
RESPONSE

WHAT VOTING IN LONG-TERM CARE CAN TEACH THE REST OF US[†]

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[†] An invited response to Nina A. Kohn & Casey Smith, *Defending Voting Rights in Long-Term Care Institutions*, 103 B.U. L. REV. 1025 (2023).

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INTRODUCTION

“How a society treats its most vulnerable . . . is always the measure of its humanity.”¹ In their impressive piece, *Defending Voting Rights in Long-Term Care Institutions*,² Nina Kohn and Casey Smith perform a remarkable service in forcing us to measure ourselves and our social commitments. What they reveal is not pretty.

Their piece serves as a potent reminder of our systemic failings in ensuring the effective exercise of the franchise by meeting citizens where they are. Residents in long-term care—most of whom are elderly, and many of whom have disabilities—comprise not only an underserved population, but also an underreported underserved population, with vulnerabilities too frequently forgotten because they are tucked behind institutional doors.³ Many of us may not be particularly eager to live in long-term care facilities even if we are eager to live long enough to make long-term care a practical necessity. Perhaps our distaste for the various indignities of aging and/or physical infirmity, particularly in a setting with constant reminders of dependence on others, creates a psychological incentive to avoid more seriously grappling with problems in such settings, including barriers to voting rights. Kohn and Smith do us all a favor in refocusing our attention.

Kohn and Smith offer a rich descriptive account of the difficulties that would-be voters in long-term facilities may face and a thorough examination of the statutory framework that should—in theory—prevent or mitigate those difficulties. This detail is valuable in itself. But I am also struck by the extent to which their chronicle of the voting process in long-term settings brings some broader aspects of the voting process more generally clearly into focus.

¹ Ambassador Matthew Rycroft, Statement to the UN Security Council Open Debate on Children and Armed Conflict (June 18, 2015), <https://www.gov.uk/government/speeches/how-a-society-treats-its-most-vulnerable-is-always-the-measure-of-its-humanity>. Pearl S. Buck expressed a similar sentiment decades earlier: “Yet somehow our society must make it right and possible for old people not to fear the young or be deserted by them, for the test of a civilization is the way that it cares for its helpless members.” PEARL S. BUCK, *MY SEVERAL WORLDS* 385 (1954).

² Nina A. Kohn & Casey Smith, *Defending Voting Rights in Long-Term Care Institutions*, 103 B.U. L. REV. 1025 (2023).

³ According to one national survey, ninety-three percent of residents in long-term care institutions are sixty-five or older, eighty-one percent are seventy-five or older, and fifty-five percent are eighty-five or older. CHRISTINE CAFFREY, MANISHA SENGUPTA & AMANUEL MELEKIN, NCHS DATA BRIEF: RESIDENTIAL CARE COMMUNITY RESIDENT CHARACTERISTICS: UNITED STATES, 2018, at 1 (2021), <https://stacks.cdc.gov/view/cdc/103826> [<https://perma.cc/9RH4-YD5Z>].

I. SOCIAL DETERMINANTS OF HEALTH

First is the connection that Kohn and Smith make between the act of voting and the provision of health care, simple but profound. The primary data at the backbone of the piece are resident responses to nursing home inspection reports—and, as the authors point out, without a specific prompt, most of that data likely arises in the context of residents’ spontaneous responses to open-ended questions about well-being.⁴

It is now commonplace in the health care field to recognize that there are social determinants of health: human-focused environmental conditions with an enormous impact on health outcomes.⁵

Civic participation is one of these essential inputs—and participation in the electoral process is one of the impactful components of that civic participation, with an internationally recognized correlation between voting activity and better self-reported health, even after controlling for individual and country characteristics.⁶ Put simply: the engagement that comes with voting is likely one contributor to overall well-being.

The difficulties that long-term care residents face in voting is, unquestionably, a concern because a vibrant democracy depends on fulfilling our responsibility to ensure that eligible citizens can participate in the democratic process. But those difficulties are also a concern for long-term care residents’ interest in the provision of *care*. Residents likely recognized the connection between civic participation and health, perhaps “only” intuitively, in responding to nursing home inspectors’ inquiries. And it is a welcome reminder of the connection beyond the context of long-term care.

II. BURDEN FOR SOME

Second is the familiar observation that procedures that seem insignificant or unremarkable to many may become significant barriers to some. This is not an issue unique to voters in long-term care institutions but a recurring difficulty for many underserved populations: for example, Native Americans attempting to find the means to notarize documents or simply return mail ballots on rural Tribal lands,⁷ low-income individuals with difficulty securing photo

⁴ Kohn & Smith, *supra* note 2, at 1034.

⁵ *Social Determinants of Health*, U.S. DEP’T OF HEALTH & HUM. SERVS.: HEALTHY PEOPLE 2030, <https://health.gov/healthypeople/priority-areas/social-determinants-health> [<https://perma.cc/T4KZ-TMJR>] (last visited Apr. 18, 2023).

⁶ *Civic Participation*, U.S. DEP’T OF HEALTH & HUM. SERVS.: HEALTHY PEOPLE 2030, <https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/civic-participation> [<https://perma.cc/R3R3-YFL9>] (last visited Apr. 18, 2023); *see also* Announcement of Solicitation of Written Comments on Proposed Healthy People 2030 Objectives, 87 Fed. Reg. 64240 (Oct. 24, 2022).

⁷ *See* REPORT OF THE INTERAGENCY STEERING GROUP ON NATIVE AMERICAN VOTING RIGHTS 17-19, 24-25 (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/03>

identification,⁸ or formerly incarcerated voters struggling to determine the extent of accumulating fees and fines.⁹ Kohn and Smith's remarkable research documents instances of active disenfranchisement perpetrated by institutions of long-term care.¹⁰ But there are barriers well beyond the most obvious. The more limited the options for satisfying a particular regulatory prerequisite—say, the ability to demonstrate eligibility—the more substantial a burden that prerequisite may become for those who are already shunted to the margins. Similarly, the more complex the process for voters to register, receive ballots, and cast those ballots, the more substantial a burden that complexity may become.¹¹

Indeed, for some voters, the description of the process may itself amount to a burden.¹² The “document insights” function that comes standard with Microsoft Word assesses the instruction language of Florida's voter registration form, or of Alabama's application for a mail ballot, as requiring more than a thirteenth-grade reading level.¹³ About ten percent of Florida's voting-age citizens have not completed twelfth grade, and about thirty-eight percent have completed

/Tribal-Voting-Report-FINAL.pdf [https://perma.cc/PP64-ZD5M]; NATIVE AM. RTS. FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 28, 40-41, 95, 97-98 (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf [https://perma.cc/VDT7-DWFA]; *see also, e.g.*, League of Women Voters of Okla. v. Ziriaux, 463 P.3d 524 (Okla. 2020). *But see* DCCC v. Ziriaux, 487 F. Supp. 3d 1207 (N.D. Okla. 2020).

⁸ *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 211-23 (2008) (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 238-39 (Breyer, J., dissenting).

⁹ *See* Jones v. Governor of Fla., 975 F.3d 1016, 1062-65 (11th Cir. 2020) (Martin, J., joined by Wilson, Jordan & Pryor, JJ., dissenting); *id.* at 1065-74 (Jordan, J., joined by Wilson, Martin & Pryor, JJ., dissenting); *id.* at 1107-12 (Pryor, J., joined by Wilson, Martin & Jordan, JJ., dissenting).

¹⁰ *See, e.g.*, Kohn & Smith, *supra* note 2, at 1042-43 (noting the instance of a resident actively prevented from leaving the facility in order to obtain the identification required by state law to vote).

¹¹ *Id.* at 1040-43.

¹² *Id.* at 1043.

¹³ Microsoft Word uses the Flesch-Kincaid Grade Level index, which has become one commonly recognized, transsubstantive measure of readability. *See generally* J. PETER KINCAID, ROBERT P. FISHBURNE, JR., RICHARD L. ROGERS & BRAD S. CHISSOM, NAVAL TRAINING COMMAND, RESEARCH BRANCH REPORT 8-75: DERIVATION OF NEW READABILITY FORMULAS (AUTOMATED READABILITY INDEX, FOG COUNT AND FLESCH READING EASE FORMULA) FOR NAVY ENLISTED PERSONNEL (1975), <https://apps.dtic.mil/sti/pdfs/ADA006655.pdf> [https://perma.cc/R4TP-H2SB].

Florida has enacted a statutory requirement that insurance policies maintain, at least as a default, a minimum score on the “Flesch reading ease test,” which is related to the grade level index. *See* FLA. STAT. § 627.4145 (2023). Florida's own voter registration form does not meet the default readability standard required for those insurance policies.

twelfth grade but nothing further; about twelve percent of Alabama’s voting-age citizens have not completed twelfth grade, and about forty-three percent have completed twelfth grade but nothing further.¹⁴ Kohn and Smith document problems for long-term care residents with cognitive disabilities, and these problems are concerning.¹⁵ But for the even more sizable pool of citizens with limited educational background, standard forms may also be out of reach without assistance. When standard word processing software can readily provide real-time feedback on the ways that we describe procedures ostensibly open to every citizen over eighteen, there are few legitimate reasons to allow the instructions to become their own accessibility barrier.

III. WORTHINESS TEST

The fact that there are few legitimate reasons does not mean that there are no reasons. The history of American election law is replete with procedures that seem calibrated to test voters’ “worthiness” at least as much as their qualifications. But this manifests with an inside voice. Only in limited circumstances will the courts condone the denial or abridgement of citizens’ franchise where the central ostensible rationale resolves to whether those citizens are seen to be deserving. Felony disenfranchisement provisions, the lingering constitutional vitality of literacy tests, and at the margins, fights over the youth vote can be seen as lingering examples of an increasingly constricted constitutional permission to exclude for exclusion’s sake.¹⁶ The Supreme Court’s recent decision on partisan gerrymandering may perhaps be a rare and

¹⁴ B29002 | *Citizen, Voting-Age Population by Educational Attainment: 2021: ACS 5-Year Estimates Detailed Tables*, U.S. CENSUS BUREAU (2022), [https://data.census.gov/table?q=educational+attainment&t=Age+and+Sex:Citizenship&g=010XX00US\\$0400000&tid=ACSDT5Y2021.B29002&tp=true](https://data.census.gov/table?q=educational+attainment&t=Age+and+Sex:Citizenship&g=010XX00US$0400000&tid=ACSDT5Y2021.B29002&tp=true) [<https://perma.cc/672X-FC2N>].

¹⁵ Kohn & Smith, *supra* note 2, at 1043.

¹⁶ See, e.g., *Davis v. Beason*, 133 U.S. 333, 346-47 (1890), *abrogated by Romer v. Evans*, 517 U.S. 620 (1996); *Washington v. State*, 75 Ala. 582, 585 (1884) (describing the need to protect the “purity of the ballot box”); *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51-52 (1959); Press Release, U.S. Rep. Grace Meng, *Meng Reintroduces Legislation To Lower the Voting Age in America to 16 Years Old* (Jan. 26, 2023), <https://meng.house.gov/media-center/press-releases/meng-reintroduces-legislation-to-lower-the-voting-age-in-america-to-16-0> [<https://perma.cc/B938-NB82>]; Meg Kinnard, *Ramaswamy Proposes Raising Voting Age to 25, Unless People Serve in Military or Pass a Test*, AP (May 11, 2023, 9:04 PM), <https://apnews.com/article/vivek-ramaswamy-voting-age-2024-president-ea1429836e8f809fbf301b7b027f4ab9> [<https://perma.cc/M666-YWTA>]. *But see Romer*, 517 U.S. at 634; *Richardson v. Ramirez*, 418 U.S. 24, 78-83 (1974) (Marshall, J., joined by Brennan, J., dissenting). Literacy tests, at least, have since been outlawed by statute. 52 U.S.C. § 10501.

unwelcome new addition to the category.¹⁷ Most of the time, though, formal doctrine seems to reject as illegitimate election procedures designed to screen voters based on whether they deserve to participate in the franchise.¹⁸

Lamentably, that legal doctrine does not preclude procedural screens for worthiness as a practical matter. Procedures legally justified by the need to protect against fraud—even when that need is real—may actually be calibrated at least as much as a test of endurance as eligibility. The Australian ballot offers a notorious example. In the mid-nineteenth century, the problem with local party machines buying votes using party-made ballots was very real—and at the same time, state-printed ballots were celebrated in some quarters as an effective barrier against the votes of the eligible-but-illiterate, including African-Americans kept illiterate by state policy.¹⁹ Voter registration requirements were selectively applied in urban environments both because it was harder to confirm identity in large urban precincts and because—even without accounting for intentionally discriminatory implementation—those requirements would likely reduce participation of poorer, immigrant, urban voters.²⁰

Indeed, even without any impact on the integrity of the election process, some have viewed burdens on underserved voters as performing a salutary function in screening out those perceived to be more easily deterred—and, presumably, less worthy. For example, in 2011 Florida Senator Mike Bennett put it this way:

How much more convenient do you want to make it? We want to go to their house, take the polling booth with us? This is a hard-fought privilege. This is something people died for, and you want to make it convenient? The guy who died to give you that right, it was not convenient. Why would we make it any easier? I want them to fight for it. I want them to know what it's like. I want them to go down there and have to walk across town to go over to vote. . . . We do make it convenient for people to vote, but I

¹⁷ See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (refusing to conclude that it is impermissible for legislatures to use state power to discriminate against supporters of the opposing party on the basis of political viewpoint, at least to some degree); Justin Levitt, *The Soft Bigotry of Low Legislative Expectations*, ELECTION L. BLOG (July 4, 2019, 6:00 AM), <https://electionlawblog.org/?p=105968> [<https://perma.cc/K9WS-TAHT>].

¹⁸ See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (applying strict scrutiny to “statutes denying the franchise to citizens who are otherwise qualified by residence and age”); *cf.* *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (“‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”).

¹⁹ See, e.g., *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2365 (2021) (Kagan, J., joined by Breyer & Sotomayor, JJ., dissenting); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 1880-1910*, at 51-56 (1974).

²⁰ See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 65-66 (2000); KOUSSER, *supra* note 19, at 47-50.

got to tell you I wouldn't even have any problem making it harder. I would want them to really want to be informed. I would want them to really want to vote as badly as I want to vote.²¹

(The next year, lines in Florida were more than six hours long for some voters.)²² And just this year, presidential advisor and attorney Cleta Mitchell lamented that it was not sufficiently difficult for college students to vote:

[W]e need to be looking at what are these college campus locations and polling—what is this young people effort that they do? They basically put the polling place next to the student dorm so they just have to roll out of bed, vote, and go back to bed. . . . Wisconsin is a big problem because of the first day, because of the polling locations on college campuses.²³

(Two weeks earlier, students reportedly had to wait in line for at least forty-five minutes to an hour at some polling places.)²⁴

To be abundantly clear, the subterranean use of procedure to weed out undesirable voters is not a legitimate use of state authority. But it is difficult to discount the possibility that some of the conditions imposed upon voters in long-term care institutions are based in longstanding ambivalence about whether those individuals should be voting at all. And even when that ambivalence does not manifest in a conscious predominant intent to exclude via procedure, it may be that policymakers ambivalent about the participation of some segments of the electorate find the impact of burdensome procedure to be at least not unwelcome.

IV. THE COMBINATION

The two factors immediately above—the fact that some procedures may impose a larger burden on some underserved populations, and the fact that that impact may, for some, function as a bit of a test of worthiness—also highlight how relentlessly American election law places the burden of effectuating electoral activity on individuals. This is a familiar legal posture in the American

²¹ Notice of Filing of Revised Jointly Stipulated Facts, Doc. No. 78, Ex. 28, at 32-35, *Florida v. Holder*, No. 11-cv-01428 (D.D.C. Mar. 7, 2012); *see also* *Florida v. United States*, 885 F. Supp. 2d 299, 354 n.66 (D.D.C. 2012); Aaron Sharockman, *Think We Have It Tough? In Africa, People Walk Up to 300 Miles To Vote, GOP Senator Says*, POLITIFACT (May 6, 2011), <https://www.politifact.com/factchecks/2011/may/06/mike-bennett/think-we-have-it-tough-africa-people-walk-300-mile/> [<https://perma.cc/G2Y2-X9WX>].

²² Frances Robles, Martha Brannigan & Daniel Chang, *Miami-Dade Will Not Have Full Results Until Wednesday*, MIAMI HERALD (Nov. 7, 2012), <https://www.miamiherald.com/news/politics-government/article1944302.html>.

²³ Lauren Windsor (@lawindsor), TWITTER (Apr. 20, 2023, 11:41 AM), <https://twitter.com/lawindsor/status/1649075730687352833>.

²⁴ Sam Levine & Alice Herman, *Wisconsin Voters Cast Ballots in Crucial State Supreme Court Election*, GUARDIAN (Apr. 4, 2023, 5:06 PM), <https://www.theguardian.com/us-news/2023/apr/04/wisconsin-supreme-court-election-polls> [<https://perma.cc/9WZU-YM73>].

context. At least with respect to the federal constitution, our constitutional rights are negative: they are protections against government imposition on our private activity.

That American constitutional default of protection from government, though, is a poor fit in the electoral context. Public elections represent a function that we *cannot* provide privately: government forbearance is not an option. In the election sphere, we necessarily depend on active government engagement.

And yet, we tend in most instances to treat voting as a private activity rather than a public function. Most jurisdictions depend on voters to inform themselves about the fact of an upcoming election and the choices on the ballot, rather than affirmatively sending outbound communication. Most jurisdictions still depend on voters to take the initiative to get registered and to ensure that their registration information is up to date when they move, rather than taking public initiative to register voters as a default when interactions with other government entities show that they are eligible to vote.²⁵ Most jurisdictions depend on voters to apply for a mail ballot if they want one, which is in many jurisdictions an option available to only some residents.²⁶ Most jurisdictions require voters to learn where to go to cast a ballot in person and to get themselves to that location; if lines are long, it's usually up to the voter to handle logistics (including restroom access, shelter from weather, and childcare); and if voting hours coincide with the workday, even when jurisdictions require that employers grant leave (often unpaid), there are often steps the voter must affirmatively take to take advantage of the state-granted right.²⁷ Most jurisdictions require voters to show specific documentation of identity and depend on voters to assemble that documentation on their own.²⁸ If the voter or the government errs along the way, federal law now provides a provisional ballot that may in some jurisdictions serve as a mechanism to fix the mistake, but most jurisdictions depend on the voter to understand the nature of the problem and to take affirmative steps to address the problem in short order.²⁹

²⁵ Making registration a default status is always coupled with an opportunity to opt out. Happily, these opt-out voter registration programs are increasing in prevalence. But they still amount to a (sizable) minority of jurisdictions. *Automatic Voter Registration*, NAT'L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/automatic-voter-registration> [<https://perma.cc/9XDL-77TW>] (last updated Sept. 26, 2023).

²⁶ *Table 2: Excuses To Vote Absentee*, NAT'L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/table-2-excuses-to-vote-absentee> [<https://perma.cc/A95H-SKNP>] (last updated July 12, 2022).

²⁷ See Justin Levitt, *Long Lines at the Courthouse: Pre-election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19, 22 & n.27 (2010).

²⁸ *Voter ID Laws*, NAT'L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/voter-id> [<https://perma.cc/8NNH-G9MD>] (last updated Mar. 9, 2023).

²⁹ The Help America Vote Act requires election officials to offer a provisional ballot to voters under certain circumstances, but whether that provisional ballot is counted depends entirely on state law. 52 U.S.C. § 21082(a)(4).

There are, of course, some government jurisdictions that have proactively attempted to ease some of these burdens. And the nonprofit sector—both partisan organizations and nonpartisan ones—has often stepped in to provide (substantial) private help with these functions. But in the main, it is striking how much our election structure has offered a service designed for the average citizen and otherwise shifted the costs of this public function into the private sector for anyone whose needs may be different from that average.

This delegation of responsibility to the voter is familiar in the American context, but it is not inevitable. Other countries have taken more proactive public steps to engage citizens in the electoral process, including far more active efforts to reach voters where they are.³⁰ It is an intriguing thought exercise to consider what the election process would look like if we imagined the default to be in a different place.

V. THE LONG-TERM CARE CONTEXT

In the long-term care context, the exceptional statutory structure that Kohn and Smith describe—at least in theory—begins to approximate that thought exercise. Long-term care institutions have not only a moral obligation to provide voting access to citizens in their care, and not only a constitutional obligation to remove undue and unnecessary restrictions and barriers based on age-related stereotypes, but also a statutory obligation to provide real affirmative outbound support. It is incredibly rare to see an American regime with as firm a thumb on the scale for affirmatively assisting voters as seen here. That is, the statutory efforts required of long-term care institutions approximate an attempt to provide meaningful customer service to a degree perhaps unmatched for any other voters.³¹

As Kohn and Smith explain, this affirmative support structure includes, for example, section 7 of the National Voter Registration Act and the affirmative obligation of offices that “provide State-funded programs primarily engaged in providing services to persons with disabilities” to offer opportunities to register to vote to residents at the same time they enroll for care.³² Given the percentage

³⁰ See, e.g., Amrit Dhillon, *Poll Workers Journey To Reach India’s Most Remote Voters*, AP (Apr. 13, 2019, 5:51 AM), <https://apnews.com/article/asia-pacific-ap-top-news-india-forests-general-elections-f7a1d6bfd8b4d46885ea3248ebf1204> [https://perma.cc/9VX4-52HW] (describing government officials’ efforts to hike for a full day to reach a remote village where one woman is registered, to spend multiple days traversing gorges and jungles to get to a polling station, or to reach a polling station requiring oxygen tanks because it sits at an altitude of almost 15,000 feet).

³¹ The closest that federal law comes to providing this level of customer service for any other voting population comprises the special procedures under the Uniformed and Overseas Citizens Absentee Voting Act for deployed servicemembers, their families, and overseas citizens. See generally 52 U.S.C. §§ 20301-20307.

³² *Id.* § 20506(a); see Kohn & Smith, *supra* note 2, at 1054-59.

of residents of long-term care institutions receiving Medicaid funding and the percentage of residents with disabilities, many entities interacting with residents of long-term care institutions will have obligations under section 7 to offer affirmative assistance with voter registration. The affirmative support structure also includes the Americans with Disabilities Act, and the obligation of electoral offices and care institutions to provide reasonable accommodations for voting-related programs to individuals with disabilities residing in long-term care facilities.³³ And perhaps most notably, the affirmative support structure includes the mandate under the Nursing Home Reform Act for long-term care institutions to not just remove barriers to voting but to actively *support* and *facilitate* voting by residents.³⁴ Most American voters have no statutory right to this degree of solicitude.

Kohn and Smith quickly point out that voters' experience in practice has not lived up to these statutory guarantees, which appear to be radically underenforced at present.³⁵ There are many arenas in which the law on the books does not quite match the law on the ground, but the gap here with respect to voters in long-term care institutions appears particularly stark. The authors then canvass a number of factors that may have contributed to the disconnect: long-term care residents are not identified, as a group, as reliable partisans, and so private organizations with the desire to rally fellow co-partisans have not prioritized their voting rights; long-term care residents are more isolated from the community, and the conditions under which they exercise the franchise or fall through the cracks are less apparent to others; long-term care residents are subject to stereotype regarding their capacity to vote or interest in voting; long-term care residents have been the object of claims of fraud that may chill efforts to enforce the proactive legal regime; voting rights simply aren't a priority for litigators who are interested in ensuring adequate services for long-term care residents but who also have limited time and budget.³⁶

Kohn and Smith make no causal claims about which of these factors may be more to blame than the others; I suspect that all play a role to some degree. But I might also add one more contributing factor to the mix. The staff of long-term care institutions are often also eligible voters, socialized in the voting process built for the rest of us. This means that staff may themselves be underinformed

³³ 42 U.S.C. §§ 12132, 12182; 28 C.F.R. §§ 35.130, 35.150, 35.160, 36.201-.202, 36.301-.303; *see* Kohn & Smith, *supra* note 2, at 1059-64.

³⁴ 42 C.F.R. § 483.10(b)(2), (f)(3), (g)(7); CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., REF: QSO-21-02-NH, COMPLIANCE WITH RESIDENTS' RIGHTS REQUIREMENT RELATED TO NURSING HOME RESIDENTS' RIGHT TO VOTE 1-3 (2020), <https://www.cms.gov/files/document/qso-21-02-nh.pdf> [<https://perma.cc/CA96-TR7C>]; *see* Kohn & Smith, *supra* note 2, at 1048-50.

³⁵ Kohn & Smith, *supra* note 2, at 1035, 1065.

³⁶ *Id.* at 1071-76.

about the electoral process, if they have not taken initiative of their own.³⁷ For the staff who are engaged in voting, they are engaged within a pervasively individualistic system that demands affirmative activity from each voter. In that system, seeking (or offering) assistance can carry an unfair stigma related to the voter's presumed capacity (and perhaps a related though unwarranted connection to their presumed worthiness). Moreover, with increasing public heat around third parties assisting others in the community by collecting and dropping off valid ballots—so called “ballot harvesting”—and increasing disclosure and attestation requirements for those offering assistance with the voting process,³⁸ seeking (or offering) assistance can carry an unwarranted whiff of scandal or impropriety as well. To the extent that staff see assistance with the voting process available to them or to their social circle, that assistance may come outsourced through intermediary nonprofit organizations dedicated to the purpose.

That is, in addition to the reasons offered by Kohn and Smith for the neglect of voters in long-term care institutions, I wonder whether the socialization of institutional staff—passive but pervasive—may play a role. The affirmative assistance legally required for residents of long-term care institutions is a welcome anomaly. It likely does not reflect the staff's own lived experience with voting, which provides a powerful default point of reference, difficult to dislodge. It simply may not occur to staff that assisting residents with the mechanics of the voting process is necessary or appropriate—and if help is needed, it may be that staff are conditioned to think that dedicated nonprofits can and should fill the gap.

As a few proactive registrars have shown, we could all do with an extra dose of customer service in the electoral context. Most jurisdictions presently require

³⁷ Witness, for example, the staff at several institutions who suggested that the opportunity to vote in presidential elections is sufficient, and that there was no need to offer comparable ability in midterms or state and local elections. *See id.* at 1037 & n.58. As Kohn and Smith suggest, this may well reflect the staff's own electoral information and engagement at least as much as their understanding of rights and responsibilities for others.

³⁸ *See, e.g.,* *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2369-72 (2021) (Kagan, J., joined by Breyer & Sotomayor, JJ., dissenting); Order at 6-7, *OCA Greater Hous. v. Texas*, No. 15-cv-00679, 2022 WL 2019295, at *4 (W.D. Tex. June 6, 2022), <https://www.aaldef.org/uploads/6-6-22-oca-ghtexasorder.pdf> [<https://perma.cc/B9VM-FEUA>] (describing attestation requirements for offering assistance); Ali Swenson, *Fact Focus: Gaping Holes in the Claim of 2K Ballot 'Mules,'* AP (May 3, 2022, 7:47 PM), <https://apnews.com/article/2022-midterm-elections-covid-technology-health-arizona-e1b49d2311bf900f44fa5c6dac406762> [<https://perma.cc/P5R4-YCST>]; Amber Phillips, *What Is Ballot 'Harvesting,' and Why Is Trump So Against It?*, WASH. POST (May 26, 2020, 3:55 PM), <https://www.washingtonpost.com/politics/2020/05/26/what-is-ballot-harvesting-why-is-trump-so-against-it/>; *cf.* Complaint at 3, *Andrews v. D'Souza*, No. 22-cv-04259 (N.D. Ga. Oct. 26, 2022), https://s3.documentcloud.org/documents/23199291/andrews_v_dsouza-ttv-salem-jdoes_10_26_22.pdf [<https://perma.cc/TK59-YMD6>].

that voters respond to a set of procedural and informational demands for individual action, calibrated to the average elector; a mindset shift to meet voters where they are would amount to a sizable change in orientation, with a not insignificant set of changes to procedures along the way. I do not mean to minimize the ramifications of this shift: in a world of perennially inadequate budgets and a shifting (and increasingly complex) regulatory environment driven by both legislation and litigation, healthy degrees of standardization are essential for election administrators to do their jobs. But we could—and should—choose to invest in customer service for the franchise commensurate with the importance of the enterprise.

The legal structure for residents of long-term care institutions makes those institutions a good place to start. I do not pretend that staff's own experience with voting is the only meaningful barrier to access for residents of long-term care institutions. And I do not pretend that litigation will be unnecessary. But alongside the more adversarial paths to enforcement of existing legal obligations, an ounce of concerted proactive training may be worth a pound of reactive litigation.³⁹ Indeed, in an era of consolidating ownership of long-term care facilities, consumer demand for support for residents' exercise of the franchise might prompt more systematic awareness and training programs with the potential for geographic leverage. And perhaps a concerted effort to train staff at long-term care institutions in their customer service responsibilities has the potential not only to better serve those among our most vulnerable citizens, but also to open possibilities for engaging populations well beyond.

³⁹ With apologies to Benjamin Franklin. *Cf. On Protection of Towns from Fire*, PA. GAZETTE, Feb. 4, 1735 (published anonymously), available at NAT'L ARCHIVE: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Franklin/01-02-02-0002> [<https://perma.cc/7FTX-VQL9>] (last visited Apr. 18, 2023).