

RESEARCH ARTICLE

Public Responsibilities for Electoral Fraud Beyond Correlative Rights and Duties

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This article develops the notion that a government has a public responsibility to prevent electoral fraud in a way that extends beyond the protections conferred by an electorate's directly correlative right to voting freedom. Focusing on electoral freedom and voter fraud in electoral systems, it presents theoretical arguments for holding governments responsible arising from the incomplete or unclear nature of juristic rights, powers, and duties. It holds that such public responsibilities are functionally necessary, in the interests of a truly inclusive participatory democracy. The article uses illustrations of fair elections globally, and in the United States in particular, including the divided 2014 US Supreme Court decision, *US v. Texas*, in which the majority denied the right to vote to prisoners and parolees who are disproportionately represented by ethnic minorities.

Keywords: Rights; Responsibilities; Governments; Courts; Social justice; Voting rights; International human rights

I. Introduction

This article extends the arguments initiated in the book, *Rights and Responsibilities*,¹ to the responsibility of federal and state governments to protect the important political interests of citizens as individuals, or as a collective whole, from acts of political corruption as illustrated by election fraud.² Election fraud, as a threat to fair elections, serves as a useful illustration of the need for public responsibilities. In the absence of an express correlative right of legal duties imposed on governments and an express correlative right of voters to be protected from such fraud, public responsibility provides more robust legal protection of the political interests of a voting citizenry. This article challenges the conception of correlative jurial relations popularised by Hohfeld a century ago, that a person, including a government, is subject to a duty only if another, citizen or the citizenry as a whole, has a correlative right by which to enforce that duty.³ It argues that this understanding of rights and duties is unduly restrictive because it fails to recognise important public interests,

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¹ Leon E Trakman and Sean Gatién, *Rights and Responsibilities* (University of Toronto Press 1999).

² Insofar as democratic states conceivably ever enjoyed sovereignty that was absolute, inalienable and indivisible, that sovereignty relates to relations between and among states, including on behalf of the citizens of that state who are part of its sovereignty. To conceive of that sovereignty as vested in governments themselves, other than in a representative capacity, is to extend an absolute conception of sovereignty to governments internally contrary to the tenets of a liberal democracy, not least of all, the individual liberty of that state's citizens not to be subjugated by that state. Second, even the conception of a sovereign state is suspect insofar as governments, in representing states including their citizens, alienate and divide that sovereignty, such as treaty, statute or abdication, internationally, regionally and internally among organs of government. Third, and consequentially, governmental authority is necessarily more limited than state sovereignty. For alternative conceptions of sovereignty, see generally, Charles Sampford and Ramesh Thakur, *Re-envisioning Sovereignty: The End of Westphalia* (Ashgate 2008); Jean Cohen, *Globalization and Sovereignty* (CUP 2012).

³ Wesley N Hohfeld, 'Some Fundamental Legal Concepts as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; Wesley N Hohfeld, 'Fundamental Legal Concepts as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710. See further Wilfrid E Rumble (ed), *Austin: The Province of Jurisprudence Determined* (CUP 1995) 36.

such as voting integrity, that are not always protected by correlative rights. In particular, this article raises relevant legal and philosophical considerations in determining circumstances in which governments have affirmative responsibilities to redress perceived public wrongs, such as voter fraud, beyond their duties correlative to citizens' rights.

The pressing need for delineating circumstances where governmental responsibility should be invoked is exemplified by the failure of governments, even those with long traditions of democracy, to provide a sufficient remedy to redress electoral fraud. The current study illustrates how the theory of responsibility developed in the author's prior studies can apply to the public responsibilities of government, corporations and individuals for free and fair elections.⁴

This article proposes that such an approach will benefit from greater definition, particularly in reference to subjecting respective rights and duties to substantive principles of fairness. The author proposes that governmental responsibility for electoral fraud, arguably, should not be restricted to acts which are *per se* illegal, but extend to acts which are morally unacceptable in undermining the spirit of electoral laws, and arguably, violating the principles of democratic governance.⁵ Effectively, public responsibilities are needed where governance duties are absent, incompletely articulated, or difficult to enforce.

This article discusses the extent to which governments exercise those responsibilities in fact, and how citizens can redress lapses in such exercise, beyond their rights to vote against allegedly infracting governments. The examples are drawn primarily from election irregularities in the United States.

Such responsibilities are increasingly essential if governments are to be accountable to their citizens, and if substantive justice is truly at the core of governance in a modern participatory democracy. As an illustration, the author recommends that, in delineating the content of governmental responsibility, the effect of actions arising from the exercise of responsibility must be balanced so as to avoid having a disproportionately discriminatory effect on minority voters.

II. The Problem Stated

The conceptual case for restricting governments' public responsibilities for electoral irregularities is that governments should only be subject to duties that are correlative to the electorate's rights. If an electorate has no right to require its government to act, then that government has no duty to act. The same reasoning applies to candidates seeking public office and contributors to political campaigns. Those candidates and contributors should not be subject to duties beyond the correlative rights of the electorate.⁶

Take the following three-part example. Electoral Candidate X argues that he or she is not subject to a formal duty to refrain from engaging in racist or sexist speech in his or her electioneering campaign due to his or her constitutional right to freedom of expression under the 14th Amendment.⁷ Corporation Y contends that it is not subject to a duty to limit its contributions to a political party because it has not violated any election law, just as it has not violated any environmental duty not to pollute the environment.⁸ Government Z asserts that it is under no duty to redress such electoral irregularities in the absence of a correlative right requiring that it do so. In effect, Individual X, Corporation Y, and Government Z all contend that they are not responsible for their electoral practices, beyond their formal legal duties. They argue that, requiring otherwise, would subject them to uncertainty as to the scope and legal consequences of their actions, notwithstanding any contrary public interest in the integrity of the electoral process.

As a result, Citizen A's voting right is tenuously protected against anyone who would violate it. A may have no right against X, Y and Z if they do not owe A any legal duty.⁹ According to this juristic conception of law,

⁴ Trakman and Gatién (n 1).

⁵ See generally, Michael Alvarez and others, *Election Fraud: Detecting and Deterring Electoral Manipulation* (Brookings Institution Press 2008); Mikhail G Myagkov and others, *The Forensics of Election Fraud: Russia and Ukraine* (CUP 2009).

⁶ This conception of correlative rights and duties is ascribed to Hohfeld. See further (n 3), (n 45), (n 67) and (n 71).

⁷ On free speech rights in elections, see Brandon S Boulter, 'Expansive Speech: Citizens United V. FEC and the Free Speech Rights of Tax-Exempt Religious Organizations' (2010) *BYU L. Rev.* 2243.

⁸ On the reluctance of corporations to assume social responsibility for the exercise of rights, beyond those to which they are subject to clearly defined duties, see John M Conley and Cynthia A Williams, 'Engage, Embed, and Embellish: Theory versus Practice in the Corporate Social Responsibility Movement' (2005) 30 *J Corp L.* 1. See generally, Christine Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility', in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP 2007) 207; Radu Mares, *The Dynamics of Corporate Social Responsibilities* (Martinus Nijhoff Publishers 2008).

⁹ See further (n 24).

X, Y and Z may owe an imperfect obligation to A grounded in morality, one which A cannot enforce legally if A does not have a correlative right to do so.¹⁰

This traditional account of correlative rights and duties is deficient due to the overreliance placed on the absence of formal legal duties owed to A by X, Y and Z. The first issue is whether Citizen A's voting rights are incompletely articulated in law, inchoate in nature, or simply impracticable for A to enforce through legal rights. The second issue is whether X, Y, or Z should be subject to a legal responsibility to respect A's incomplete, imperfect or unenforceable legal right to vote if they do not owe A a legal duty. This question of responsibility, in transcending X, Y and Z's duties to A, encompasses: A's material interests falling short of a right to participate in elections; the manner in which X, Y, or Z have infringed upon A's rights; and any harm suffered by A in the absence of an enforceable legal duty owed by X, Y or Z.¹¹ Instead, a viable theory of public responsibility ought to protect the material interests of citizens like A, including the interest of free and fair elections, that are inadequately protected by rights and duties which are incompletely articulated, regressive in nature, or, at best, emerging.¹²

The objective of such responsibilities is not to seek perfectly just, efficient or *pareto* optimal outcomes, such as to render Government Z captive to the common will, acting on the whim of capricious members of the electorate, such as A. Nor is their purpose to promote overbroad remedies, such as to grant voter concessions to overbroad classes of citizens like A on account of the action or inaction of Citizen X, Corporation Y, and Government Z. The purpose of imposing a responsibility is rather to promote transparent elections that are fundamental to democratic governance, to protect the liberty of individual voters, and to advance the collective will of the state as a whole including the electorate. The result is that X, Y, and Z each owe a public responsibility to A, even though they are not subject to a formal duty to A. Specifically, Individual X has a responsibility not to use racist speech in electioneering campaigns; Corporation Y has a responsibility not to violate election guidelines in making contributions to political parties. Government Z has a responsibility to scrutineer elections. These responsibilities accord with the substantive principles of equality and fairness in conducting elections.

The purpose of recognising public responsibilities as giving rise to corresponding legal remedies is to afford due protection to political interests that have yet to be recognised as rights and, consequently, are not protected by the duty-right correlative.¹³ Imposing such remedies will help ensure public responsibilities receive the level of observance they deserve in a participatory democracy and will have the effect of validating them as not only socially and politically, but also legally, justified.

A. The Responsibilities of Electoral Candidate X

Let us first consider the case against Electoral Candidate X's responsibility to not use racist speech. The argument, in the hypothetical jurisdiction, is that X has a fundamental right to liberty including freedom of expression which all others, including governments and individuals, have a duty not to subvert. X's right, identified with liberty itself, in effect, trumps Citizen A's right not to be subjugated by X's hate speech. As a result, X owes no responsibilities to A.

However much X's "words wound", any countervailing social interest in regulating racist speech is subservient to X's right to use "fighting words".¹⁴ Speech rights entrenched in international conventions, constitutions, and bills of rights are incorporated unevenly into domestic legal systems with varying degrees of regulation.¹⁵ However, the perceived sanctity of the fundamental right to liberty and freedom of expression often prevails over the protections afforded by any such regulation of racist speech.

It is arguable that Electoral Candidate X should be subject to a legal responsibility towards A, who, in turn, may lack alternative legal protection grounded in actionable affirmative rights. Typifying the restrictive construction of affirmative rights in developed countries is the narrow construction of community interests

¹⁰ Richard B Brandt, 'The Concept of a Moral Right' (1983) 80 J Phil 29; Arthur J Dyck, *Rethinking Rights and Responsibilities: The Moral Bonds of Community* (Georgetown UP 2005). On the separation between law and morals, see Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1978).

¹¹ On limitations in such a correlative right-duty relationship, see Trakman and Gatien (n 1) Ch 1.

¹² For arguments in favour of the expansion and clarification of conceptions of human rights globally, see generally Carol Gould, *Globalising Democracy and Human Rights* (CUP 2004).

¹³ See eg David Boaz, *The Politics of Freedom: Taking on the Left, the Right, and Threats to our Liberties* (Cato Institute 2008).

¹⁴ *ibid.*

¹⁵ For the distinction drawn between "universal" human rights and their uneven application in reality, see Jack Donnelly, *Universal Human Rights in theory and practice* (3rd edn, Cornell UP 2013); for the argument that basic individual rights are justified from a universal moral point of, see William Talbott, *Which Rights Should Be Universal?* (OUP 2005).

in the U.S.¹⁶ In these systems, an individual's affirmative rights are likely to be restrictively construed in the often strident constitutional protection of X's right to speech autonomy.¹⁷

B. The Responsibility of Corporation Y

Corporation Y will argue that it complied with laws governing contributions to political parties, which is a similar argument to its claim to not have a duty to protect the environment beyond its compliance with statutorily mandated emission controls.¹⁸ Corporation Y will contend that it ought not to be subject to a public responsibility falling outside of its legal duties. Y should not be responsible to limit its contributions to a political party in the absence of pre-existing laws or, at least, clear guidelines governing such contributions. Y's defence is plausible: it should not be held legally liable for acts that were not illegal prior to its action.¹⁹

The dilemma is that contribution guidelines to political parties are often unclear. Not all contributions are monetary or readily capable of being measured monetarily. The responsibility to subject corporate contributions to public scrutiny however, may be an effective measure of the transparency of contribution practice, despite the quantification issue.²⁰ This problem is readily illustrated with regard to corporate responsibilities to engage in socially responsible investing.²¹ Included as part of that responsibility is not to invest, or to modify their investments in, countries in which governments have abused, *inter alia*, the electoral process.²² The problem is that governments are often unwilling to engage in reform on grounds that they are not under a strict legal duty to do so and because such reform is contrary to their business interests.²³ A potential responsibility of Corporation Y's in ensuring the transparency of its investment, including in an election, is a partial remedy in identifying abuses of investment guidelines and in the interests of public disclosure.

C. Imposing a Responsibility on Government Z

The public responsibility of Government Z arguably includes arriving at socially balanced remedies, such as deterring the abuse of voters' rights without stifling democratic elections, and redressing voter irregularities without undermining confidence in governance itself.²⁴ Another purpose is to render Government Z accountable for its actions – or as proposed, its responsibilities – in governance, not only through periodic elections that are often years apart, but through on-going remediation of malfunctioning electoral laws and regulations for the benefit of the electorate on whose behalf it is responsible to act.²⁵

¹⁶ For a study of how U.S. courts have interpreted affirmative action, and its significance in law, economics, philosophy, psychology, sociology, political science, and race relations, see James A Beckman, *Controversies In Affirmative Action* (Praeger 2014). For a journal issue devoted to equality rights and affirmative action, see 'The Supreme Court – 2012' (2013) 127(1) Harv L Rev. See also sssssssss8 L Ed 873 (ty is not er would take *Brown v Board of Education of Topeka* (1954) 347 US 483, (1954) 74 S Ct 686, (1954) 98 L Ed 873; Austin Sarat, *Race, Law, and Culture: Reflections on Brown v. Board of Education* (OUP 1997) 55; Robert A Ibarra, *Beyond Affirmative Action: Reframing the context of Higher Education* (University of Wisconsin Press 2001); Benjamin Baez, *Hate Speech and Tenure: Narratives about Race and Law in the academy* (Routledge Falmer 2013); Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* (Pantheon Books 2013); on education as a human right, see Douglas Hodgson, *The Human Right to Education* (Ashgate 1998).

¹⁷ On these arguments relating to responsibilities for free speech, see Leon E Trakman, 'Transforming Free Speech: Rights & Responsibilities' (1995) 56 Ohio St LJ 899–939.

¹⁸ Conley and Williams (n 8); Parker (n 8); Mares (n 8).

¹⁹ It is noteworthy that the U.S. Supreme Court has recently lifted the limit on how much any one person can donate to a political campaign, while retaining that an individual can give a maximum of \$5,200 to a single candidate. See *McCutcheon v. Federal Electoral Commission*, 572 U.S.____, 134 S. Ct. 1434 (2014).

²⁰ See generally John Samples, *The Fallacy of Campaign Finance Reform* (University of Chicago Press 2006). But see Richard M Eisenberg, 'The Lonely Death of Public Campaign Financing' (2010) Harv J L & Pub Pol'y 333.

²¹ David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution 2006); Philip Cotler *Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause* (Wiley 2014).

²² W Timothy Coombs and Sherry J Holladay, *Managing Corporate Social Responsibility: A Communication Approach* (Wiley-Blackwell 2011).

²³ On corporate ambivalence towards corporate social responsibility in relation to human rights generally, see eg Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale LJ 443; David Kinley (ed), *Human rights and Corporations* (Ashgate 2009).

²⁴ On litigation before the U.S. Supreme Court relating to alleged electoral irregularities during the 2000 Bush-Gore presidential election, see *Bush v. Gore* 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). See further Vincent Bugliosi, *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President* (Nation Books 2001); James W Ceaser and Andrew E Busch, *The Perfect Tie: The True Story of the 2000 Presidential Election* (Roman and Littlefield 2001); Alan M Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (OUP 2001); EJ Dionne Jr and William Kristol (eds), *Bush v. Gore: The Court Cases and the Commentary* (Brookings Institution 2001); Cass R Sunstein and Richard A Epstein (eds), *The Vote: Bush, Gore, and the Supreme Court* (University of Chicago Press 2001); Richard A Posner, *Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts* (Princeton University Press 2001); David Schultz, *Election Law and Democratic Theory* (Ashgate, 2014).

²⁵ See further Section VIII.

Consider, a hypothetical example where this careful balance is overthrown by a failure to fulfil public responsibility. Government Z denies Prisoner A the right to vote even though A is a member of a minority that is disproportionately represented in the prison population.²⁶ If Prisoner A has a liberty or equality right to vote which Government Z has violated, A will have a legal cause of action.²⁷ However, Prisoner A has limited legal recourse for governmental redress, when there is no such governmental duty to act.

The conceptual and functional challenge is to articulate, in a coherent, persuasive and authoritative way, the nature and limits of Government Z's responsibility for fair elections. Insofar as Government Z has a responsibility not to deny fair and equal treatment to citizens like A in the conduct of elections, Z is arguably responsible to protect A's important communal interests that are incompletely, selectively, incoherently, or simply not expressed as legal duties owed by Z. The issue to be determined is whether Government Z ought to be publicly responsible for the discriminatory effect of its election laws in the absence of such a duty. The basis for such public responsibilities is to redress the social and political interest which governments like Z may be unwilling or disinclined to recognise, for reasons of political expediency, or by the government's failure to appreciate the systemic disadvantages existing voting laws have on voters like A.

Illustration: Voter Requirements with Discriminatory Effects in the U.S.

Let us assume that laws requiring voters to have identification (ID) systemically disadvantage permanent residents or citizens who are non-English speaking immigrants, compared to English speaking persons born within the U.S. One response is that voter ID laws are *per se* legitimate in order to avoid voter impersonation. The verification of identity is a legal requirement – indeed a responsibility – placed on each and every voter, including recent non-English speaking immigrants. Another response is that voter impersonation is so occasional as not to justify the discriminatory effect of requiring voter IDs. Each position is arguable. However, the point is that communal interests ought not to be excluded on grounds that they are morally and not legally determined; it is a responsibility of governments to consider each position in enacting, modifying, or withdrawing voter ID laws.

On one side, is the view that governments should be subject to minimal legal duties in protecting rights grounded in social justice, given the variability of such rights.²⁸ On the other side, is a view that social justice is inherent and evolving;²⁹ and that governments have an expansive responsibility to enhance social justice, such as in protecting visible minorities from acts of discrimination in voting.³⁰ Typifying this concern was the recent divided 2014 U.S. Supreme Court decision, *United States v Texas*, in which the minority held that the government, in enacting voting laws which denied prisoners and parolees the right to vote had acted discriminatorily insofar as African Americans were disproportionately represented in prisons.³¹ The perceived result is likely to be that the Texan Government failed to exercise its powers to govern responsibly, notwithstanding the decision of the majority to the contrary.³²

²⁶ See eg *United States v Texas*, et al.; *Veasey v. Perry*, 574 U.S. __ 2014. Such unequal treatment based on race was a significant factor in the civil rights movement in the 1960s in the United States, including in the passing of the Civil Rights Act 1964. For a collection of articles commemorating the 50 years anniversary of that Act, see symposium – 'The Meaning of the Civil Rights Revolution', (2014) 123 *Yale LJ* 8. On the conceptual legitimacy of group rights, see Thomas Flanagan, 'The Manufacture of Minorities', in Neil Nevitte and Allan Kornberg (eds), *Minorities and the Canadian state* (Mosaic Press 1985) 107–24; Chandran Kukathas, 'Are there any Cultural Rights?' (1991) 20 *Pol Theory*, 110–15; Jan Narveson, 'Collective Rights?' (1991) 4(2) *CJLJ* 329–45; Leon E Trakman, 'Group Rights: A Canadian Perspective' (1992) 24 *NYU J Int'l L & Pol* 1579–650; Carl Wellman, *Real Rights* (OUP 1995) 157–77; Claus Offe, 'Homogeneity' and Constitutional Democracy: Coping with Identity Conflicts through Group Rights' (1998) 6 *J Pol Phil* 125–31; Jeremy Waldron, 'Taking Group Rights Carefully' in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing 2002) 203–20.

²⁷ On the tension between liberty and equality rights, see Leon E Trakman, 'Substantive Equality in Constitutional Jurisprudence: Meaning within Meaning' (1994) 7 *CJLJ* 27.

²⁸ On this minimalist approach, see Maurice Cranston, 'Human Rights, Real and Supposed', in DD Raphael (ed), *Political Theory and the Rights of Man* (Macmillan 1967); Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?' (2004) 12 *J Pol Phil* 90; Claudio Corradetti, *Relativism and Human Rights* (Springer 2004).

²⁹ On the scope of "social rights", see David Beetham, 'What Future for Economic and Social Rights?' (1995) 43 *Pol Stud* 41–60; Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press 1999); Jeff King, *Judging Social Rights* (CUP 2012); Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015).

³⁰ See eg Gareth Evans, *The Responsibility To Protect* (Brookings Institution Press 2008).

³¹ See *United States v Texas*, et al.; *Veasey v. Perry*, 574 U.S. __ 2014, 6–7.

³² *ibid.* See also Bridgette Baldwin, *Backsliding: The United States Supreme Court, Shelby County v. Holder and the Dismantling of Voting Rights Act of 1965* (2015) 17 *Berkeley J Afr-Am L & Pol'y* 251. See generally, 'Expansion of Rights and Liberties - The Right of

A widely cited earlier illustration is the case of *Muntaqim v Coombe*.³³ There, the Plaintiff, an African American, challenged the disenfranchisement of prisoners under the Voting Rights Act (the Act). While the Act was not illegal in denying prisoners and parolees the right to vote, it was argued that such a restriction collided with fundamental principles of democracy, in which the right to vote was fundamental. Emphasising dissension in the court in resolving this issue, the Second Circuit granted an *in banc* review by all active judges on the Court, after a three-judge panel ruled against the Plaintiff. The review held that Section 2 of the New York Voting Rights Act did not permit such a challenge to prisoner disenfranchisement.³⁴ However, in 2006 the Second Circuit dismissed the claim on the grounds that the Plaintiff lacked standing because he was not a resident of the State of New York and that the court lacked jurisdiction to hear his case.³⁵

III. Principled Arguments Against Imposing Public Responsibilities

The case for governmental responsibilities for electoral integrity is not without conceptual and functional challenges, namely: that governments should only be subject to duties that are correlative to the rights of the electorate.

The case against maintaining a legal responsibility beyond a duty that is correlative to a right is, arguably, illustrated by a woman's right to reproductive autonomy. If a woman has autonomy over her body, she ought not be subject to a responsibility in the absence of any discernible right or power that denies her that autonomy. Any after-the-fact infraction upon her reproductive rights, such as imposing on her a responsibility towards the foetus in exercising her reproductive rights or in protecting the integrity of her body, would constitute unfair surprise and amount to an unfair act.³⁶ If she is not subject to a legal responsibility for the foetus, why should an individual, corporation, or government be held responsible for electoral practices that allegedly undermine the integrity of an electoral system, but to which they owe no legal duty?

By parallel reasoning, a conceptual argument against imposing public responsibilities on Government Z in the absence of A's correlative citizen's right is that Government Z ought to have the power to determine the boundaries of its rights and duties.³⁷ Insofar as it enjoys the power to determine when to pass legislation to regulate electoral irregularities,³⁸ it alone should so determine, even if its laws are regressive in comparison to international laws.³⁹ Expressed constitutionally, it is ordinarily the right of the executive arm of government to determine whether, when, and how to adopt an international convention on the protection of political, social, and economic rights, similar to a convention on the protection of the environment; it is not for individuals like A, or less convincingly, communities of individuals, to usurp that power.⁴⁰

The further defence of correlative rights and duties exhausting legal obligations is that there is no place for imposing responsibilities beyond them, for example, in relation to participation in elections. In particular, imposing further responsibilities beyond rights and duties will threaten to produce a flood of legal

Suffrage' (*The National Archives*) <http://www.archives.gov/exhibits/charters/charters_of_freedom_13.html; US Voting Rights>, accessed 24 May 2015.

³³ 366 F. 3d 102 (2d Cir.2004).

³⁴ See *Muntaqim v Coombe*, 396 F. 3d 95, 2004; Alexandra Sadinsky, 'Redefining En Banc Review in the Federal Courts of Appeals' (2014) 82 *Fordham L Rev* 2015–6 (discussing the Second Circuit's tradition of granting few suggestions for rehearing in banc) <<http://ir.lawnet.fordham.edu/flr/vol82/iss4/9>> accessed 20 May 2015.

³⁵ *Muntaqim v Coombe* 449 F. 3d 371, 2006. The Court's denial of standing was based on *Muntaqim's* transferral to a prison in California where he was deemed resident, whereas the law in issue applied to New York residents.

³⁶ On the different familial and other interests in the foetus and its impact upon responsibilities for and towards the foetus, see Leon E Trakman and Sean Gatien, 'Rights and Values in the Abortion Debate: A Rights Metamorphosis' (1995) 14 *Windsor YB Access Just*.

³⁷ On the sovereign rights of states, arguably as distinct from the rights of governments, see further (n 2).

³⁸ This is similar to the government's ability to regulate the emission of noxious gasses,

³⁹ The internal source of such governmental power in a democracy, presumptively, resides in the right to govern through the will of the electorate. The external source lies in the recognition of its right to govern by the international community of states. The problem is that voting irregularities undermine the internal source of a government's democratic power, as well as its legitimacy and efficacy internationally.

⁴⁰ While treaties are ordinarily executed by the executive branch of government, a distinction exists in U.S. law between the treaty making process and the executive agreement process. However, the difference is not substantial for the purposes of this analysis. See further Arizona State University, 'United States Treaties and International Agreements' (*Arizona State University Law*, January 2015), <<http://www.law.asu.edu/library/RossBlakleyLawLibrary/ResearchNow/ResearchGuides/TreatiesandInternationalAgreements.aspx>> accessed 20 May 2015.

claims which neither electoral officers nor national courts can reasonably sustain.⁴¹ Moreover, determining the boundaries of public responsibilities will be tenuous at best and arbitrary at worst.

Similarly, to hold persons beyond governments, such as corporations, liable for electoral fraud in a manner similar to how they are held liable for environmental pollution, would unfairly surprise them, by imposing responsibilities on them in the absence of their violating specific legal rights.⁴² If it is the populace at large that is harmed by deleterious electoral practices, similar to how it is the whole populace that is negatively affected by the emission of noxious gasses, if there is no basis to establish the violation of another right such as in tort, then there should be no legal recourse. By parallel reasoning, if Individual X or Corporation Y is not subject to an election law governing their electoral practices, neither should be held legally responsible for that law's deficiencies, just as a corporation should not be responsible for gas emissions that are in compliance with environmental laws.⁴³

The problem with this reasoning is that it does not recognise the need for public responsibilities precisely because the legal duties to act are absent, incomplete, or imperfect. None of this ignores legal duties that governments and individuals owe on account of the correlative rights of others.⁴⁴ Governmental rights and powers remain important including protecting the foundations of democratic elections. However, insofar as a right to participate in governance gives rise to governance duties, that are incomplete or imperfect in nature, imposing public responsibilities on governments can affirm and, where appropriate, extend those duties. One example of this is by impeding governments or powerful elites from undermining community efforts to exercise those electoral rights along ethnic or other lines. Such a public responsibility in governance can also supplement other legal remedies for wrongfulness in the conduct of elections, notably in criminal law.⁴⁵

The challenge in articulating the content of a public responsibility, which may conflict with certain relatively established values, also derives from the fact that a public responsibility is communal in nature. Therefore, it encompasses collective interests beyond the formally constituted rights of voters like Prisoner A. This adds to the complexity of fulfilling public responsibilities with reference to public interest that may not necessarily accord with the individual interest of A alone.

The key dilemma in determining a government's public responsibilities in international law is the perception that "[t]he core organising principles – sovereignty, formal equality, independence, and non-intervention in each other's internal affairs," remain central limits on the states governments' responsibilities to each other, as they did in 1648 when the Treaty of Westphalia was signed.⁴⁶

IV. The Case for Constitutionalising Public Responsibilities

A. The Public Responsibility Imperative

Despite the noted reservations above, it is arguable that the pragmatic rationale for governmental responsibilities to citizens within a democratic state is justified where governance duties are absent, incompletely articulated, or difficult to enforce in relation to important political interests.

First, the public interest in redressing political corruption, such as through vote-rigging, self-evidently subverts the transparent conduct of elections. Second, the interest in addressing acts of political corruption ordinarily falls to governments themselves to prosecute electioneering fraud in criminal law, rather than

⁴¹ On the conceptual and functional limitations associated with correlative rights and duties, see Section II.

⁴² On corporate social responsibility, see (n 7) and (n 20).

⁴³ One might question the extent to which consumers have rights and responsibilities, such as to preserve the environment. See further Garry Chapman and Gary Hodges, *Consumer Rights and Responsibilities* (MacMillan 2008). On responsibility, beyond correlative legal duties, for environmental damage, see Trakman and Gatién (n 1) 215; Leon E Trakman and Sean Mark Gatién, 'Rethinking International Environmental Rights and Responsibilities' in Leon E Trakman and others, *Doing Business in Mexico* (Transnational Legal 2003).

⁴⁴ There are persuasive critics who point out that "jural correlatives" are discussed more in the abstract than in concrete cases, with the only major work applying this theory allegedly emanating from Walter Wheeler Cook in 1921 see Morton J Horowitz, 'Hohfeld's Influence On Legal Thought' in *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (OUP 1992).

⁴⁵ Ivana Markova, 'A Dialogical Perspective of Social Representations of Responsibility' in Intoshio Sugiman and others, *Meaning in Action: Constructions, Narratives, and Representations* (Macmillan 2008) 253.

⁴⁶ Cathy J Nolan, 'The Evolution of Great Power Rights and Responsibilities' in Cathy J Nolan (ed), *Power and Responsibility in World Affairs: Reformation versus Transformation* (Political Science 2004). For the Treaty of Westphalia, see Gerard Terborch, 'The Treaty of Westphalia, 1648' (*Schiller Institute*, May 2003) <http://www.schillerinstitute.org/strategic/treaty_of_westphalia.html> accessed 20 May 2015.

relying on extra-territorial institutions such as the International Criminal Court.⁴⁷ Third, the public prosecution of electioneering wrongdoing is only effective insofar as governments recognise that they have rights, or powers so to act, and are willing to exercise them to address the abuse of electoral laws.⁴⁸ The fourth argument is an extension of the third, that, should governments fail to exercise those powers, the consequence of that non-exercise may undermine independent elections.⁴⁹

The fifth argument is that given the understanding that a sovereign state includes citizens' rights,⁵⁰ citizens have the right to protect the democratic nature of elections through their right to vote out a government that fails to redress such acts of fraud.⁵¹ These citizens' rights however, are often subject to delay and depend on whether and when a government in power is ready to call elections. Further, they are dependent on the government's will to address such acts as electioneering fraud.⁵²

Sixth, and the most essential argument in this article, is that if governments fail to exercise their powers responsibly to redress the transparent conduct of elections, citizens should have the right to compel such action for the common good. If governments do not identify, investigate and prosecute electioneering offences both effectively and fairly, citizens should have the residuary rights to redress those acts of electioneering fraud responsibly.⁵³

Viewed conceptually, it is deficient to insist that the citizenry at large can vote out a government that rigs elections, engages in ballot-stuffing, or disenfranchising voters – or that individuals close to that government do so and sanctions are not imposed on them. Viewed functionally, election fraud usually occurs before or during elections that are periodic and are usually called for by the ruling government within a time span which it may protract, particularly if it feels politically vulnerable to an electoral backlash of election tampering. The formal acts of the executive, such as a president or governor-general dismissing a government, is only determinative if that executive officer is willing to do that act; which may well not be the case.⁵⁴

Countering these arguments however, is the spectre of a government in a so-called democracy acting lawlessly. It is precisely the omission in failing to prosecute criminal offenders for political ends, or for legitimating lawlessness – and indeed a fraud on the citizenry as a whole – that a government acts irresponsibly. It is not plausible to insist that a government today has absolute, indivisible and inalienable sovereign power and even less plausible to suggest that governments enjoy such powers as though they are synonymous with a nation state.⁵⁵

The scaremonger response that a potential plethora of citizens bringing actions to redress alleged abuses of the electoral process would produce chaos is countered by the requirement that citizens can only proceed legally if they can establish their standing, individually or collectively, to bring such actions. This includes their having sufficient causes of action and evidence verifying their claims.⁵⁶ Whether or not such powers of the electorate are realistic is arguable. However, they would be in addition to political parties having the legal right to apply to have election results set aside on grounds of voting irregularities which ordinarily

⁴⁷ See Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2003); William Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011).

⁴⁸ See Broomhall (n 47) Section VIII.

⁴⁹ *ibid.*

⁵⁰ See further (n 2).

⁵¹ *ibid.*

⁵² See further Douglas (n 75).

⁵³ The governmental dilemma in protecting the rights of individuals, while also protecting the common or social good which may diverge from those rights is reflected in both liberal and communitarian discourse. Liberal scholars such as John Rawls, Charles Taylor and community-focused theorists such as Michael Sandel all accept the importance of individual and community values in rights discourse. However, they diverge over whether and when "the self" (individual) ought to be prioritised over "the other" (the community or "the good"). See eg John Rawls, *The Law of Peoples; with the idea of Public Reason revisited* (Harvard UP 1999) ch 3. See further Section VII.

⁵⁴ On the dismissal in Australia of the Whitlam Government by Governor General Kerr in 1975, see George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (6th edn, Federation Press 2014) 361–5. On an earlier dismissal of the government in New South Wales, see *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394; affirmed [1932] AC 526.

⁵⁵ Cohen (n 3).

⁵⁶ On the complex issue of standing to sue in administrative law, see *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses* [1981] 2 All ER 93; [1982] AC 617. See further Peter Cane, 'The Function of Standing Rules in Administrative Law' (1981) Public Law 332, reprinted in Denis J Galligan (ed), *Administrative Law* (1992) 303, 326; Bernard Schwartz, *Lions over the Throne: The Judicial Revolution in English Administrative Law* (New York University Press 1987) 6. But see Lord Denning in *The Discipline of Law* (Butterworths 1979) 133.

must be brought during or directly after an election within this restricted time frame and on evidence of systematic irregularities.⁵⁷ Such a pre-emptive challenge would also vary from *quo warranto* proceedings brought somewhat after an election.⁵⁸

B. The International Basis for Public Responsibility

Reinforcing these governmental responsibilities are international law claims that a government is responsible for international wrongs, arguably, including systemic abuse of the political process such as excluding minorities from voting. In the international sphere, the difficulties of delineating the boundaries and providing content to public responsibility have similarly been debated. As Roberto Ago commented on the task of determining the principles governing the responsibility of states for international wrongs, that “*it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.*”⁵⁹ Determining a government’s public responsibilities is particularly difficult with regard to governments that either denying a right to vote to a class of prisoners that have committed a particularly heinous crime, or restricting the right to free speech of Electoral Candidate X.

Despite this difficulty, concern about states’ governments not being subject to adequate responsibilities to citizens is increasingly evident in evolving fields of international law which include, for many new democracies, emerging rights to fully participate in free elections. This internationalisation of “internal” excesses, such as rampant governmental corruption in national elections, is reflected in “the progressive development” of customary international law and, more cautiously, is embodied in secondary principles of international law relating to the obligations of states for international wrongs.⁶⁰

Despite this positive understanding of state responsibilities, the difficulty is in determining the boundaries of “secondary principles” of responsibility imposed on states. This is most salient in relation to wrongs perpetuated against the state’s own citizenry, such as national electoral fraud, as distinct from wrongs done to other states and their subjects. The issue is the perceived insularity of nation states’ governments from international accountability for electoral fraud, and indeterminacy in the contestation of allegedly fraudulent elections.⁶¹ Further accentuating this lack of international accountability is the perception that electoral irregularities in new democracies represent “soft” law in which democratic elections are treated as tenuous means of protecting emerging, rather than emerged, human rights.⁶² Such difficulties are accentuated when governments insist that the “right” of ethnic, religious or other minorities to participate in national elections is religiously or morally, rather than legally, determined,⁶³ or that electoral irregularities must be resolved along political, rather than legal, lines.⁶⁴

V. Giving Content to Public Responsibilities

However much public responsibilities may originate in “imperfect obligations” grounded in morality, they are only sustainable in law if they are constitutionally, or at least legally, recognised and enforced.⁶⁵

⁵⁷ These “rights” are ordinarily supervised by Electoral Commissions, whose powers and duties diverge globally according to constitutional, statutory or other instruments empowering them. See generally, the Electoral Knowledge Network, ‘Parties and Candidates’ (*Electoral Knowledge Network*) <<http://aceproject.org/main/english/pc/pcb.htm>> accessed 20 May 2015. See further *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Davis v. Federal Election Commission*, 554 U.S. 724 (2008); and *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

⁵⁸ See Section VII. In such cases it must be established that the official in issue was holding office illegally.

⁵⁹ Yearbook International Law Commission, Volume II, Document A/8010/Rev 1970 1, 306 para 66 (c).

⁶⁰ On the work of the International Law Commission, under a mandate from the United Nations, to develop rules governing the international responsibility of states for wrongs, see the United Nations, ‘Materials on the Responsibility of States for Internationally Wrongful Acts’ st/leg/ser b/25 (*United Nations*, 2012) <<http://legal.un.org/legislativeseries/documents/Book25/Book25.pdf>> accessed 20 May 2015.

⁶¹ See further (n 94), (n 98) and (n 99).

⁶² On the difficulty in determining when human rights are, in fact, legal rights, see Rowan Cruft, ‘Human Rights as Rights’ in G Ernst and J Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011).

⁶³ On the moral dimensions of human rights, see Carl Wellman, *The Moral Dimensions of Human Rights* (OUP 2010); Adam Etinson (ed), *Human rights: Moral or Political?* (OUP 2015).

⁶⁴ On the political dimension of human rights, see Pablo Gilabert, ‘Humanist and Political Perspectives on Human Rights’ (2011) 39 *Pol Theory* 439. On this legitimacy of human rights, see John Tasioulas, ‘Human Rights, Legitimacy, and International Law’ (2013) 58 *Am J Juris* 1.

⁶⁵ According to John Austin, “imperfect laws” prescribe action, but lack the threat of punishment or legal sanctions. See Rumble (n 3).

A governmental responsibility for electoral fairness, in falling outside a duty-right correlative relationship, is not jural in nature.⁶⁶ It is however, arguably enforceable on constitutional grounds.⁶⁷ There are two broad but non-exhaustive areas in which to determine the constitutionality of governmental responsibilities: “first, the merits of giving constitutional recognition to responsibilities; second, the possible recognition at a constitutional level of rights relating to . . . social justice and the welfare state . . .”⁶⁸ Arguably, promoting “good administration” includes redressing electoral fraud that undermines the administration of justice. The overriding function in constitutionalising such public responsibilities is to ensure that they are both understood and respected including by the government responsible for administering them.⁶⁹ As a result, it is necessary for public responsibilities to be principled in nature, not only pragmatically determined.

A principled approach towards legitimating public responsibilities involves disputing a formal legal system that is confined by jural correlatives and opposites – rights, no-rights, privileges, duties, powers, disabilities and immunities – and that excludes responsibilities as being non-conceptual and therefore, non-legal in character.⁷⁰ For legal responsibilities to transcend these jural relationships, legal responsibilities for electoral integrity need to explicate social and political interests as legal, not only moral, requirements and as not being permanently separated from law.⁷¹ This is introduced in Section VI immediately below while the legal and functional basis of public responsibilities are addressed in greater details in Section VII.

VI. The Proportionality of ‘Responsible’ Actions

The conceptual defence of a public responsibility for electoral integrity should be circumscribed in a manner that is comparable to, but distinct from, a legal duty. In particular, the remedy for failing to fulfil a public responsibility should be commensurable with the social interest in issue and not disproportionate to the allegedly irresponsible act giving rise to that remedy. For example, the remedy for a government, corporation, or individual for engaging in electoral fraud should be commensurate with the public harm arising from it that harm and should not exceed it.

As a result, a constitutional democracy is supported by imposing a responsibility on a government to prosecute electoral fraud and other electoral irregularities in the absence of formal legal duties. Should the government fail to exercise that responsibility, or do so partially or imperfectly, it would not be disproportionate to allow public actions by voting citizens to ensure on-going governmental accountability to the electorates that empower them.

To ensure that public responsibilities are relied upon appropriately, the person or persons, such as members of minorities, who are alleged to be systemically denied their voting rights, must establish an *a priori* case in support of that responsibility to invoke a remedial action. This includes the need to establish the political, economic, or social importance of the communal interest impacted by that denial, and the failure of the government to address it, such as in providing discrete minorities with limited access to voting stations, whether intentionally or otherwise. The persons prosecuting allegations of irresponsible governance

⁶⁶ The author’s critique of Hohfeld’s theory on correlative rights and duties therefore focuses on the wider social and economic and moral ramifications of his jural relations. Most scholars concentrate on the analytical soundness of Hohfeld’s jural relations in positive law, not on these wider ramifications including for and in law. For commentary on the analytical soundness of Hohfeld’s jural relations, as distinct from its wider socio-economic implications, see Michael K Addo, ‘Does Hohfeld Still Matter?’ (1997) 29 BLJ 7; Pierre Schlag, ‘How To Do Things With Hohfeld’ (2015) 78 LCP 186; for a critique of Hohfeld’s analysis, see Joseph William Singer, ‘The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld’ (1982) Wis L Rev 975 <<http://projects.iq.harvard.edu/files/singer/files/jurisprudence.pdf>> accessed 20 May 2015.

⁶⁷ See Section V.

⁶⁸ Lord Chancellor’s Department, Ministry of Justice, Parliament of Great Britain, *Rights and Responsibilities: Developing our Constitutional Framework, Summary of Responses* (Cm 7860, 2010) 7.

⁶⁹ *ibid.* The summary states further “Respondent citizens were also asked for “views on the legal effect of any Bill, and to look again at assumptions about how best to ensure that rights and responsibilities are respected and understood”.

⁷⁰ On the correlative nature of rights and duties, ascribed to Wesley Hohfeld (n 66); see too Arthur Corbin, ‘Legal Analysis and Terminology’ (1919) 29 Yale LJ 163; Isaac Husik, ‘Hohfeld’s Jurisprudence’ (1924) 72 U Pa L Rev 263; Willard S Randall, ‘Hohfeld on Jurisprudence’ (1925) 41 L Q Rev 86; George W Goble, ‘A Redefinition of Basic Legal Terms’ (1935) 35 Colum L Rev 535; Max Radin, ‘A Restatement of Hohfeld’ (1938) 51 Harv L Rev 114; Julius Stone, ‘An Analysis of Hohfeld’ (1963) 48 Minn L Rev 313; Glanville Williams, ‘The Concept of Legal Liberty’, in Robert Summers (ed), *Essays in Legal Philosophy* (University of California Press 1968) 121; Layman E Allen, ‘Formalizing Hohfeldian Analysis to Clarify the Multiple Senses of “Legal Right”: A Powerful Lens for the Electronic Age’ (1974) 48 S Cal L Rev 428; Andrew Halpin, ‘Hohfeld’s Conceptions From Eight to Two’ (1985) 44 CLJ 435. See too Albert Kocourek, ‘The Hohfeld System’ (1920) 15 Ill L Rev 24; Albert Kocourek, ‘Various Definitions of Jural Relation’ (1920) 20 Col L Rev 394; Albert Kocourek, ‘Rights in Rem’ (1920) 68 Pa L Rev 322; Albert Kocourek, ‘Plurality of Advantage and Disadvantage in Jural Relations’ (1920) 9 Mich L Rev 47.

⁷¹ On the permanent separation between law and morals, in the so-called Hart-Fuller debate, see note 11.

must demonstrate their legal standing to make the claim.⁷² Such standing to proceed could conceivably be restricted to recognised political entities, such as political parties, rather than a plethora of individuals giving rise to a flood of claims.⁷³

The legal application of these principles to the illustration of electoral fraud should identify the basis for the government being responsible for the prosecution of electoral fraud; the importance of the electoral interest which the government failed to protect, and the standing of political parties, classes of persons or other private citizens to invoke that governmental failure to bring a claim.

Illustration: Applying Proportionality to Discriminatory Voting Requirements in the U.S.

To return to an earlier illustration, it is arguable that governments, in devising laws governing the conduct of elections, have at least an affirmative responsibility to balance the political and social benefits of enacting laws restricting the voting rights of prisoners and parolees on grounds that, while not formally discriminating against African Americans, those laws have a disproportionately greater impact on them. Such a responsibility arguably extends beyond the broader policy consideration as to whether denying prisoners *en masse* the “democratic” right to vote is discriminatory in relation to those entitled to vote.⁷⁴

This is not to claim that federal and state governments in the U.S. are required to exercise affirmative responsibilities that would protect the democratic rights of a minority of aspirant voters, which are conceivably at variance with the democratic rights of a greater number of others who are entitled to vote because they are not incarcerated or parolees at the time of voting. For example, imposing an affirmative responsibility on governments to enact voter ID laws, or laws requiring voters to show a photographic identification at the polls, can root out fraud arising from the in-person impersonation of a voter.⁷⁵ Such laws however, can deny voters’ rights to the four to eight percent of persons in most U.S. states who do not have proper identification and who are not identified with voter fraud or related voting irregularities.⁷⁶

Determining the nature of government responsibility in such cases is not self-evident, particularly in light of competing normative implications arising from voter ID laws. For example, it is plausible to maintain that state governments are legally responsible to pass voter ID laws to protect important political and social interests in “electoral integrity”, as the Supreme Court recently held in *United States v Texas*. In this case the Supreme Court allowed Texas to enforce its voter identification law.⁷⁷ However, it is also plausible for governments not to legislate in this way if there is limited evidence of such fraud and if such an enactment is more likely to undermine, rather than promote, the sanctity of voting rights in a democracy, such as by having a discriminatory effect on minorities. As Justice Ginsburg argued in her dissenting opinion in *United States v Texas*: “The greatest threat to public confidence in elections in this case is the prospect of enforcing a purposefully discriminatory law, one that likely imposes an unconstitutional poll tax and risks denying the right to vote to hundreds of thousands of eligible voters.”⁷⁸

Despite the absence of a correlative legal duty to the rights of prospective voters, in choosing whether, when, and how to regulate voter identification, governments can be expected to balance

⁷² See (n 57) and accompanying text.

⁷³ *ibid.*

⁷⁴ See eg Brenda Wright and Lisa J Danetz, ‘National Voting Rights Institute, Brief, Amici Curiae in Support of Plaintiff-Appellant Jalil Abdul Muntaqim, a/k/a/ Anthony Bottom, Urging Reversal of the District Court, On Behalf of National Voting Rights Institute and Prison Policy Initiative’ (*National Voting Rights Institute*) <<http://www.prisonpolicy.org/reports/muntaqim.html>> accessed 20 May 2015.

⁷⁵ But see Joshua A Douglas, ‘Procedural Fairness in Election Contests’ (2013) 88 Ind LJ 1.

⁷⁶ See Kevin J Coleman, Eric A Fischer and L Paige Whitaker, ‘Voter Identification Requirements: Background and Legal Issues’ (*Congressional Research Service*, 10 November 2014). <<http://library.law.uiowa.edu/files/library.law.uiowa.edu/files/R42806.pdf>> accessed 20 May 2015; Daniel P Tokaji, *The E-book on Election Law: An Online Reference Guide* (Moritz College of Law 2013).

⁷⁷ See *United States v Texas*, et al.; *Veasey v. Perry*, 574 U.S. __ 2014, 6–7. The Law in Texas required that voters show a state-issued driver’s license, personal ID card or concealed handgun license, or a U.S. citizenship certificate, military ID card or passport. The majority opinion written by Justice Antonio Scalia is available at Justice Antonio Scalia, ‘Veasey v Perry: Emergency Application to Vacate Fifth Circuit Stay of Permanent Injunction’ (*Supreme Court of the United States*) <<http://www.bradblog.com/wp-content/uploads/Texas-voter-ID-Veasey-stay-applic-10-15-14.pdf>> accessed 20 May 2015.

⁷⁸ 574 U.S. __ 2014, see Justice Ginsburg (dissenting), ‘Veasey v Perry: On Application to Vacate Stay’ (*Supreme Court of the United States*, 18 October 2014) <http://www.supremecourt.gov/opinions/14pdf/14a393_08m1.pdf> accessed 20 May 2015.

the costs and benefits of passing voting laws in exercising their affirmative responsibilities.⁷⁹ A government, for example, may act responsibly in passing an ID law requiring photo IDs to avoid voters being impersonated, if doing so does not disproportionately disenfranchise more voters who do not have IDs and are not associated with voter fraud. The governmental responsibility in each case, arguably, is to balance the social benefits and harm in determining whether and if so, in what manner to enact voter ID laws. Governments that engage in such an assessment along public interest lines, arguably, exercise their legal responsibilities in the absence of a *per se* duty to do so.⁸⁰

VII. Remedies: Claims Brought by Individuals

Construed expansively, an individual citizen's violation of a duty owed to the state constitutes a violation of the rights of everyone within that state. In effect, the criminal justice system imposes duties on everyone to not engage in such violations; it gives rise to a duty owed to the state broadly construed, including to the citizenry as a whole that is negatively impacted by those violations. The government acts as a sovereign on behalf of the state, including all citizens. Its powers include the right of criminal prosecution and enforcement. According to a formal construction of governmental rights or powers and duties, those powers cannot be exercised other than through duly constituted constitutional, legislative, executive, or judicial action.⁸¹ Individuals therefore, do not ordinarily have the right or power to act other than through these governmental authorities.⁸²

The first problem relates to the conceptual nature of correlative rights and duties. If the citizenry as a community at large enjoys the right to vote in free elections by not being subject to electoral fraud or other irregularities, then it is logical, under a theory of correlative rights and duties, for the government, in representing all citizens, to redress that fraud rather than rely on individuals or groups of citizens to do so instead.⁸³ Alternatively conceived, citizens do not have *per se* legal rights of action to redress those alleged fraudulent acts criminally however much they may have civil rights of action against anyone, including the government, who violates their individual rights.⁸⁴

In functional terms, insofar as correlative rights or powers and duties accord with sovereign powers to a government, that government has the right and, indeed, the power to decide when to prosecute such acts as electioneering fraud. The criminal justice system, however independent an arm of government it may be, is sometimes built upon the conceptual and functional foundation of governments presenting cases to the courts for public prosecution. This is notably so in the United States and Switzerland where private prosecutions are exceptional, in contrast to Germany and France where they are more readily available.⁸⁵ Private prosecutions have limited scope in Commonwealth jurisdictions.⁸⁶

The second problem is functional because it conceives of how individual citizens can impose a duty upon the government, an official or individual who engages in electioneering fraud. It is functionally difficult to determine how an individual can bring a private action against another individual, such as an electoral candidate or an official, for engaging in such fraud, other than through the government representing voters at large in prosecuting offenders criminally for electioneering fraud. The fact that private rights of action sometimes *are* available, such as through a *quo warranto* writ in elections in the United States, merely attests

⁷⁹ A government in so acting responsibly is not strictly acting under a duty because citizens do not ordinarily have the legal right to compel the government not to pass voting ID laws, notwithstanding their democratic right to vote. The distinction is between a citizen having a *per se* right to vote, but still being subject to requirements in relation to its exercise including being disqualified for not having a requisite ID.

⁸⁰ But see David Schultz, 'Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement' (2008) 34 Wm Mitchell L Rev 484. See further Section VI.

⁸¹ On the declining significance of private prosecutions in criminal cases, see Jon Roland, 'Private Prosecutions' (*The Constitution Society*, 25 September 1995) <<http://constitution.org/uslaw/pripro01.htm>> accessed 20 May 2015; Roger A Fairfax, Jr, 'Delegation of the Criminal Prosecution Function to Private Actors' (2009) 65 Yale LJ 209.

⁸² On the public prosecution system in the United States and its comparison to prosecutions in some European countries, see Gwladys Gilliéron, *Public Prosecutors in the United States and Europe: a Comparative Analysis with Special Focus on Switzerland, France, and Germany* (Springer 2014).

⁸³ See Andrew Sidman, 'Outmoded Concept of Private Prosecution' (1975) 25 Am U L Rev 754; Irving R Kaufman, 'Criminal Procedure in England and the United States: Comparisons in Initiating Prosecutions' (1980) 49 Fordham L Rev 26; Robert M Ireland, 'Privately Funded Prosecution of Crime in the Nineteenth-Century United States' (1995) 39 Am J Legal Hist 43.

⁸⁴ "Ordinarily" is intended to recognise variations among national legal systems over the rights of citizens to prosecute such cases, see Section VII.

⁸⁵ Gwladys Gilliéron (n 84).

⁸⁶ On the function of the Director of Public Prosecution in the United Kingdom and Australia respectively, see Helen Fenwick and Richard Glance, *Q&A Civil Liberties & Human Rights 2013–2014* (Routledge 2013); Christopher Thomas Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (NSW Thomas Reuters 2014).

to a statutory determination that governments may be declared functionally responsible, beyond formal legal duties, to redress alleged electoral irregularities in elections.⁸⁷

The third problem is that individuals may lack the right to enforce the duties owed by others to not engage in electioneering fraud as a preserve of the criminal justice system. The citizenry as a collective ought to have that right through a constitutional or legal challenge, not limited to actions by political parties, to prosecute those responsible for election rigging, such as already exists in some U.S. states.⁸⁸ In these cases there would still need to be some commensurability and proportionality between the rights of political parties or other citizens' groups to bring such challenges against a ruling party, or constituents of it, for violating the electoral process. Such a challenge is conceivable under the Federal Corrupt Practices Act in the United States⁸⁹ which is directed at redressing deficiencies in election contest provisions in state law.⁹⁰

The fourth problem is the prospect of a plethora of frivolous and vexatious legal actions including those founded under the guise of political opportunism in which private prosecution is used to sublimate governments or render them dysfunctional.⁹¹ This concern inheres in public interest litigation; it can also be addressed by requiring claimants to establish viable causes of action and standing to prosecute claims as *a priori* prerequisites to public action.⁹² It is, nevertheless, a valid concern.

A related problem is that courts may be reluctant to hear private prosecutions of voting irregularities on grounds that the matters are subject to public prosecution, including through established public offices, such as the Commissioner for Elections who is responsible for scrutinising elections in the United States, as in Canada.⁹³

Further challenging is that Congressional – or Parliamentary – governance, functioning along party lines, is sometimes ill-suited to redress allegations of fraud by a ruling party, its officials, or other alleged offenders purporting to act in its interests. These concerns are not purely academic. They are reflected in electoral concerns raised in the United States in 2014 relating to large-scale voting by non-citizens;⁹⁴ bribery and corruption by two Democratic state legislators;⁹⁵ early ballot irregularities;⁹⁶ illegal incentives to distort voting preference;⁹⁷ and improper use of ID and registration documents.⁹⁸ Such concerns about electoral fraud also have a lengthy history in both developing and developed countries and are by no means limited to the United States.⁹⁹

Also problematic is expecting a government to pass laws directed at scrutinising electoral practice. Such an approach poses political challenges, especially when the investigation is likely to cause the government political damage at the polls.¹⁰⁰ Its power to identify abuses of the electoral process is also unavoidably

⁸⁷ See further Section VIII.

⁸⁸ Hugh M Lee, 'An Analysis of State and Federal Remedies for Election Fraud, Learning From Florida's Presidential Election Debacle' (2001) 63 U Pitt L Rev 159.

⁸⁹ 42 U.S.C. § 1983.

⁹⁰ Lee (n 90) 192–214.

⁹¹ *ibid*, a response may be that arriving at makeshift judicial or other solutions to avoid political crises may well be the source of further crises; Ron Hirschbein, *Voting Rites: the Devolution of American Politics* (Praeger 1999).

⁹² On the scope and limits of public interest litigation, see Karen O'Connor and Lee Epstein, 'Rebalancing the Scales of Justice: Assessment of Public Interest Law' (1984) 7 Harv J L & Pub Pol'y 483; Jeremy Rabkin, 'Public Interest Law: Is it Law in the "Public Interest"?' (1985) 8 Harv J L & Pub Pol'y 341; Lee Edwards (ed), *Bringing Justice to the People: the Story of the Freedom-Based Public Interest Law Movement* (Heritage Books 2004); Howard M Erichson, 'Doing Good, Doing Well' (2004) 57 Vand L Rev 2087; Ann Southworth, 'Conservative Lawyers and the Contest over the Meaning of Public Interest Law' (2005) 52 UCLA L Rev 1223–1278; Scott L 'Cummings & Ingrid v. Eagly, After Public Interest Law' (2006) NW U L Rev 1251.

⁹³ See further (n 22) and (n 57).

⁹⁴ Reported between October 30 2014 and November 27 2014. See 'Voter-Registration Fraud in the US: Documented' (*Discover the Networks*) <<http://www.discoverthenetworks.org/viewSubCategory.asp?id=2216>> accessed 20 May 2015. See too, Parts 2–3, top of web link, for additional incidences of election fraud.

⁹⁵ *ibid*, reported on December 19 2014.

⁹⁶ *ibid*, reported on August 25 2014.

⁹⁷ *ibid*, reported on October 29 2014.

⁹⁸ *ibid*, reported on October 22 2014, April 1 2014 and March 25 2014. Threats to voting systems, not limited to electoral fraud, are available at the website of the National Institute of Standards and Technology, see 'NIST and the Help America Vote Act (HAVA)' (*National Institute of Standards and Technology*, 23 February 2009) <<http://www.nist.gov/itl/vote/index.cfm>> accessed 22 May 2015.

⁹⁹ See Hugh M Lee, 'An Analysis of State and Federal Remedies for Election Fraud, Learning From Florida's Presidential Election Debacle' (2001) 63 U Pitt L Rev 159; Daniel P Tokaji, 'The Paperless Chase: Electronic Voting and Democratic Values' (2005) 73 Fordham L Rev 1711; Steven F Huefner, 'Remedying Election Wrongs' (2007) 44 Harv J Legis 265, 278–9.

¹⁰⁰ On the 1999 attempt to amend the Canada Elections Act, see James R Robertson, 'Bill C-2: The Canada Elections Act' (*Government of Canada Publications*, 15 October 1999). <<http://publications.gc.ca/Collection-R/LoPBdP/LS/362/362c2-e.htm>> accessed 20 May 2015.

imperilled by conflicts of interest in regulating itself and its officials, while its public accountability through subsequent elections lack immediate effect.

Further, any system purporting to ensure that governments act responsibly can be oversold. For example, *quo warranto* prerogative writs are potentially overbroad in their scope if they are construed to mean: “We the people have the ability to take charge of our government through the use of *Quo warranto*, [that] this was given to us by our founding fathers for the purpose of removing a power holding office who we deem harmful to our country.”¹⁰¹ *Quo warranto* prerogative writs were and are not intended as commonplace instruments for the unbridled use of electorates seeking to remove unpopular governments.¹⁰²

This is not to claim that the federal and state governments have avoided their responsibilities in redressing voting irregularities generally. The contrary is evident. For example, all fifty U.S. states have adopted “election contest” provisions by which either the losing candidate or a voter can challenge election results based on some irregularity that allegedly altered the election outcome.¹⁰³ In such cases, the candidate and, particularly, an aggrieved voter may lack a pre-existing legal right giving rise to a correlative governmental duty to redress that alleged election irregularity. This extends beyond the duty of state governments to act responsibly in empowering losing candidates or voters to apply to courts or other tribunals to resolve alleged election irregularities.¹⁰⁴

VIII. Remedies: Responsible Government Action

The *quo warranto* prerogative writ does illustrate how a court or tribunal can remedy the failure of members of government to act responsibly following their election to office. A few states employ the common law prerogative writ of *quo warranto*, which allows a court or a tribunal to oust someone from office if the person is serving “illegally.”¹⁰⁵ This *quo warranto* writ is also available at any time, even long after the election, if there is evidence that the person who so acted is improperly holding office.¹⁰⁶ *Quo warranto* prerogative writs are rarely invoked in practice. An example is to oust an elected member of the legislature for having breached election laws at the time of his or her election. *Quo warranto* writs however, can remedy irresponsible governance arising from voting irregularities that potentially threaten the integrity of the voting system.¹⁰⁷

Further, there are various U.S. federal and state bodies that are responsible for criminal investigations that focus on prosecuting election crimes. These bodies monitor elections and bring criminal prosecutions if they find evidence of criminality, such as voters’ fraud.¹⁰⁸

¹⁰¹ See Josey Wales, ‘Quo Warranto.PDF: Big Trouble for Every Federal Judge and all 9 US Supreme Court Justices’ (Video) (*Before It’s News*, 13 November 2014) <<http://beforeitsnews.com/politics/2014/11/quo-warranto-pdf-big-trouble-for-every-federal-judge-all-9-us-supreme-court-justices-video-2664604.html>> accessed 20 May 2015.

¹⁰² See eg Douglas (n 75); Coleman, Fischer and Whitaker (n 76).

¹⁰³ Douglas (n 75).

¹⁰⁴ *ibid* 4, see too Barry H Weinberg, *The Resolution of Election Disputes: Legal Principles that Control Election Challenges I* (2nd edn, IFES 2008). Election contest provisions also exist in foreign jurisdictions, such as in the UK, see eg, *Watkins v Woolas* [2010] EWHC 2702 (QB) [3] (Eng.), available at (*British and Irish Legal Information Institute*, 5 November 2010) <<http://www.bailii.org/ew/cases/EWHC/QB/2010/2702.html>> accessed 20 May 2015.

¹⁰⁵ See Edward Jenks, ‘The Prerogative Writs in English Law’ (1922) 32 *Yale LJ* 523. On the nature and application of *quo warranto* remedies to voting, see George W McCrary, *A Treatise on the American Law of Elections* (4th edn, Callaghan 1897) 279–429; Steven F Huefner, ‘Just How Settled Are the Legal Principles that Control Election Disputes?’ (2009) 8 *Election LJ* 233, 235–6; Douglas (n 75) 67–71.

¹⁰⁶ See eg *Hussey v Say*, No. CAAP-13-0002255 (April 24, 2014) on a petition for a writ of *quo warranto* before the Hawaii Intermediate Court of Appeals, of a long standing House member in the Hawaii legislature who represented one district and is registered to vote there while living (with his family) in another district. The Circuit Court dismissed the challenge. However, the Court of Appeals held that this was a challenge to the representative’s qualifications under the Constitution, and that courts “are the ultimate interpreters of the Constitution.” at 6, see Justice Foley, ‘Hussey v Say’ (*Intermediate Court of Appeals of the State of Hawaii*, 23 April 2014) <http://www.courts.state.hi.us/docs/opin_ord/ica/2014/April/CAAP-13-0002255ada.pdf> accessed 20 May 2015.

¹⁰⁷ See section IV.

¹⁰⁸ See eg Neb. Rev. Stat. Ann. § 32–1103 (Lexisnexis 2008); Mo. Ann. Stat. §§ 115.555, 561 (West 2003); N.J. Stat. Ann. § 19:29–5 (West 1999); Mont. Code Ann. § 13–36–207 (2011); Ga. Code Ann. § 21–2–526(a) (2008); Wash. Rev. Code Ann. § 29a.68.100 (West 2005); N.J. Stat. Ann. §§ 19:29–5–6; Ohio Rev. Code Ann. § 3515.12 (Lexisnexis 2012); Tex. Elec. Code Ann. § 221.004 (West 2010); Wash. Rev. Code Ann. § 29a.68.050 (West 2005); 10 Ill. Comp. Stat. Ann. 5/23–1.1a (West 2010); Conn. Gen. Stat. 9–325 (West 2009); La. Rev.Stat. Ann. § 1409(g), (h) (2012); N.J. Stat. Ann. § 19:29–11 (West 1999); N.M. Stat. Ann. § 1–14-5 (West 2003); Kan. Stat. Ann. §§ 25–1443-1450 (2000); Minn. Stat. Ann. §§ 209.045, .09(2),10(4) (West 2009); Minn. Stat. Ann. § 209.09(1); Ala. Code § 17–16-62 (Lexisnexis 2007); Kan. Stat. Ann. § 25–1450; Minn. Stat. Ann. § 209.09(1); N.D. Cent. Code § 16.1–16-09 (2009); Utah Code Ann. § 20a-4–406(l)(b) (Lexisnexis 2010); Wis. Stat. Ann. § 9.01(6), (9) (West 2004). See generally, Steve Bickerstaff, ‘Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election’ (2001) 29 *Fla St U L Rev* 425, 433–4; Barry H Weinberg (n 104) 121–5; Douglas (n 75) 35–50.

Governments are also constantly in search of new ways to improve the integrity of the voting system, such as by devising new methods of detecting voting irregularities in electronic voting systems.¹⁰⁹

What is suspect, however, is an expansive conception of government sovereignty in which governmental powers such as over the conduct of elections is presented as absolute, indivisible, and inalienable.¹¹⁰ Such a notion is overbroad in both its nature and application. It undermines the governments' accountability to voters for not holding the government responsible through electoral laws, for using inadequate methods of detecting voting irregularities, and for failing to redress systemic discrimination in voting laws in order to protect individual rights that are not in need of such protection.

This concern is all the more justified given the range of potential election frauds that are perpetrated, in multiple countries in recent history. Examples include: governments manipulating electoral districts and demographics; disenfranchising voters or enfranchising unqualified voters; providing misleading and confusing information to voters; attempting to intimidate voters; ballot stuffing; tampering with electronic voting machines; misuse of proxy votes; and destroying or otherwise invalidating ballots, among other illegal acts.¹¹¹

IX. Conclusion

This article critiques the expansive nature of governmental powers and the correlative duty of citizens to comply with those powers. It maintains that, should federal and state governments fail to exercise their powers, they are not ordinarily subject to duties due to the absence of correlative rights of citizens to compel governmental action. Citizens have limited recourse, other than through subsequent elections, to compel governments to protect their electoral rights, such as through limitedly available private prosecutions, or costly civil suits. In response, this article extends the conception of legal responsibilities to compel governments to govern fairly and effectively in the democratic interest.

One can conceive of the responsibilities of governments, such as to prosecute electoral offenders, as legal duties arising from constitutions, legislation or judicial decisions, in a similar manner to the duties imposed on employers by employment contracts, sanctioned by legislation, to protect the rights of employees against workplace.¹¹² However, such electoral laws may fail to delineate public rights that are correlative to public duties owed by governments to the citizenry, or to groups or classes within that citizenry. Moreover, the conception of sovereignty, in ascribing powers to governments to determine when to exercise their electoral powers within a constitutional democracy, may unduly insulate governments from corresponding legal duties to act in the public interest.¹¹³

In arguing for imposing public responsibilities on governments, the purpose is not to encourage, nor indeed facilitate, a flood of public interest claims by a myriad of individual citizens against the government, but to promote on-going accountability in the process of governance itself. Actions against governments for engaging in, or tolerating, election irregularities ought to be subject to transparent requirements. However, citizens challenging such governmental action ought also to act responsibly, including by establishing a justiciable cause of action, demonstrating standing, and adducing evidence that a claim is not frivolous or vexatious. This article has argued that, by imposing such public responsibilities on governments, elected offices, and citizens alike, electoral systems can redress restrictive conceptions of correlative rights and duties as well as overbroad notions of governmental sovereignty. The foundation of such responsibilities is to ensure neither more nor less than fairness in the conduct of public elections.

Competing Interests

The author declares that they have no competing interests.

¹⁰⁹ See Dimitrios Zissis, *Design, Development, and use of Secure Electronic Voting Systems* (IGI Global 2014).

¹¹⁰ See Cohen (n 2) and Sampford and Thakur (n 2).

¹¹¹ On electoral "irregularities" associated with voting technology, see Roy G Saltman, *The History and Politics of Voting Technology* (Palgrave MacMillan 2006).

¹¹² An example would be workplace bullying. Compare, by parallel reasoning, the responsibility of employers and employees for workplace bullying and corruption. See Kara A Arnold and Kathryn E Dupré, 'Interpersonal Targets and Types of Workplace Aggression as a Function of Perpetrator Sex' (2011) 23 *Employ. Respons. Rights J* 163; Margaret H Vickers, 'Towards Reducing the Harm: Workplace Bullying as Workplace Corruption—A Critical Review' (2014) 26 *Employ. Respons. Rights J* 95.

¹¹³ See Section II and IV.

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