testimony does not violate the hearsay rule. Even though the testimony references an out-of-court written statement—the ballot—the testimony is not offered to prove the truth of any matter asserted in the ballot, but merely the fact that the statement was made therein.

However, separate and apart from a hearsay objection to testimony about the content of a written document such as a marked ballot is a best evidence objection to such testimony. Under the best evidence rule, unless an exception applies, the original of a writing—as contrasted with testimony about the writing’s content or a copy of the writing—is required in order to prove the writing’s content.<sup>319</sup> Thus, proving the content of a marked ballot by means of a voter’s own testimony or the testimony of a third person who watched her cast it would ordinarily violate the best evidence rule.<sup>320</sup>

The reason that the best evidence rule might demand the exclusion of testimony regarding the content of an out-of-court writing even when the

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317. See FED. R. EVID. 804(b)(1).

318. See FED. R. EVID. 803(1). If none of these specific exceptions and exemptions apply, a party can invoke the residual exception, which empowers a court to admit hearsay statements not covered by any codified exception but that have equivalent circumstantial guarantees of trustworthiness. See FED. R. EVID. 807.

319. See FED. R. EVID. 1002.

320. See *Helm v. State Election Bd.*, 589 P.2d 224, 234 (Okla. 1979).

hearsay rule would not is that the two rules serve different purposes.<sup>321</sup> The hearsay rule is concerned with the accuracy and honesty of the out-of-court declarant and thus demands that the declarant appear at trial and testify when her statement's relevance depends upon the jury crediting the truth of the statement, but not when it is offered merely to prove the fact that the statement was actually made.<sup>322</sup> The hearsay rule is not, however, concerned with the veracity of the in-court witness who recounts an out-of-court statement made by an out-of-court declarant.<sup>323</sup> However, the best evidence rule *is* concerned with the veracity of such an in-court witness testifying to the content of an out-of-court written statement, and thus prefers that the writing itself be offered into evidence rather than secondary evidence regarding its content.<sup>324</sup>

In the context of electoral evidence, the best evidence rule is thus concerned with the possibility that either the voter herself or the third party who observed her would not accurately recount the tenor of the vote cast, and thus ordinarily would demand that the marked ballot itself be produced into evidence to prove the tenor of the individual's vote. It would also be concerned with the possibility that an official canvas of the ballots was not accurate, and thus would demand resort to the ballots themselves.<sup>325</sup> And thus, court decisions generally hold that ordinarily the best evidence of how a person voted is her marked ballot.<sup>326</sup>

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321. See Colin Miller, *Contents May Have Shifted: Disentangling the Best Evidence Rule from the Rule Against Hearsay*, 71 WASH. & LEE L. REV. ONLINE 186, 194–98 (2014).

322. See Miller, *supra* note 321, at 188–92, 197–98.

323. See Miller, *supra* note 321.

324. See *id.* at 198 (noting that, in contrast to the hearsay rule, “the Best Evidence Rule is concerned with the question of whether a statement was made”).

325. When what is sought to be proven is not the vote of a specific individual but the overall outcome of the election, there is a split on whether the best evidence of that is the ballots themselves, *see, e.g.*, Viel v. Summers, 209 P. 454, 456–57 (Idaho 1922); Spidle v. McCracken, 25 P. 897, 898 (Kan. 1891), or the official canvas of the same, *see, e.g.*, Rhode v. Steinmetz, 55 P. 814, 817 (Colo. 1898); Pullen v. Mulligan, 561 N.E.2d 585, 607–08 (Ill. 1990). To some extent, the approach followed depends on the philosophical question of what one means by the election result. *See* 8 J. WIGMORE, EVIDENCE §§ 1240, 1351, at 572, 836 (McNaughton rev. ed. 1961). Even if the ballots are treated as the best evidence, the official canvas should qualify as an admissible summary of the same. *See* FED. R. EVID. 1006.

326. *See* Nat'l. Fed'n of Ry. Workers v. Nat'l Mediation Bd., 110 F.2d 529, 536 (D.C. Cir. 1940); Pullen, 561 N.E.2d at 607–08; Laleman v. Bredesen, 36 N.E.2d 727, 728 (Ill. 1941); Reynolds v. State, 61 Ind. 392, 422–23 (1878); State *ex rel.* Beu v. Lockwood, 165 N.W. 330, 333 (Iowa 1917); Hudson v. Solomon, 19 Kan. 177, 179–80 (1877); Rich v. Young, 197 S.W. 442, 444 (Ky. 1917); Carabajal v. Lucero, 158 P. 1088, 1092–93 (N.M. 1916); Howser v. Pepper, 79 N.W. 1018, 1019 (N.D. 1899); Helm v. State Election Bd., 589 P.2d 224, 234 (Okla. 1979); Hartman v. Young, 20 P. 17, 19–20 (Or. 1888); Thoms v. Andersen, 244 N.W.2d 311, 311–12 (S.D. 1976); Owens v. State, 64 Tex. 500, 505 (1885); Savage v. Umphries, 118 S.W. 893, 903 (Tex. Civ. App. 1909). Case law describing the best evidence rule sometimes uses the phrase “parol evidence” to refer to oral secondary evidence normally prohibited by the best evidence rule. *See, e.g.*, Midland Eng'g Co. v. John A. Hall Constr. Co., 398 F. Supp. 981, 989 (N.D. Ind. 1975); Condren v. Gibbs, 127 S.W. 731, 733 (Ark. 1910); State v. Bagemehl, 515 P.2d 1104, 1108 (Kan. 1973); State v. Curry, 473 S.W.2d 747, 748–49 (Mo. 1971); State v. Anderson, 169 S.E.2d 38, 40 (N.C. Ct. App. 1969); Doss v. Chambers, 188 S.W. 260, 262 (Tex.

In the case of a simple dispute over the tally of the ballots in a close contest, the best evidence rule would simply require production of the ballots themselves as contrasted with merely the official canvas or voter testimony. Or, if there was a dispute over the intent of a handful of ambiguously marked ballots, the best evidence rule would require that resort be had solely to the contested ballots themselves.<sup>327</sup>

However, things become more complicated when it becomes necessary to prove the votes of specific voters. For example, suppose that only one vote separates the candidates, and there are five individuals known to have voted illegally. Alternatively, perhaps one would like to prove a person's legal vote in an election regarding gay rights in a case in which she is alleged to have acted with anti-gay animus. With the advent of the secret ballot, there is no way in these or other comparable circumstances to identify the "ballot itself" of the voter at issue. Moreover, there may be circumstances in which resort to the ballots themselves makes no logical sense, such as where there are allegations that the original ballots were tampered with, or that the original ballots were lost, destroyed, or stolen.

Yet, as with the hearsay rule, there are exceptions to the best evidence rule that would be applicable in such scenarios. For example, if the originals are lost or destroyed (and not by the proponent of alternative evidence acting in bad faith), or they cannot be obtained by any available judicial process, then resort to secondary evidence—such as testimony regarding the contents of the writing—is permissible.<sup>328</sup> These exceptions have been deemed applicable in election contests in which the original ballots have been lost, destroyed, or stolen,<sup>329</sup> or when there is an allegation that the originals have been tampered with, treating that as akin to destruction.<sup>330</sup> Similarly, when there is a need to identify the votes of specific voters but no way to tie ballots to specific voters—such as when one is trying to determine the votes cast by illegal voters—courts deem the best evidence rule inapplicable since the original ballots are for all intents

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App. 1916); *Gutierrez v. State*, 745 S.W.2d 529, 530 (Tex. App. 1988); CONG. GLOBE, 35th Cong., 1st Sess. 2318, 2322 (1858).

327. See *McCreery v. Burnsmier*, 127 N.E. 171, 174 (Ill. 1920); *Wimmer v. Eaton*, 34 N.W. 170, 171 (Iowa 1887); *Butler v. Town of Edgefield*, 493 S.E.2d 838, 844 (S.C. 1997); *Duncan v. Willis*, 302 S.W.2d 627, 637 (Tex. 1957); *State ex rel. Cremer v. Steinborn*, 66 N.W. 798, 798 (Wis. 1896).

328. See FED. R. EVID. 1004(a), (b).

329. See *Condren*, 127 S.W. at 733; *Merritt v. Hinton*, 17 S.W. 270, 271 (Ark. 1891); *Dixon v. Orr*, 4 S.W. 774, 776 (Ark. 1887); *Laleman*, 36 N.E.2d at 728–29; *State ex rel. Figley v. Conser*, 24 Ohio Cir. Dec. 270, 274–75 (Ohio Cir. Ct. 1902); *State ex rel. Schuetz v. Luy*, 79 N.W. 776, 776–77 (Wis. 1899).

330. See *McDonald v. Wood*, 24 So. 86, 88 (Ala. 1898); *Laleman*, 36 N.E.2d at 728–29; *Kreitz v. Behrensmeyer*, 17 N.E. 232, 243–44 (Ill. 1888); *Pedigo v. Grimes*, 13 N.E. 700, 704 (Ind. 1887); *Hudson*, 19 Kan. at 180–81, 186; *Dubie v. Batani*, 37 P.2d 662, 668 (Mont. 1934); *Howser*, 79 N.W. at 1019; *Thoms*, 244 N.W.2d at 312–13; *Savage*, 118 S.W. at 903.

and purposes unavailable.<sup>331</sup> In these circumstances, the best evidence rule recognizes that resort to secondary evidence is necessary to resolve such cases.<sup>332</sup>

In sum, just like the political vote privilege, the privilege against self-incrimination, and the rule against hearsay, the best evidence rule will block some electoral evidence, but its porosity will permit at least some electoral evidence to be admitted.

#### 4. *Unfair Prejudice*

Under the Federal Rules of Evidence and their state law counterparts, evidence that has probative value and is not subject to exclusion on the ground of privilege, hearsay, the best evidence rule, or any other evidentiary basis for exclusion can nonetheless be excluded if the court determines that “its probative value is substantially outweighed by a danger of . . . unfair prejudice.”<sup>333</sup> Thus, when evidence has only slight probative value, but there is the risk that the trier of fact might misuse or overweigh it, the court has discretion to exclude the evidence on the ground of unfair prejudice.

Under this evidentiary principle, exclusion of electoral evidence might thus be called for when it is offered in cases in which its probative value is tenuous, but its risk of being misused or overvalued is high. As shown in Part II, the probative value of electoral evidence is far lower when it is offered outside of electoral contests, such as when offered to show discriminatory intent in a civil or criminal case or to impeach a witness or a potential juror for bias against a party. Given the low probative value and significant risk of being overvalued or misused by the trier of fact, courts have discretion to exclude electoral evidence offered in these contexts under Rule 403, and parties are very likely to invoke it in that context.

However, Rule 403 is written in general terms, and trial court judges are given broad leeway in applying its balancing test. Their application of Rule 403 is subject to review only for abuse of discretion, and such rulings are rarely reversed on appellate review.<sup>334</sup> Thus, although it has the potential to minimize the third risk associated with electoral evidence, it is

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331. See *Crabb v. Orth*, 32 N.E. 711, 712 (Ind. 1892); *Montgomery v. Dormer*, 79 S.W. 913, 915–16 (Mo. 1904); *Lane v. Bailey*, 75 P. 191, 195 (Mont. 1904); 8 J. WIGMORE, EVIDENCE §§ 1192, 1291a, at 436, 506–07 (McNaughton rev. ed. 1961).

332. See *McDonald*, 24 So. at 88; *State ex rel. Beu v. Lockwood*, 165 N.W. 330, 333 (Iowa 1917); *Savage*, 118 S.W. at 903.

333. See FED. R. EVID. 403.

334. See *Old Chief v. United States*, 519 U.S. 172 (1997); MUELLER & KIRKPATRICK, *supra* note 297, at 4:12.

not a consistently reliable method of assuring that such evidence will be excluded.

#### IV. A PROPOSAL FOR REFORM

Electoral evidence in its various forms is most relevant in election contests and has lesser relevance in other types of substantive disputes or when offered to prove the potential bias of a juror or a witness. Yet electoral evidence carries with it a number of dangers, including questionable trustworthiness, undermining of ballot secrecy, and the risk of being overvalued or misused by the trier of fact.

Existing evidentiary principles address some of the dangers associated with electoral evidence, but do so in a piecemeal fashion that only partially addresses the dangers associated with electoral evidence. Together, the political vote privilege and the privilege against self-incrimination serve as the most significant barriers to admitting electoral evidence, providing the potential for excluding testimony from nearly every voter—legal or illegal—regarding the tenor of her vote. Yet, because both privileges put the power to invoke or waive them in the hands of the individual voter-witnesses—and in the case of the privilege against self-incrimination, in the hands of the government through a grant of immunity—they permit testimony containing all of the dangers associated with electoral evidence to be admitted, even if one or more of the parties to the action oppose its admission. Moreover, the privileges regulate only one type of electoral evidence—direct testimony from the voter herself—and leave unregulated other forms of electoral evidence, such as the voter's out-of-court oral or written statements regarding the tenor of her vote, testimony of third persons who witnessed an individual cast her vote, or other circumstantial evidence of how she voted.

Three other evidentiary doctrines partially fill some of these gaps, but leave gaps of their own. The rule against hearsay presumptively excludes a voter's out-of-court oral, written, and nonverbal assertions regarding the tenor of her vote. Yet the rule against hearsay contains numerous exceptions, at least half a dozen of which provide a basis for admitting such statements. The best evidence rule presumptively prefers the original ballots themselves over testimony regarding the content of the same, but like the rule against hearsay, it contains several exceptions that pave the way for allowing such testimony in most circumstances in which electoral evidence is in play. Finally, the rules of evidence give trial courts the discretion to exclude evidence with low probative value when there is a risk that it might be overvalued or misused by the trier of fact, a provision that can be valuable outside of electoral contests when the probative value of electoral evidence is low and the risk of misuse is high. However, that

discretion is relatively unstructured and reviewed deferentially on appeal, leading to inconsistent application across judges and over time.

Although the Federal Rules of Evidence and their state law counterparts consist largely of general rules such as these to address every category of evidence, they also acknowledge that discrete categories of evidence, when offered for particular purposes, raise sufficient dangers and implicate important social policy concerns so as to call for a categorical rule excluding such evidence, when offered for those purposes. Thus, for example, the Federal Rules of Evidence include rules excluding (subject to specified exceptions) a variety of different categories of evidence, including: character evidence;<sup>335</sup> evidence of subsequent remedial measures;<sup>336</sup> evidence of compromise offers and negotiations;<sup>337</sup> offers to pay medical and similar expenses;<sup>338</sup> evidence of pleas, plea discussions, and related statements;<sup>339</sup> evidence of liability insurance;<sup>340</sup> and evidence of the victim's sexual behavior or predisposition in sex-offense cases.<sup>341</sup> At the state level, a number of states also categorically exclude statements of sympathy or benevolence.<sup>342</sup> As rules derivative of the general principle set forth in Federal Rule of Evidence 403 and its state law counterparts, these specific rules are often justified on the ground that the evidence at issue is almost always of low probative value relative to its risk of being overvalued or misused.<sup>343</sup> Yet each of these rules is also justified on the ground that it furthers some broader social policy. Thus, excluding evidence of subsequent remedial measures is justified by the "social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."<sup>344</sup> Excluding evidence of compromise offers and negotiations in civil cases and pleas, plea discussions, and related statements in criminal cases furthers the public policy favoring the disposition of civil and criminal cases by compromise.<sup>345</sup> Evidence of offers to pay medical and similar expenses are excluded so as not to discourage those benevolent gestures from taking

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335. See FED. R. EVID. 404.

336. See FED. R. EVID. 407.

337. See FED. R. EVID. 408.

338. See FED. R. EVID. 409.

339. See FED. R. EVID. 410.

340. See FED. R. EVID. 411.

341. See FED. R. EVID. 412.

342. See, e.g., CAL. EVID. CODE § 1160 (2001); TENN. R. EVID. 409.1.

343. See FED. R. EVID. 404 advisory committee's note; FED. R. EVID. 407 advisory committee's note; FED. R. EVID. 408 advisory committee's note; FED. R. EVID. 409 advisory committee's note; FED. R. EVID. 411 advisory committee's note.

344. See FED. R. EVID. 407 advisory committee's note.

345. See FED. R. EVID. 408 advisory committee's note; FED. R. EVID. 410 advisory committee's note.

place.<sup>346</sup> Evidence of a victim's sexual behavior or predisposition is excluded in sex-offense cases so as to encourage victims of such crimes to come forward and report the crimes and testify against their attackers without fear that the intimate details of their past sexual activities will be divulged and explored in court.<sup>347</sup>

Electoral evidence has much in common with the types of evidence covered by these categorical rules of exclusion. Outside of electoral contests, its probative value is typically low relative to its risk of being overvalued or misused by the trier of fact. In all types of cases, admitting it undermines the social policy of ballot secrecy, which in turn furthers the interest in free exercise of the franchise. Moreover, electoral evidence has the added danger of being unusually untrustworthy. While these concerns are addressed to some extent by the existing rules of evidence, they contain a number of gaps that still allow for the admission of electoral evidence that raises one or more of these dangers. For these reasons, a categorical rule generally excluding such evidence seems justified.

In drafting such a rule, policy makers would—in addition to stating the general rule of exclusion—need to address two additional matters. First, they would need to define with precision the phrase “electoral evidence” so as to determine what comes within the scope of the rule. Second, they would need to identify the exceptions to the general rule, if any.

At the very least, such a rule should define the phrase “electoral evidence” to exclude any direct evidence of how someone voted in an election. This would include the voter's own testimony regarding the tenor of her vote, evidence of the voter's out-of-court written or oral statements regarding the tenor of her vote, and testimony by those who claim to have observed the person cast her vote. All three of these are tainted by risks of untrustworthiness: the first by the voter's lack of trustworthiness, the third by the third party's potential to distort, and the second by the lack of trustworthiness of both the voter and the third party. Although the last type of direct evidence is arguably more trustworthy since a third party has directly observed it, admitting it significantly erodes the social policy favoring ballot secrecy. Because of the many risks associated with direct evidence of how a person cast her vote, such evidence should be excluded without regard to the purpose for which the evidence is being offered. Because of the inherent unreliability and other dangers associated with such direct evidence, the rule should thus be modeled after Federal Rule of Evidence 412—which provides for a blanket exclusion of evidence of a victim's other sexual behavior or sexual predisposition, subject to finite

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346. See FED. R. EVID. 409 advisory committee's note.

347. See FED. R. EVID. 412.

exceptions<sup>348</sup>—and not the other categorical rules of exclusion, which only exclude the evidence if it is offered for certain purposes but not others.<sup>349</sup>

Whether such a rule should also exclude circumstantial evidence of how someone voted—such as her party registration, her contributions to political parties and candidates, her signing of petitions to place a candidate or an initiative on the ballot, and her statements of support for particular candidates and ballot issues—is a closer question. In contrast to direct evidence of how someone voted, admitting these categories of electoral evidence does not undermine the interest in ballot secrecy. Indeed, three of these acts—party registration to participate in a primary election, contributions to candidates, and the signing of nominating petitions—are typically legally required to be openly public acts performed on the part of voters. Those same three acts are also more reliable proof of an individual’s likely vote. It is one thing to make a casual remark of support for or opposition to a given candidate in a social setting, when one’s statement may be colored by an effort to fit in with a given social group. The decision to register with a political party, to donate money to a candidate, or to sign a nominating petition, on the other hand, involves making a known public statement that is not likely to be undertaken casually by a voter. Moreover, to the extent that a jurisdiction opts to resolve election contests by means of the “direct evidence” method, excluding these types of evidence will make it impossible to resolve such disputes in accordance with state law.

Objective circumstantial evidence—such as party registration, campaign contributions, and signatures on nominating petitions—does not pose nearly the same dangers as does direct electoral evidence. It is objectively verifiable (and thus more trustworthy), and because it involves acts legally required to be performed in a public fashion, admitting such evidence does not undermine the right to a secret ballot. Moreover, although it is true that they might, in some instances, result in erroneous predictions of how a person voted or likely voted, when used in election contests (as opposed to trying to prove the tenor of a specific person’s vote in other types of cases), the errors are likely to cancel one another out. In other words, unless there is a reason to believe that registered Republicans are more likely than registered Democrats to cast crossover votes (or vice versa), it will still allow for the accurate resolution of election disputes. For example, if an election contest between two candidates is divided by a single vote, and there are five illegal votes cast by registered Democrats and only one illegal vote cast by a registered Republican, it seems to be an

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348. *See id.*

349. *See, e.g.*, FED. R. EVID. 407 (deeming evidence of subsequent remedial measures to be inadmissible only when offered for certain purposes); FED. R. EVID. 404(b) (deeming evidence of a crime, wrong, or act to be inadmissible when offered to prove a person’s character, but not when offered for other purposes).

easy call to declare the Republican candidate the winner by resort to the circumstantial evidence of party registration.

On the flip side, there are still some risks associated with admitting even circumstantial evidence of how one voted in an election. First, some categories of circumstantial evidence—such as general statements of support for a particular candidate or ballot issues—raise the same dangers of trustworthiness as direct statements by the voter regarding the tenor of her vote. Second, the knowledge that one’s political contributions, party registrations, and signatures on nominating petitions could be admitted in judicial proceedings might discourage some people from engaging in those activities. Third, allowing only for the admission of circumstantial evidence of how one voted may present the trier of fact with a distorted picture of how a person likely voted. Based on his party registration alone, one would infer that former president George H.W. Bush voted for Donald Trump in the 2016 election, yet his public statements indicated otherwise.<sup>350</sup> These risks suggest that circumstantial electoral evidence should be admitted only when absolutely necessary—such as when needed to resolve an election contest—but they do not compel the conclusion that it should never be admitted, or that it should only be admitted in conjunction with direct electoral evidence.

As for exceptions to any such rule of exclusion, five possibilities stand out as potentially required. First, to the extent a jurisdiction follows the “direct evidence” approach to resolving disputed election contests, an exception would be necessary to avoid having the rule make a *de facto* change in substantive law. Second, the rule should be drafted so as to make it possible for someone to introduce evidence required to prove a claim in a case alleging discrimination on the basis of political affiliation. In such a case, a person is required to prove that the plaintiff and the defendant have opposing political affiliations, and that the defendant acted with bias based on those differences.<sup>351</sup> There are certain types of evidence—such as party registration and statements like “I hate Democrats”—which directly prove the necessary elements of a political affiliation discrimination claim but that in theory could be used to prove circumstantially how someone voted in a particular election context. The rule should be drafted to make clear that such evidence is not barred when offered in such discrimination cases. Third, to the extent that the tenor of one’s vote is an essential element of a charge, claim, or defense, electoral evidence offered to prove that essential

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350. Steph Solis, *George H.W. Bush to Vote for Clinton, Reports Say*, USA TODAY (Sept. 20, 2016, 12:57 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/09/20/george-hw-bush-vote-clinton-reports-say/90723912/>.

351. See *supra* notes 151–52.

element should be admissible.<sup>352</sup> This exception would likely be applicable in one narrow but important instance: a criminal case in which a person stands accused of bribing someone or being bribed to vote a particular way.<sup>353</sup> Fourth, to the extent that electoral evidence in any given case is deemed by a court to be constitutionally required to prove the bias of a potential juror or witness, it would override any exclusionary rule to the contrary.<sup>354</sup> Finally, the rule should make clear that the original ballots themselves are never subject to exclusion by this rule even if a voter has self-identified herself on the ballot, which is typically a basis for invalidating a ballot<sup>355</sup> and which of course requires resort to the self-identifying ballot itself.

Ideally, the need for the first exception will quickly diminish in the United States through procedures designed to identify and sequester the ballots of challenged voters. Such procedures have quickly spread throughout the United States in the twenty-first century as a result of the Help America Vote Act of 2002 (HAVA),<sup>356</sup> which requires states to provide voters whose credentials are challenged at the polling place and who are unable to then prove their eligibility to vote to cast a “provisional ballot.”<sup>357</sup> Such provisional ballots are individually sequestered from other cast ballots and are counted only if the voter’s eligibility to vote is subsequently established.<sup>358</sup> Such a procedure—particularly if coupled with a requirement that voter credentials must be challenged at the time of voting or the right to later challenge is waived—obviates the need for testimony in election contests from legal and illegal voters alike in most instances. Ensuring that there is a paper backup of votes cast—such as through the use of voting machines with VVPAT technology—obviates the

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352. Cf. FED. R. EVID. 405(b) (creating an exception to the general rule prohibiting proof of character by way of specific instances of conduct when character is an essential element of a charge, claim, or defense).

353. See *supra* note 280. In contrast, this exception would *not* apply in the situation in which a person is alleged to have murdered someone because the victim voted for a specific candidate or a specific way on a ballot measure. Motive is not an essential element of the crime of murder, and one could admit the general motive evidence that the defendant was angry at the victim for voting for a particular candidate without introducing evidence of precisely who the victim voted for. Introducing evidence of specifically who the victim voted for typically adds nothing in terms of relevance but increases the risk that the jurors might misuse the information, say, by engaging in jury nullification because they, too, are angered by who the victim voted for. In any event, at most what would be relevant in such a case is who the defendant *perceived* the victim to have voted for and not who the victim *actually* voted for, and the former could be admitted without running afoul of the proposed rule.

354. Cf. FED. R. EVID. 412(b)(1)(C) (creating an exception for “evidence whose exclusion would violate the defendant’s constitutional rights”).

355. See, e.g., IOWA CODE ANN. § 49.98 (West 2013); LA. STAT. ANN. § 18:1316 (1987).

356. Help America Vote Act of 2002, Pub. L. No. 107-252, § 302, 116 Stat. 1706 (2002) (codified at 52 U.S.C. § 21082 (2012)).

357. 52 U.S.C. § 21082(a) (2012).

358. See *id.*

need for voter testimony in most of the remaining types of election contests: in the event of a machine malfunction, resort can be made to the paper backup rather than voter testimony in an attempt to recreate the results of the election.

Putting all of this together leads to the following proposed amendment to the Federal Rules of Evidence and their state law counterparts:

### **Rule 416: Electoral Evidence**

(a) **Prohibited Uses.** Testimony by a voter, by third persons who observed the voter cast her vote, the voter's out-of-court statements regarding the tenor of her vote, or any other direct or circumstantial evidence of how a specific identified person cast her vote in a political election conducted by secret ballot is not admissible.

(b) **Exceptions.**

(1) ***Election contests.*** When required by law to resolve an election contest, objectively verifiable circumstantial evidence offered to prove how a person cast her vote—such as party registration, contributions to specific candidates, and signatures on nominating forms—is admissible.

(2) ***Political affiliation discrimination.*** Circumstantial evidence that could be used to infer the tenor of a person's vote in a specific election is not excluded by this rule if it is offered for the purpose of proving discrimination on the basis of political affiliation.

(3) ***Essential element.*** When the tenor of a person's vote is an essential element of a charge, claim, or defense, direct or circumstantial evidence offered to prove the tenor of the vote cast is admissible.

(4) ***Criminal cases.*** Electoral evidence, the exclusion of which in a criminal proceeding would violate the defendant's constitutional rights, is admissible.

(5) ***Original ballots.*** This rule does not require the exclusion of the original ballots themselves, even if the ballots contain self-identifying marks that could be used to tie a ballot to a specific individual.

Although to some degree duplicative of the political vote privilege and the privilege against self-incrimination, such a rule should be seen as supplementing, rather than replacing, those privileges. One virtue of a categorical rule of exclusion is that—unlike with the privileges—the parties, and not merely the voters themselves, are empowered to invoke it, thus allowing the parties to block the admission of untrustworthy evidence in proceedings in which they will most directly be impacted. The privileges, however, should remain in place to empower a voter to protect her individual right not to disclose the tenor of her vote in the situation in which the parties to a proceeding may wish to force her to do so by collectively failing to invoke the categorical rule of exclusion.

#### CONCLUSION

Electoral evidence is relevant and thus potentially admissible, not only to resolve election contests, but also for a number of other substantive and impeachment purposes. Yet electoral evidence in all of these contexts introduces a number of dangers, including the risk of admitting untrustworthy evidence, undermining the right to a secret ballot, and admitting evidence that might be overvalued or misused by the trier of fact. The Federal Rules of Evidence and their state law counterparts address many of these dangers, but in a piecemeal and incomplete fashion that still allows for the admission of some electoral evidence that possesses some or all of these dangers.

Ideally, changing the way in which we run elections—including the creation of a paper trail for all votes cast, a requirement that all challenges to voter credentials be raised at the time of voting, and a system for sequestering challenged votes—will obviate the need for electoral evidence in election contests, in which such evidence is most relevant. Yet, because such reforms have not occurred nationwide,<sup>359</sup> and because electoral evidence is still potentially admissible in other types of cases,<sup>360</sup> this Article concludes that federal and state policy makers should enact a specific rule that—subject to limited exceptions—categorically excludes electoral evidence from judicial proceedings.

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359. *See supra* notes 69, 356–358.

360. *See supra* Part I.C.2.