

# Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown

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## *I. Introduction*

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In the 2004 presidential election, the United States came much closer to electoral meltdown, violence in the streets, and constitutional crisis than most people realize. Locked in an extremely tight race for the presidency, incumbent Republican President George W. Bush and his Democratic challenger, United States Senator John Kerry, focused their attention on winning a few "battleground" states, most importantly, the State of Ohio. It turned out that under the Electoral College system the winner of Ohio's twenty electoral votes was to become the next president.<sup>1</sup> Preliminary results on election night showed President Bush with an approximate 136,000-vote lead over Kerry<sup>2</sup> out of approximately 5.5 million votes cast, with approximately 153,000 provisional ballots<sup>3</sup> yet to be considered for inclusion in the totals.

Facing these numbers—a 136,000-vote lead with 153,000 votes to be counted—Kerry lawyers "did the math"<sup>4</sup> and concluded that the election was beyond the "margin of litigation."<sup>5</sup> While Democrats had identified many problems with the way the election was conducted in Ohio, it was hard to come

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Loyola Law School's librarians for library assistance.

1. Ford Fesseden & James Dao, *Ohio Remains Battleground as Late Voting Delays Count*, N.Y. TIMES, Nov. 3, 2004, at P1.

2. CNN, *Bush Camp Claims Certainty of Victory*, at <http://www.cnn.com/2004/ALLPOLITICS/11/02/election.main/index.html> (Nov. 3, 2004).

3. "A provisional ballot is a conditional ballot that enables an eligible voter to participate in an election when, due to an administrative error or for some other reason, [the voter's name is] not listed on the voting rolls." Daniel Tokaji, *Provisional Voting: Federal Law and Ohio Practice*, in THE E-BOOK ON ELECTION LAW (last visited June 13, 2005), at [http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures\\_rules\\_01.html](http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_rules_01.html) (on file with the Washington and Lee Law Review). On November 3, the day after Election Day, it was not clear precisely how many provisional ballots were waiting to be counted in Ohio. CNN estimated the number at close to 175,000, but that it could have been as high as 250,000. See CNN, *supra* note 2. Eventually, Ohio reported 158,642 provisional ballots issued, and 123,548 valid provisional votes counted. OHIO SECRETARY OF STATE, 2004 HISTORICAL ELECTION DATA, PROVISIONAL RESULTS, at <http://serform.sos.state.oh.us/sos/results/2004/gen/provisional.htm> (last visited June 13, 2005) (on file with the Washington and Lee Law Review). States varied widely in their treatment of provisional ballots. See ELECTIONLINE.ORG, BRIEFING: SOLUTION OR PROBLEM? PROVISIONAL BALLOTS IN 2004, 8, 10–17 (Mar. 2005), at <http://electionline.org/site/docs/pdf/ERB.10.Provisional.Voting.3.17.2005.a.pdf> (summarizing the treatment of provisional ballots in the states and highlighting the differences).

4. Adam Liptak, *In Making His Decision in Ohio, Kerry Did the Math*, N.Y. TIMES, Nov. 4, 2004, at A10.

5. The term appears to have originated with John Fund in 2002. See John H. Fund, *Have You Registered to Sue?*, WALL ST. J., Nov. 6, 2002, at A22 ("If the number of provisional ballots exceed the margin of victory in the Senate race, you can bet a lawyer will echo the Florida 2000 argument that 'every vote must count,' regardless of eligibility. In future, winners will have to hope their margins are beyond 'the margin of litigation.'").

up with a legal theory that could capture enough votes so as to swing the results in Ohio, and therefore in the country, to Kerry. The morning after Election Day, Kerry conceded the race and agreed that Bush was victorious in his re-election quest.<sup>6</sup> After the provisional ballots were counted, Ohio's final election results showed Bush finishing with 2,859,768 votes, compared to Kerry's 2,741,167,<sup>7</sup> a difference of 118,601 votes.

Suppose that the initial election night difference between Bush and Kerry in Ohio had been 36,000 votes instead of 136,000 votes, a result that would have required less than a 2% swing among Ohio voters toward Kerry compared with the actual results. In such circumstances, the Ohio—and national—election would have been well within the margin of litigation, and it would have gotten ugly very quickly.

By all accounts, this presidential race was exceedingly partisan in Ohio and throughout the country. Responding to the first presidential meltdown in recent memory—Florida 2000—Democrats and Republicans in Election 2004 had dispatched "armies of lawyers" to litigate controversies over the rules of engagement.<sup>8</sup> In Ohio, Democrats and their allies were already involved in litigation before Election Day over numerous issues, some stemming from discretionary decisions made by Ohio Secretary of State Kenneth Blackwell. Blackwell, a Republican elected to the office of secretary of state, co-chaired President Bush's re-election campaign committee in Ohio, and many Democrats viewed him with distrust. In his capacity as the state's Chief Elections Officer, he had decided, among other things, that provisional votes cast by a voter in the "wrong precinct" would not be counted and that voter registration forms printed on paper not of sufficient weight were to be rejected (a decision he later reversed).<sup>9</sup>

Republicans, meanwhile, had made their own plans for using election law for political advantage. They had announced shortly before Election Day that they planned to challenge 35,000 registered Ohio voters, which led to

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6. See Liptak, *supra* note 4 (discussing Kerry's decision to concede defeat).

7. OHIO SECRETARY OF STATE, 2004 HISTORICAL ELECTION DATA, at <http://www.Sos.state.oh.us/sos/results/2004/gen/pres.htm> (last visited June 13, 2005) (on file with the Washington and Lee Law Review).

8. Susan Greene et al., *Legal Eagles Will Eye Voting: 'Armies of Lawyers' Tapped*, DENV. POST, Oct. 17, 2004, at C1.

9. The Democrats' allegations against Blackwell are discussed in great detail in a report issued by the House Judiciary Committee Democratic staff at the request of Representative John Conyers. HOUSE JUDICIARY COMMITTEE DEMOCRATIC STAFF, PRESERVING DEMOCRACY: WHAT WENT WRONG IN OHIO (Jan. 5, 2005) [hereinafter PRESERVING DEMOCRACY], available at [http://www.house.gov/judiciary\\_democrats/ohiostatusrept1505.pdf](http://www.house.gov/judiciary_democrats/ohiostatusrept1505.pdf).

litigation making it all the way to the Supreme Court in the hours before the polls opened on Election Day.<sup>10</sup>

Democrats had been litigating before Election Day to overturn some of Blackwell's decisions, and there was much more potential litigation in light of events on Election Day.<sup>11</sup> Besides concerns about long lines at the polls—some longer than eight hours<sup>12</sup>—one of the more promising suits for Democrats concerned the lack of uniform standards for Ohio county election judges to use in determining whether to accept a provisional ballot.<sup>13</sup> At issue was whether such a lack of uniformity violates the Fourteenth Amendment's Equal Protection Clause under the Supreme Court's *Bush v. Gore*<sup>14</sup> decision, the case that ended the Florida recount in 2000. There also were allegations that Democratic and minority voters in Ohio faced long lines to vote because of a deliberate decision to provide an inadequate number of voting machines in predominantly Democratic and minority areas.<sup>15</sup> Any manual Ohio recount would have required bipartisan election judges to discern the intent of voters, many of whom voted using the now-infamous punch cards with their "hanging chads."<sup>16</sup> And there was a great deal of concern over the integrity of the vote

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10. James Dao, *Officials Say 2 Court Rulings Will Halt G.O.P. Challenges*, N.Y. TIMES, Oct. 30, 2004, at A14. For more details on this aspect of the Ohio controversy, see *infra* Part III.D.

11. See Election Law @ Moritz, at <http://moritzlaw.osu.edu/electionlaw/litigation-archive.html> (last visited June 13, 2005) (listing the Ohio litigation related to the 2004 presidential election).

12. Daniel Tokaji, *The 2008 Election: Could It Be a Repeat of 2000?*, FINDLAW, Nov. 30, 2004, at [http://writ.news.findlaw.com/commentary/20041130\\_tokaji.html](http://writ.news.findlaw.com/commentary/20041130_tokaji.html) (on file with the Washington and Lee Law Review).

13. Complaint, *Schering v. Blackwell*, No. 1:04-cv-755 (S.D. Ohio), at <http://moritzlaw.osu.edu/electionlaw/docs/ohio/041102-Schering-complaint.pdf> (last visited June 13, 2005).

14. *Bush v. Gore*, 531 U.S. 98 (2000).

15. See PRESERVING DEMOCRACY, *supra* note 9, at 24–31 (collecting evidence and suggesting that the misallocation of voting machines "perhaps borders on fraud").

16. Such a recount apparently would not have presented as difficult a situation as the one faced by election judges in Florida 2000. In Ohio, the law provided a clearer standard to judge the intent of the voter. Ohio Revised Code Section 3515.04 requires that at least two corners of the chad be detached: "If a county used punch card ballots and if a chad is attached to a punch card ballot by three or four corners, the voter shall be deemed by the board not to have recorded a candidate, question, or issue choice at the particular position on the ballot, and a vote shall not be counted at that particular position on the ballot in the recount." Moreover, the differential undervote rate (i.e., the rate of votes for which there is no recorded vote for an office—in this case, for a presidential candidate) between punch cards and other systems was less pronounced. In Florida 2000, the undervote rate for punch card machines was 3.92%, compared to a 1.43 % rate for optical scan machines. *Bush v. Gore*, 531 U.S. 98, 126 n.4 (Stevens, J., dissenting). In contrast, the Ohio 2004 residual rate in punch card counties was about 1.84%, compared to

counting itself, concern that only intensified a few days after the vote when elections officials revealed that an error with an electronic voting system gave President Bush 3893 extra votes in suburban Columbus.<sup>17</sup> In the days after the election, the Internet was rife with rumors of a stolen election and vote fraud.<sup>18</sup>

In this intense partisan atmosphere and amid controversies over the fairness of election administration, it is not hard to imagine public protests and even civil disturbance if these issues—and therefore the fate of the presidency—once again rested with the courts, as had occurred in Florida 2000.<sup>19</sup> Indeed, around the time of the U.S. presidential election, there also was a vote for president of the Ukraine, and street protests there following allegations of fraud likely influenced the decision of Ukraine's highest court to order a new election.<sup>20</sup> In Election 2004, both Democrats and Republicans used the Ukraine example to raise allegations of fraud by the opposing party: Democrat John K. Galbraith wrote that "if the Ukraine standard were applied to Ohio—as it should be—then the late lamented U.S. election certainly was stolen."<sup>21</sup> In Washington State, which had its own controversy over a contested razor-thin election for governor, Republican protesters who did not want the state supreme court to order 573 erroneously rejected ballots from Democratic-leaning King County to be counted, held signs in front of the courthouse reading "Welcome to Ukraine."<sup>22</sup> The real analogy to Ukraine was

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1.25% for votes cast using electronic voting machines and 1.01% for votes cast using optical scan machines. Daniel P. Tokaji, *How Did Ohio's Voting Equipment Fare in 2004?*, Election Law @ Moritz, at <http://moritzlaw.osu.edu/electionlaw/comments/2005/comment0208.html> (Feb. 8, 2005) (on file with the Washington and Lee Law Review); see also Roy A. Schotland, *In Bush v. Gore: Whatever Happened to the Due Process Ground?*, 34 LOY. U. CHI. L.J. 211, 224 n.68 (2002) (noting Ohio as among other states with "lower-risk" intent of the voter standards compared to Florida's standard).

17. John McCarthy, Associated Press, *Voting Machine Error Gives Bush 3,893 Extra Votes in Ohio*, at <http://sfgate.com/cgi-bin/article.cgi?f=/news/archive/2004/11/05/politics/1149EST0515.DTL> (Nov. 5, 2004) (on file with the Washington and Lee Law Review).

18. Rick Klein, *Internet Buzz on Vote Fraud Is Dismissed*, BOSTON GLOBE, Nov. 10, 2004, at A1.

19. For a good introduction to the legal issues in the Florida controversies, see ABNER GREENE, *UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY* (2001).

20. Peter Finn, *Refusing to Accept Loss in Election, Ukrainian Premier Looks to Courts*, WASH. POST, Dec. 28, 2004, at A16.

21. James K. Galbraith, *Democracy Inaction*, SALON, at [http://archive.salon.com/opinion/feature/2004/11/30/ukraine\\_election/index\\_np.html](http://archive.salon.com/opinion/feature/2004/11/30/ukraine_election/index_np.html) (Nov. 30, 2004) (on file with the Washington and Lee Law Review).

22. CBS News, *Wash. State Winner by 8 Votes?*, at <http://www.cbsnews.com/stories/2004/12/22/politics/main662582.shtml> (Dec. 22, 2004) (on file with the Washington and Lee Law Review).

not in the presence of massive fraud in the election system but rather in the possibility that street action and political protest could have affected the outcome of the presidential election or at least harmed the legitimacy of the electoral process. The very basis of our democratic system of government—the use of free and fair elections for the peaceful transfer of power from one administration to the next—was called into question by concerns over the rules for the casting and counting of votes and frequent, if often unwarranted, allegations of fraud.

There seems little doubt that such allegations of fraud are adversely affecting Americans' views of the electoral process. According to a post-election NBC News/*Wall Street Journal* poll, more than a quarter of Americans worried that the vote-count for president in 2004 was unfair.<sup>23</sup> And there is a partisan and racial dimension to the issue. John Harwood reported from the same survey results that just "one-third of African-Americans call the vote 'accurate and fair,' while 91% of Republicans do."<sup>24</sup> A similar partisan divide developed in a post-election Florida poll.<sup>25</sup> It is hardly surprising that the winners have more faith in the process than the losers. But, just before the election, a Rasmussen Reports poll showed 58% of American voters believing there was "a lot" or "some" fraud in American elections.<sup>26</sup>

These data are volatile, but they show that significant numbers of the public—many more Democrats than Republicans—have concerns over the national election process. Figure 1 shows the results of a National Election Studies time series question on views of the fairness of American elections.<sup>27</sup> In 1996, about 9.6% of the public (7.5% of Democrats and 12% of

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23. NBC News/*Wall Street Journal* Poll, Study #6050, p. 11 (question 8), available at <http://online.wsj.com/public/resources/documents/poll20041217.pdf> (last visited June 13, 2005).

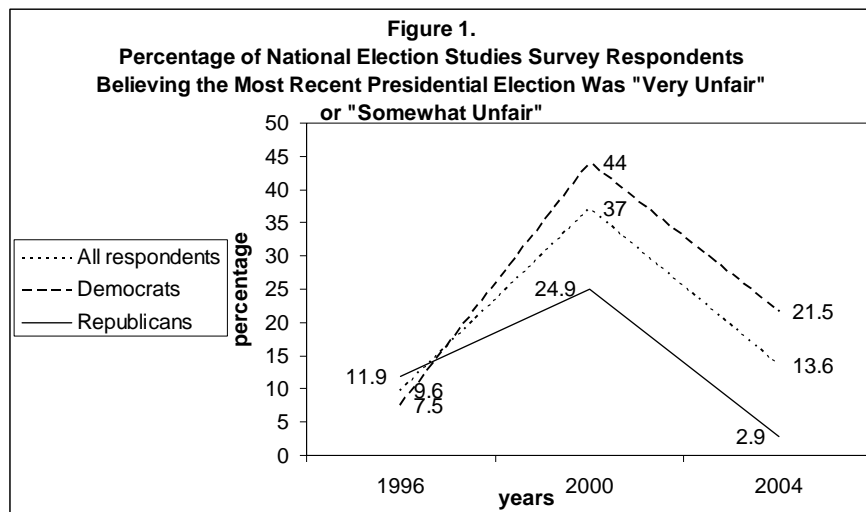
24. John Harwood, *Splits Over Iraq Persist Beyond Election*, WALL ST. J., Dec. 17, 2004, at A4.

25. See Associated Press, *Poll: Fla. Voters Had No Voting Problems* (Dec. 8, 2004), available at <http://www.wjla.com/news/stories/1204/192973.html> (noting that in a poll of Florida voters and their confidence that their vote was counted correctly, "95 percent of the Republicans quizzed said they were very or somewhat confident in the result, compared with only 58 percent of Democrats") (on file with the Washington and Lee Law Review).

26. Rasmussen Reports, *58% Worried About 2004 Voting Debacle*, at <http://www.rasmussenreports.com/Voter%20Fraud%20Oct%2019.htm> (Oct. 19, 2004) (on file with the Washington and Lee Law Review).

27. The source for the data used in Figure 1 is the National Election Studies data from the University of Michigan, available at <http://www.umich.edu/~nes> (data downloaded Mar. 22, 2005) (on file with the Washington and Lee Law Review). The "Democrats" and "Republicans" categories included those who identified themselves as "independents" but leaned toward one of the political parties.

Republicans) thought the manner of conducting the most recent presidential election was "somewhat unfair" or "very unfair." The number skyrocketed to 37% of the public (44% of Democrats and 25% of Republicans) in 2000 following the Florida debacle. By 2004, the number fell to a still worrisome 13.6% of the public holding strongly negative views of American election administration. The gap between the views of Democrats (21.5%) and Republicans (2.9%) remains quite large.



The fact that Republicans were victorious in the 2000 and 2004 presidential elections might drive the large disparity between Democrats and Republicans.<sup>28</sup> Consider voter attitudes toward the fairness of the Washington State gubernatorial election in 2004. After a series of recounts and court battles, a Democrat was declared the winner.<sup>29</sup> In a January 2005 Elway Poll of Washington voters, 68% of Republicans thought the state election process was unfair, compared to 27% of Democrats and 46% of Independents.<sup>30</sup> It is hard to escape the conclusion that views about the

28. It is also interesting that retrospective views on the fairness of the 2000 election have hardened over time. Although 44% of Democrats called the 2000 election somewhat or very unfair in 2000, in 2002 that number rose to 68% and in 2004 it rose again to 75.2%. On the other side of the aisle, 24.9% of Republicans called the 2000 election somewhat or very unfair in 2000, compared to 10.2% who viewed the 2000 election that way in 2002 and 14% who viewed it that way in 2004. *Id.*

29. See Sarah Kershaw, *Governor-Elect Declared In Washington Recounts*, N.Y. TIMES, Dec. 31, 2004, at A18 (describing the hotly contested Washington election and noting that the Democratic candidate was eventually declared the victor).

30. Stuart Elway of the Elway Poll has cross-tabulated the results in his January 2005

fairness of the process are driven, at least in part, by the outcome that recent elections have produced. If that is so, it should not be surprising to see large numbers of Republicans nationally indicating a lack of faith in the election process if the next close election features a Democrat squeaking by to gain the presidency.

One would hope that improvements in light of the 2000 debacle would improve both the reality and the perception of the fairness of U.S. election administration. The bad news from Election 2004, however, is that things likely will not improve sufficiently in 2008. Indeed, many of the steps taken in light of the Florida 2000 election debacle have, at least in the short term that includes Election 2004, made things worse. Aggravating the situation, election reform is emerging as a partisan issue, with Democrats more interested in reform than Republicans and pushing reforms favored more by Democrats than Republicans. This decreases the possibility of reform being enacted in the serious and bipartisan manner most likely to successfully avoid electoral meltdown.

As Part I below details, the extreme partisanship and close division of the American electorate, coupled with the Electoral College system, make the possibility of another razor-close presidential election fairly likely in one or more battleground states. Add to that mix election administration incompetence and a widely decentralized system of election administration with a patchwork of inconsistent rules. Even worse, since *Bush v. Gore*, losing candidates have become more willing to resort to election law as part of a political strategy: The number of election-law related cases in the lower courts has risen dramatically compared to the period before *Bush v. Gore*.<sup>31</sup> Election administration that is anything less than perfect can open the door to controversy in close elections.

Several steps exist to minimize, though not eliminate, the possibility of electoral meltdown. The country is already, albeit slowly, improving voting technology.<sup>32</sup> In addition, the country can always strive to improve further the competence of election administration. Improvement is an admirable goal, but given the resources the country is willing to use for election administration and the limits on human capacity, it is hard to imagine that competency improvements can do much more to alleviate

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Elway Poll question by party at my request (on file with the Washington and Lee Law Review).

31. *Infra*, text accompanying Fig. 3.

32. See Charles Stewart III, *Residual Vote in the 2004 Election*, VTP Working Paper #25 (Feb. 2005) (noting that voting reforms put in place for the 2004 election saved approximately one million votes that would have been lost in 2000), available at [http://vote.caltech.edu/media/documents/wps/vtp\\_wp25.pdf](http://vote.caltech.edu/media/documents/wps/vtp_wp25.pdf).



meltdown potential—at least once transitions to new voting technologies are complete.

Part II of this Article argues for three reforms that could significantly lower the risk of electoral meltdown. First, this Article advocates registration reform, in particular universal voter registration conducted by the government coupled with a voter identification program. There has been a wide partisan divide in the election administration debate between Democrats who have expressed concern about voter suppression and Republicans who have expressed concern about voter fraud. The proposed registration reform can alleviate both of those concerns, minimize the potential for any political rhetoric regarding voter fraud, and eliminate a great majority of potential litigation surrounding presidential election administration. The greatest threat to implementation comes from opposition by civil liberties groups to voter identification cards and by Republicans who may fear the partisan consequences of universal voter registration.

Second, this Article advocates a transition to nonpartisan election administration. The nonpartisan solution aims to create both the actuality and appearance of neutrality in election administration, thereby bolstering the public's faith in the process. Australia and Canada serve as good models for reform in this regard, though nationalizing election administration may not be necessary. This Article considers how to assure that U.S. election administrators are truly nonpartisan and contrasts arguments for nonpartisan election administration with calls for nonpartisan redistricting commissions and campaign finance enforcement. Unlike those latter agencies, where fundamental ideological issues about the goals of supervisory agencies remain unresolved, it seems possible to articulate a consensus set of election administration principles that nonpartisan administrators could apply and a means to adopt such a reform.

Third, this Article discusses the role of the courts in minimizing electoral meltdown. The key is to encourage courts to be more willing to entertain pre-election litigation and to be much more chary of entertaining post-election litigation. To the extent election administration problems can be recognized in advance, pre-election judicial review prevents future harm from occurring rather than putting courts in the position of trying to undo the bad effects of a past harm. Consider a suit brought before Florida 2000 to prevent the use of Palm Beach County's notorious "butterfly ballot" on grounds that it would confuse voters.<sup>33</sup> The costs of post-election review

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33. See *infra* notes 218–22 and accompanying text (noting the Florida court's reluctance to take on a challenge to the butterfly ballot after the election, and highlighting the benefits of

are large: The pressure put on courts to decide arcane election law questions when the outcome of an election is on the line—especially a presidential election—is huge, and the appearance of partisan decisionmaking is inevitable.

These proposed fixes would help not only to lessen the dangers of a presidential election meltdown; they also will make electoral disputes over other elected offices less likely to erupt as well. The improvements also will serve to diffuse certain controversies that have emerged since Florida 2000, such as the concern over the security of proposed electronic voting. Many of the proposals can be adopted on the state rather than federal level, and some through initiative, making the possibility of change more likely. No one can eliminate close elections, but there is much more that can be done to prevent their metamorphoses into a crisis of legitimacy.

## II. *Why the Risk of Electoral Meltdown Remains High*

### A. *The Margin of Litigation*

What defines the margin of litigation? The closeness of election results is the biggest single factor that predicts the possibility of a post-election controversy spilling into court.<sup>34</sup> For presidential elections, this definition must be modified to take into account the nature of the Electoral College. The closeness of election results in a state whose electoral votes matter to the outcome of the Electoral College tally is the biggest single factor that predicts the possibility of a post-election controversy over presidential election results spilling into court.

Closeness matters for the simple reason that it makes it more likely that lawyers can point to an election problem that could have affected the outcome of the race. The smaller the margin, the more likely an error in election administration affected the results. The Ohio 2004 situation illustrates the point well. Democratic lawyers had theories to challenge the counting of (or failure to count) particular votes in Ohio but there were not enough votes "in play" under these theories that could have shifted more than 100,000 votes from Bush to Kerry.

One mathematician responded to the Florida 2000 debacle by noting that America's voting system tries to "measure bacteria with a yardstick."<sup>35</sup>

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bringing the challenge in advance of the election).

34. Orr and Williams term this phenomenon the "first law of electoral law." Graeme Orr & George Williams, *Electoral Challenges: Judicial Review of Parliamentary Elections in Australia*, 23 SYDNEY L. REV. 53, 73 (2001).

35. John Allen Paulos, *We're Measuring Bacteria With a Yardstick*, N.Y. TIMES, Nov. 22,

Putting the point slightly differently, American presidential elections work well as a means of aggregating majority preference so long as the margin of victory is sufficiently large. Elections are a good rough measure of popular support. But fairly serious problems with vote counting technology, inconsistent rules for counting and aggregating votes, and potential human error make the American election administration system a poor measuring device when there is a close election requiring election officials to produce an exact count of votes. In a very close election, the margin of error is likely to exceed the margin of victory.

Faced with this reality, there are, at least in theory, three methods to decrease the chance of an election being within the margin of litigation. First, the United States can try to restructure presidential elections so as to avoid close election outcomes; second, the nation can improve the human and technological inputs that go into voting and vote counting; and third, the nation can reduce the possibility that, in the event of a close election and vote counting problems, post-election litigation will be successful. Unfortunately, each of these strategies is fraught with difficulties; but the third strategy presents the most promise.

### *B. The Expected Closeness of Future Presidential Elections*

The first potential solution is also the least promising: There are not many ways to make a presidential election less close if the nation wants to continue to have real, competitive elections. One possible change is to abolish the Electoral College in favor of a system for selecting the president through a national popular vote.<sup>36</sup> A priori, it is difficult to tell whether such a change would increase or decrease the chances of post-election litigation and electoral meltdown. Such a change would have two countervailing effects. On the one hand, the popular vote method opens up

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2000, at A27.

36. There are many other arguments for and against abolishing the Electoral College that are beyond the scope of this Article. Abolition does not appear to be a realistic possibility for the foreseeable future. See generally Nelson Polsby, *Holy Cow! Preliminary Reflections on the 2000 Election*, in *A BADLY FLAWED ELECTION*, 270–81 (Ronald M. Dworkin ed., 2002). One California legislator has proposed moving California to a proportional allocation of the state's electoral votes—but only if Florida, New York and Texas go along. Don Thompson, Associated Press, *San Diego Mayoral Race Fallout Promotes Election Change* (Mar. 15, 2005), available at <http://www.signonsandiego.com/news/politics/20050315-1736-ca-xgr-election-law.html> (on file with the Washington and Lee Law Review). Another possibility is adding a single Electoral College vote to be allocated to whichever of the three-vote states has the largest population so as to avoid a tie vote and the election going to the House of Representatives.

the possibility of post-election legal challenge anywhere in the United States in an effort to harvest votes, thereby broadening the scope of potential election problems for creative lawyers to examine. On the other hand, the popular vote method increases the vote margin between candidates, because it aggregates votes from all fifty states plus the District of Columbia.

Even in an extremely close popular vote race in percentage terms, the absolute numbers on a national scale would be difficult to overcome through litigation. In Election 2004, for example, President Bush's popular vote margin of victory over Senator Kerry in percentage terms was 50.8% to 48.3%, a difference of only 2.5%.<sup>37</sup> But in total number of votes, the difference was a bit over 3 million votes,<sup>38</sup> an extremely large margin for Kerry lawyers to overcome even if they litigated election problems in all 50 states. Of course, the absolute margins of victory might be smaller if voters in formerly "safe" states such as Texas and California were motivated by a change in voting method to turn out in higher percentages to vote for president. On the whole, however, abolition of the Electoral College probably would decrease the potential for meltdown, but it is hard to reach this conclusion with any confidence.

Putting aside Electoral College reform, there are good reasons to believe that the nation will continue to see extremely close presidential elections in the U.S. for the foreseeable future. In the first place, America is in an era of unprecedented partisanship. Gary Jacobson has recently updated his study of voter attitudes toward the president from President Eisenhower through the 2004 election, looking at the difference in voter approval ratings of the president by voters identified as Democrats or Republicans. Figure 2 shows his analysis.<sup>39</sup>

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37. CNN.com, *Election Results*, at <http://www.cnn.com/ELECTION/2004/pages/results/president/> (last visited July 23, 2005) (on file with the Washington and Lee Law Review).

38. Brian Falter, *Election Turnout in 2004 Was Highest Since 1968*, WASH. POST, Jan. 15, 2005, at A05.

39. Jacobson's earlier figure appeared in Gary C. Jacobson, *Partisan Polarization in Presidential Support: The Electoral Connection*, 30 CONGRESS & THE PRESIDENCY 1, 27 fig. 21 (2003). He has given permission to reproduce his updated figure.

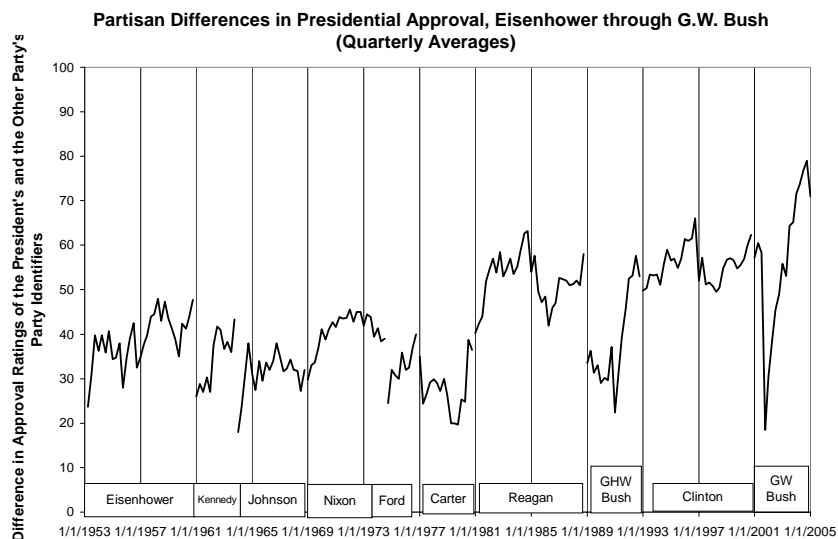
**Figure 2**

Figure 2 illustrates that the difference in voter attitudes toward the president is reaching the outmost levels possible. Putting aside a post-September 11, 2001 dip (and a smaller dip surrounding the 1991 Gulf War) the general trend is unmistakable: Democrats and Republicans increasingly have polarized attitudes toward the Chief Executive. Just before the 2004 election, the gap was 79%, with 91.8% of Republicans approving of President Bush's job compared to 12.8% of Democrats. It is hard to imagine the nation will see a much larger gap.

It is not just voters who are partisan. Following the Republican realignment in the South, voting in Congress by party is more polarized than at least since the 1950s.<sup>40</sup> Party control of the White House has real power consequences, and voters understand that.

Second, faced with strong partisan feelings, presidential elections are becoming acutely intense, particularly in the so-called "battleground" states whose electoral votes could affect the outcome of the national race. The amount of money pouring into the presidential election campaign—even after the McCain-Feingold campaign finance reforms—has hit record levels.<sup>41</sup>

40. *Id.*; see also the political science sources cited in Richard L. Hasen, *Do The Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 822 & nn.31–32 (2001) (noting cohesion of parties in Congress, as reflected by "unprecedented" unity scores).

41. Anthony Corrado & Thomas E. Mann, *In the Wake of BCRA: An Early Report on*

Additionally, in 2004, turnout exceeded that in any presidential race since 1968.<sup>42</sup> Although turnout increased across the board, it increased by a 2-1 ratio in "battleground" states compared to other states.<sup>43</sup>

Democrats, stung by their defeat in 2004, could well nominate a more centrist candidate in 2008, perhaps a candidate who will move to the right on issues such as abortion<sup>44</sup> and gay marriage.<sup>45</sup> The more that both parties present a candidate who can appeal to the median voter in battleground states, the more likely it is that future election contests will remain close.

### *C. Improvements in Voting, Vote Counting, and Vote Counting Rules*

With electoral closeness itself not subject to much election administration reform, the analysis turns to an improvement in the human, technological, and legal inputs that go into voting and vote counting. Following Florida 2000, improvement in voting technology became a central feature of election administration reform. Florida unsurprisingly acted first by eliminating punch cards with "hanging chads" and moving statewide to electronic and optical scan methods for voting.<sup>46</sup>

Other states followed suit with technological changes, some spurred by litigation or the threat of litigation. Many electoral jurisdictions decided to wait before investing in new voting technology. Part of the wait resulted from

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*Campaign Finance in the 2004 Elections*, 2 THE FORUM art. 3 (2004), at <http://www.bepress.com/forum/vol2/iss2/art3> (last visited June 13, 2005) (on file with the Washington and Lee Law Review).

42. Faler, *supra* note 38.

43. Curtis Gans, News Release, Center for the Study of the American Electorate, President Bush, Mobilization Drives Propel Turnout to Post 1968-High; Kerry, Democratic Weakness Shown, at 2, at <http://www.fairvote.org/reports/CSAE2004electionreport.pdf> (last visited June 13, 2005).

44. See David D. Kirkpatrick, *For Democrats, Rethinking Abortion Runs Risks*, N.Y. TIMES, Feb. 16, 2005, at A18 (describing the fractures within the Democratic party regarding abortion, and noting the search to find more centrist party members).

45. See Will Lester, Associated Press, *New DNC Head Dean Looks to Rebuild Party* (Feb. 15, 2005) (discussing Dean's efforts to better communicate with voters regarding issues such as gay marriage and abortion), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/02/15/politics/p100203S44.DTL> (on file with the Washington and Lee Law Review).

46. See John McCarthy, *Florida Leads the Nation in Election Reform*, FLA. TODAY, May 21, 2001, at 1 (summarizing Florida election law reform); FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS, VOTING SYSTEMS, at <http://election.dos.state.fl.us/votemeth/index.shtml> (last visited June 13, 2005) (providing information about Florida's electronic voting system) (on file with the Washington and Lee Law Review).

the new competition among voting technology vendors for lucrative new contracts. Part resulted from delays in Congress (much caused by partisan bickering) over the enactment of a federal law, the Help America Vote Act, that promised federal financial help for jurisdictions to switch from antiquated and less accurate voting technologies. And part, at least in more recent years, resulted from concern over the security of electronic voting machines (or DREs),<sup>47</sup> which computer science critics and others claimed were subject to manipulation by a computer hacker.<sup>48</sup>

In the short run, the push to eliminate punch cards and lever machines in exchange for better technology has made the chances of meltdown higher, not lower. It only takes one glitch in a very close state to throw the system into chaos. This potential situation should not be a surprise given the learning curve associated with new technology, particularly technology that is to be used by poll workers who typically get very little training before operating the machinery for a very long day.

In Election 2004, for example, Carteret County, North Carolina, elections officials made a mistake in how much data they believed could be stored on a DRE machine, resulting in the loss of over 4500 votes.<sup>49</sup> The remedy, and the means for determining the winner of the statewide race hanging in the balance, is still in dispute.<sup>50</sup>

To give another example, Los Angeles County had to eliminate the use of punch card technology after California's secretary of state agreed to decertify punch card machines effective with the 2004 election to settle an equal protection lawsuit brought by Common Cause.<sup>51</sup> Because Los Angeles was not

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47. The acronym stands for "Direct Recording Electronic" devices for voting. The Caltech/MIT Voting Technology Project, *Residual Votes Attributable to Technology: An Assessment of the Reliability of Existing Voting Equipment*, Version 2 at 3, at [http://www.hss.caltech.edu/%7Evoting/CalTech\\_MIT\\_Report\\_Version2.pdf](http://www.hss.caltech.edu/%7Evoting/CalTech_MIT_Report_Version2.pdf) (Mar. 30, 2001).

48. For a detailed history of voting technology change after *Bush v. Gore*, see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711 (2005).

49. Associated Press, *More than 4,500 North Carolina Votes Lost Because of Mistake in Voting Machine Capacity*, at [http://www.usatoday.com/news/politicselections/vote2004/2004-11-04-votes-lost\\_x.htm](http://www.usatoday.com/news/politicselections/vote2004/2004-11-04-votes-lost_x.htm) (Nov. 5, 2004) (on file with the Washington and Lee Law Review).

50. See David Ingram, *Election-Law Fix Passes Senate Panel*, WINSTON-SALEM J., Feb. 16, 2005, at B1 (discussing debate over law that, if passed, would give the legislature authority to decide disputed elections), available at [http://www.journalnow.com/servlet/Satellite?pagename=WSJ2FMGArticle%2FWSJ\\_BasicArticle&c=MGArticle&cid=1031780851638&path=!localnews!elections&s=1037645509113&tacodalogin=no](http://www.journalnow.com/servlet/Satellite?pagename=WSJ2FMGArticle%2FWSJ_BasicArticle&c=MGArticle&cid=1031780851638&path=!localnews!elections&s=1037645509113&tacodalogin=no).

51. See *infra* notes 229–35 and accompanying text (discussing *Southwest Voter Registration Educ. Project v. Shelley*).

ready to purchase and roll out new DRE technology, it adopted a transition system, "InkaVote," that appears to fare almost as poorly as punch cards in counting votes.<sup>52</sup>

Although one can expect that jurisdictions eventually will catch up with the learning curve, it is not necessarily true that this will happen any time soon. Part of the reason is America's "hyper-federalized"<sup>53</sup> system of election administration. Rather than a unitary system for federal elections organized on the federal or state level, the decentralized system is hyper-federalized, using sub-state levels of election administration organization, such as counties, to create nearly 13,000 electoral districts in the United States.<sup>54</sup> Hyper-federalization leads to a variety of decisions in machinery purchases, vote-counting rules, ballot security procedures, training of poll workers, and in other areas. Adoption of new technology takes time to work out, and many problems are not apparent until a system has been in place for a while and used under different conditions.

Even when voting technology greatly improves, it is not clear that it can improve enough—near the point of perfection—to prevent post-election litigation in the case of an extremely close election. Florida is a good case in point. No question, Florida's election administration situation in 2004 was greatly improved over the 2000 elections debacle.

In 2000, undervotes and overvotes accounted for 2.9302% of the votes cast in the presidential race. In 2002, that number dropped to 0.7766%, due in large part to a change in the voting systems that were certified for use in the State. The most recent election cycle saw yet another reduction in that number, dropping it to a historically low 0.4116%.<sup>55</sup>

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52. See Henry Brady, Performance of Voting Systems on March 2, 2004 at 1 (Revised and Corrected May 10, 2004) (concluding that "the InkaVote system has a higher residual vote rate than the systems used by other large California counties"), available at [http://ucdata.berkeley.edu:7101/new\\_web/IVrevis4.pdf](http://ucdata.berkeley.edu:7101/new_web/IVrevis4.pdf) (last visited July 16, 2005).

53. Alec Ewald, American Voting: The Local Character of Suffrage in the United States 2 (Feb. 2005) (unpublished doctoral dissertation on file with the Washington and Lee Law Review). Ewald traces the hyper-federalized system back to the colonial period. *Id.* at 52.

54. See *id.* at 7 (citing NATIONAL COMMISSION ON ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 29 (2001), available at [http://millercenter.virginia.edu/programs/natl\\_commissions/commission\\_final\\_report/fullReport.pdf](http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/fullReport.pdf)).

55. DIV. OF ELECTIONS, FLA. DEP'T OF STATE, ANALYSIS AND REPORT OF OVERVOTES AND UNDERVOTES FOR THE 2004 GENERAL ELECTION 1 (2005), at [http://election.dos.state.fl.us/reports/pdf/Over\\_Under\\_Report\\_04.pdf](http://election.dos.state.fl.us/reports/pdf/Over_Under_Report_04.pdf). See also Stewart, *supra* note 32, at 4 (reporting an overall national residual vote rate—including overvotes and undervotes—of 1.07% in the 2004 presidential election, compared to a 1.91% rate in 2000).



Even though the state department charged with administering its elections declared Election 2004 "a great success,"<sup>56</sup> electoral meltdown was still possible if the vote difference between Bush and Kerry in 2004 had been as close as the 537-vote margin between Bush and Gore in 2000. According to an Electionline.org report, the following problems occurred in Florida 2004: Almost 40 votes on electronic voting machines were lost in Boynton Beach because of a power failure; 14,000 votes had to be recounted in Volusia County after a memory card failed; a ballot tabulator in Broward County started counting backwards after reaching 32,000 ballots; computer error gave wrong figures to Escambia County voting officials; and nearly 270 votes were found in a box in Pinellas County two weeks after the election (with 12 more ballots found later).<sup>57</sup> Each of these incidents could have provided fodder for post-election litigation (and rampant, blog-based speculation and analysis) in the event of a razor-thin electoral margin for one of the candidates.

Limitations on human capacity similarly impede the possibility of a perfect vote count. One obvious problem is that elections are administered on the retail level by poll workers, many of whom receive little or no training for the position and work a 12–15 hour day.<sup>58</sup> Even election professionals can make mistakes: Consider the 437 provisional ballots cast in the Washington governor's race that King County elections workers mistakenly fed into voting machines and that can no longer be separated from other ballots for purposes of a recount.<sup>59</sup>

Another factor is the interaction between voting technology, humans, and election law rules for counting votes. Consider a recent controversy surrounding the San Diego mayoral election.<sup>60</sup> Following concerns over the security of electronic voting, California Secretary of State Kevin Shelley decertified some electronic voting systems, including the system used in San

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56. *Id.* at 2.

57. ELECTIONLINE.ORG, BRIEFING: THE 2004 ELECTION (Dec. 16, 2004), at <http://electionline.org/site/docs/pdf/ERIPBrief9Final.pdf>.

58. Jim Drinkard, *Scarcity of Poll Workers Persists*, USA TODAY, Oct. 26, 2004, at A1, available at [http://usatoday.com/news/politicselections/nation/president/2004-10-26-poll-workers\\_x.htm](http://usatoday.com/news/politicselections/nation/president/2004-10-26-poll-workers_x.htm).

59. David Postman, *GOP Says It Found 300 Illegal Votes*, SEATTLE TIMES, Jan. 27, 2005, at B2, available at [http://seattletimes.nwsourc.com/html/localnews/2002161949\\_vance27m.html](http://seattletimes.nwsourc.com/html/localnews/2002161949_vance27m.html).

60. For background information relating to the next few paragraphs, see Greg Moran, *Re-Election of Murphy Will Stand, Judge Rules*, SAN DIEGO UNION-TRIB., Feb. 3, 2005, at A1, available at [http://www.signonsandiego.com/uniontrib/20050203/news\\_1n3ballot.html](http://www.signonsandiego.com/uniontrib/20050203/news_1n3ballot.html); SignOn San Diego.com, *New Rules to Be Drafted for Write-In Candidates*, at <http://www.signonsandiego.com/news/politics/20050202-1132-writeins.html> (Feb. 2, 2005) (on file with the Washington and Lee Law Review).

Diego, California. San Diego adopted an optical scan system for the first time in Election 2004.

On the Election 2004 ballot was the run-off between two candidates for city mayor. Both listed candidates were Republicans, but a Democratic member of the city council, Donna Frye, mounted a write-in campaign. According to election officials, Frye received about 1000 fewer votes than the top listed candidate, incumbent mayor Dick Murphy. But it turns out that the registrar did not include in the official count over 5000 additional votes by voters who wrote Frye's name on the write-in line but failed to "bubble in" a space next to the write-in line as state law required for optically scanned ballots.<sup>61</sup>

This situation led to a number of lawsuits in state and federal courts. Part of the problem is that the city charter and municipal code conflict over whether write-in votes are permitted in run-off elections. Another problem is the clash between election law rules and the clear intent of the voters. An election contest filed in state court contended that federal constitutional concerns required that the Frye votes be counted, particularly because election officials counted the votes of voters who incorrectly filled in or circled the bubble for their ballots (as opposed to leaving the bubble blank) for either of the two listed candidates or Frye. Much of the confusion over how to cast a valid write-in vote appears to have stemmed from the last-minute change in voting systems. The result is election administration that undermines the legitimacy of the people in the electoral process and of the mayor, regardless of what happens in the courts.<sup>62</sup>

These kinds of problems seem genuinely hard to avoid, especially if jurisdictions are unwilling to undertake periodic election law audits to account for potential problems in their election laws. Not only have most jurisdictions failed to do so,<sup>63</sup> many do not act even in the face of actual problems. Consider, for example, the October 2003 California recall election.<sup>64</sup> There

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61. Greg Moran, *Court Case on Behalf of Frye Votes is Dropped*, SAN DIEGO UNION-TRIB., May 13, 2005, at A1, available at <http://www.signonsandiego.com/news/metro/20050513-9999-1n13bubbles.html>; see also *McKinney v. Superior Ct.*, 21 Cal. Rptr. 3d 773, 776-78 (Ct. App. 2004) (holding that the plaintiff's case was barred due to the plaintiff's failure to avail himself of the pre-election remedy provided by law).

62. See Richard L. Hasen, *The Mayoral Election: Off to Court We Likely Go*, SAN DIEGO UNION-TRIB., Dec. 17, 2004, at B9 (comparing the views of voters in San Diego with the views of voters after the Florida 2000 debacle), available at [http://www.signonsandiego.com/uniontrib/20041217/news\\_lz1e17hasen.html](http://www.signonsandiego.com/uniontrib/20041217/news_lz1e17hasen.html).

63. San Diego is at least considering amending their law to bar write-in candidacies in run-off elections. *New Rules to Be Drafted for Write-In Candidates*, *supra* note 60.

64. For background and more details on the information contained in this paragraph, see Richard L. Hasen, *The California Punch Card Recall Litigation: Why Bush v. Gore Does Not*

were over twenty suits concerning various aspects of the recall rules, including litigation over the rules for nominating petitions for candidates to replace Governor Davis on Part 2 of the recall ballot.<sup>65</sup> One part of the state elections code provides that the rules for nominating candidates for Part 2 of the recall generally shall be made "in the manner prescribed for nominating a candidate to that office in a regular election . . ."<sup>66</sup> But those usual nomination provisions explicitly state that they do not apply to recall elections.<sup>67</sup> California's secretary of state nonetheless applied those rules, thereby allowing anyone with 65 signatures and \$3,500 a place on the recall ballot.<sup>68</sup> The California Supreme Court refused to consider whether to overturn the secretary's decision or defer to his administrative judgment. The result was a ballot with 135 potential replacements for Governor Davis.<sup>69</sup> Even in the face of such a blatant conflict in the state's election statutes, more than a year after the recall the California legislature has not passed a bill to fix this obvious internal inconsistency in the state code.

In sum, although things have improved from 2000 to 2004 in terms of voter technology, things have not improved enough—in terms of voting technology, human capacity, and vote counting rules—to move comfortably outside the margin of litigation.

#### *D. The Post-2000 Election Litigation Environment*

The last two sections set out to demonstrate that close presidential elections seem likely to persist at least in the near term. Although there have been some marked improvements in voting technology since the 2000 election, continued voting technology and administration issues, combined with somewhat unclear and contradictory election law rules, can open the door for post-election litigation.

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"Suck" (Sept. 2004) (unpublished manuscript, on file with the Washington and Lee Law Review), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=589001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=589001).

65. *Id.* at 1–2 (noting the nomination litigation).

66. CAL. ELEC. CODE § 11381 (West 2005).

67. *Id.* § 8000(a).

68. *Recall in California*, Institute of Governmental Studies, University of California at Berkeley, at <http://www.igs.berkeley.edu/library/htRecall2003.html> (last visited July 23, 2005) (on file with the Washington and Lee Law Review).

69. *2003 Special Election Certified*, California Secretary of State, Elections Division, at [http://www.ss.ca.gov/elections/2003\\_cert\\_cand\\_list.htm](http://www.ss.ca.gov/elections/2003_cert_cand_list.htm) (last visited July 23, 2005) (on file with the Washington and Lee Law Review).

Unfortunately, the 2000 Florida election debacle has made it more likely that courts will decide elections. *Bush v. Gore* has had both a direct and an indirect effect on the possibility of post-election litigation. Directly, *Bush v. Gore* has opened up a window for the litigation of equal protection claims based upon the failure to have uniform standards for administering elections in a single jurisdiction.<sup>70</sup> *Bush v. Gore* itself concerned the lack of uniform standards for a recount of votes in the 2000 presidential election in Florida, and since that case, lawyers have tried to use the case to raise similar arguments. Thus, lawyers have argued that the use of punch card voting machines, with their high error rates, in only some parts of a jurisdiction holding an election constitutes a *Bush v. Gore* violation.<sup>71</sup> In Ohio in 2004, lawyers argued a *Bush v. Gore* violation occurs when the state fails to set out uniform standards for judging whether to count certain provisional ballots.<sup>72</sup> And in the San Diego race, as discussed above, lawyers argued that the inconsistent treatment for judging voter intent on nonconforming ballots violated the principles of *Bush v. Gore*.<sup>73</sup>

As predicted,<sup>74</sup> lower courts have read *Bush v. Gore* in Rashomonic fashion. Some have read the case as having little or no precedential value, some have read it as requiring states to come forward with a rational basis for a proposed disparity in treatment, and some have applied stricter scrutiny. Commentators break down on similar lines, with some reading the case as not really an equal protection case at all, but rather a case about limited unbridled discretion in the hands of partisan election officials.<sup>75</sup>

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70. See, e.g., Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 392–94 (2001) (suggesting that for at least a short time *Bush v. Gore* will be treated as precedent, and giving five hypothetical situations in which courts could hold that certain voting disparities violate equal protection).

71. Thus far, such claims have met with mixed success. Compare *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (holding that there is a potential equal protection violation with Illinois's selective use of punch card machines) with *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 805 (N.D. Ohio 2004) (holding there is no equal protection violation from Ohio's selective use of punch card machines).

72. See *Complaint*, *supra* note 13 at 1–2 and accompanying text (including in the Complaint a violation of plaintiffs' equal protection rights under *Bush v. Gore*).

73. See *supra* notes 60–62 and accompanying text (summarizing controversy in San Diego election).

74. See Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1497 (2002) (citing the opacity of the opinion and predicting that the Court will eventually sort out the various lower courts' interpretations).

75. On the academic debate, see generally Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004).

It may be unsurprising that the Supreme Court has failed yet to cite to or more precisely define the scope of the *Bush v. Gore* precedent since 2000.<sup>76</sup> But that failure creates a period of uncertainty. I have praised uncertainty in election law cases as a way for the Supreme Court to gain new information about how to craft the contours of a new equal protection right.<sup>77</sup> In most election law cases, there is no urgency in crafting the right, such as in judicial consideration of whether a districting plan creates an unconstitutional racial gerrymander:<sup>78</sup> The decision does not affect the outcome of an imminent election. In contrast, a great deal of litigation could be avoided if jurisdictions knew precisely when, if at all, *Bush v. Gore* requires uniformity in election procedures, technology, or rules.

*Bush v. Gore*, and the Florida 2000 debacle more generally, seem to have opened up the courts to greater election litigation. I have termed this phenomenon "election law as political strategy,"<sup>79</sup> whereby the resistance to challenging election rules in court seems to be evaporating. Rather than simply accepting election results in a close election with regret,<sup>80</sup> candidates and others apparently have come more emboldened (or simply learned that courts may grant relief) in the face of a close election and inevitable election administration problems.

The hypothesis that Florida 2000 has emboldened more election-related litigation is unprovable, but statistics on election-related litigation from 1996–

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76. Chief Justice Rehnquist did not even cite his concurring opinion in *Bush v. Gore* in his dissent from the denial of a writ of certiorari in *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004). *Salazar* considered the Colorado Supreme Court's power to prevent the state legislature from enacting a mid-decade redistricting. *Id.* at 1093. It concerned questions of state court power over state legislative decisions that exactly paralleled the Article II argument the Chief Justice, joined by Justices Scalia and Thomas, endorsed in his concurring opinion in *Bush v. Gore*. Justices Scalia and Thomas joined the Chief Justice in the *Salazar* dissent as well. *Id.*

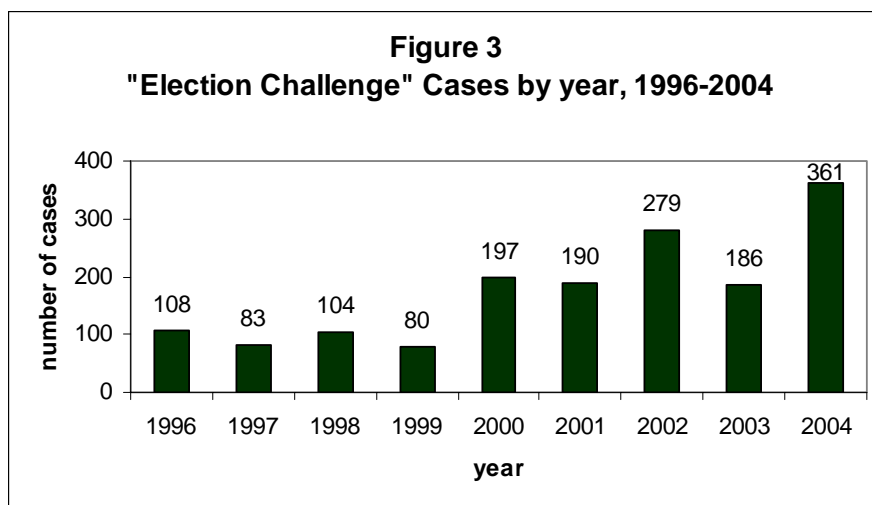
77. Hasen, *Benefits of "Judicially Manageable" Standards*, *supra* note 74, at 1503; RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 47–72 (2003) (praising the use of unmanageable judicial standards in the development of a political equal protection right).

78. *See Shaw v. Reno*, 509 U.S. 630, 657–58 (1993) (holding that plaintiffs had stated a claim under the Equal Protection Clause by asserting that the North Carolina government had adopted a reapportionment scheme so irrational that it could only be understood as an effort to segregate voters).

79. *See* Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 239 n.1 (2004) (noting my earlier use of the term).

80. *See* STEVEN E. SCHIER, *YOU CALL THIS AN ELECTION? AMERICA'S PECULIAR DEMOCRACY* 100 (2003) ("Nixon considered challenging the popular vote results in several states but relented in the interest of regime stability."); Joseph Perkins, *Please, No Post-Election Heroic Measures*, SAN DIEGO UNION-TRIB., Oct. 29, 2004, at B7 (noting that neither Richard Nixon nor Gerald Ford sought recounts despite close races in a handful of states).

2004 are at least suggestive of such a shift. Figure 3 shows the number of election-related cases in state and federal courts found through a Lexis search of cases containing the words "election" and variations on "challenge," culling out cases that are obviously inapplicable.<sup>81</sup> In 1996, for example, there were 108 such cases. In 2004, there were 361 such cases. The average number of cases in the 1996–99 period was 96 per year, compared to an average of 254 cases per year from 2001–04.<sup>82</sup>



Two other factors—both indirectly a result of Florida 2000—have exacerbated the post-Florida litigation explosion. First, a number of Help America Vote Act (HAVA)<sup>83</sup> provisions kicked in for the first time in a presidential election, and many of those provisions were unclear and untested. For example, HAVA required jurisdictions to allow voters whose names are not on registration rolls to cast a "provisional ballot;"<sup>84</sup> but the law was unclear over, among other things, whether election officials must count in the total a ballot cast by a registered voter who attempts to vote in a different precinct

81. The list is no doubt underinclusive of all election litigation during the period, but it provides a good rough comparison of the pre- and post-2000 period. The entire database of cases is posted at <http://electionlawblog.org/archives/washleeappendix.xls> (last visited June 14, 2005) (on file with the Washington and Lee Law Review).

82. Some of the increase has to do with the fact that there are more redistricting cases at the beginning of each decade. But removing the redistricting cases from the 2001–04 period still yields an average of 240 cases per year.

83. Help America Vote Act of 2002, 42 U.S.C.A. §§ 15301–15545 (West 2005).

84. *Id.* § 15482.

than the one at which he is registered (the so-called "wrong precinct" voter).<sup>85</sup> Over time these HAVA issues will be resolved,<sup>86</sup> but questions remain. The courts have already reached divergent opinions on the "wrong precinct" issue.<sup>87</sup>

Second, apparent partisan biases of election administrators have energized the opposition to be more willing to go to court.<sup>88</sup> Part II.B discusses the extent of the partisan involvement in election administration and a proposal towards nonpartisan election administration. Here, it is enough to note what occurred in Florida 2000. Florida's Secretary of State Katherine Harris was a Republican who co-chaired George W. Bush's presidential election committee in Florida.<sup>89</sup> Her discretionary decisions regarding recount-related activity in Florida were viewed suspiciously by Democrats.<sup>90</sup> Many county canvassing boards, in contrast, were dominated by Democrats, and their actions similarly were viewed by Republicans with suspicion.<sup>91</sup>

Since 2000, both Democrats and Republicans have focused their attention on controversial election law decisions of secretaries of state chosen in partisan elections, intimating that the secretaries' decisionmaking was in the interest of their party, rather than the interests of the public.<sup>92</sup> Whether those concerns are legitimate or not, they lower any resistance potential litigants may have to challenging election-related decisions of these officers.

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85. See Edward B. Foley, *Latest Developments & Current Situation: An Assessment, Election Law @ Moritz*, at <http://moritzlaw.osu.edu/electionlaw/analysis/041024a.html> (Oct. 24, 2004) (commenting on a case that decided the "wrong precinct" problem for Ohio, and noting the other HAVA problems yet to be settled) (on file with the Washington and Lee Law Review).

86. For a look at a number of the unresolved issues, see Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 437-43 (2004).

87. For links to the cases heard during 2004, see the list posted at <http://moritzlaw.osu.edu/electionlaw/keyissues/key-provisional.html> (last visited June 14, 2005) (on file with the Washington and Lee Law Review).

88. For an early look at partisan bias of election administrators against third party and independent candidates, see Bennett J. Matelson, Note, *Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law*, 69 N.Y.U. L. REV. 1238 (1994). The more recent phenomenon is bias against a major party or major party candidate.

89. Ann Shorstein, *Politicizing the Election Process: "The Katherine Harris Effect,"* 2 FLA. COASTAL L.J. 373, 377 (2001).

90. See, e.g., ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE SUPREME COURT HIJACKED ELECTION 2000 29, 232 n.60 (2002) (noting the relationship between Harris and Bush and commenting on the likely bias of Harris).

91. See RICHARD A. POSNER, BREAKING THE DEADLOCK 57 (2001) ("Democrats dominated the canvassing boards of all four counties [in which Gore sought a recount]. Close calls therefore were likely to favor Gore.").

92. See *infra* Part II.C (discussing allegations of partisan bias in U.S. election administration).

### III. Three Ways of Reducing the Margin of Electoral Meltdown

#### A. Introduction

After the 2000 Florida debacle, there was great consensus that much needed to be done to fix the American system of election administration. But despite the existence of a number of bipartisan and nonpartisan commissions proposing reform,<sup>93</sup> partisan bickering in Congress blocked many reform proposals. Democrats tended to favor reforms to make it easier to vote, while Republicans favored proposals to prevent electoral fraud.<sup>94</sup> The result was the compromise legislation of HAVA, which will incrementally, but likely not sufficiently, reduce the possibility of post-election meltdown.

As noted above, a main feature of HAVA is the financial assistance it provides for jurisdictions to buy new voting technology.<sup>95</sup> HAVA also created the Election Assistance Commission (EAC), which oversees the transfer of funds to states, engages in voting research, and has other responsibilities.<sup>96</sup> On the voter registration front, HAVA requires that states provide provisional ballots to voters who request them and that states create a computerized, statewide registration database to assist in directing voters to the polls.<sup>97</sup> This latter provision could help minimize some controversies over voter registrations in the future, but it was not a factor in the 2004 election because it appears that 41 states obtained waivers from the EAC from complying before 2006.<sup>98</sup>

Although things have definitely improved since 2000, for reasons given in Part I, it is unlikely that post-2000 changes such as HAVA will be enough to eliminate a serious risk of post-election litigation surrounding presidential

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93. See Shambon, *supra* note 86, at 426–27 & nn.9–15 (linking to the most prominent studies).

94. See Daniel J. Palazzolo, *Election Reform After the 2000 Election*, in *ELECTION REFORM: POLITICS AND POLICY* 9 (Daniel J. Palazzolo & James W. Ceaser eds., 2005) ("Republicans have been more likely to seek safeguards against fraud in voter registration and voting processes, while Democrats are more committed to ensuring equal access to polling places and recount rules that allow for consideration of the voter's intent.").

95. 42 U.S.C.A. §§ 15301–15306 (West 2005).

96. *Id.* §§ 15321–15472.

97. *Id.* §§ 15481–15502.

98. See Press Release, United States Election Assistance Commission, U.S. Election Assistance Commission Reports to Congress on Election Reform Progress in 2004, at <http://www.civilrights.org/issues/voting/details.cfm?id=28137> (Feb. 9, 2005) (noting that "[a]t least nine states had developed and used a statewide voter registration database to help increase access to the process and reduce opportunities for fraud. All states and territories must have a statewide database by January 1, 2006") (on file with the Washington and Lee Law Review).



elections. Consider the EAC. In theory, a national election administration body has the potential to impose uniformity and consistency in administration that could go some way toward avoiding meltdown. Even if the power of such a group is only advisory,<sup>99</sup> it could potentially propose election administration reform legislation in a way to cajole Congress to act,<sup>100</sup> much like the 9/11 Commission.<sup>101</sup> But the EAC's powers are limited and its profile, so far, is low. The National Association of Secretaries of State has issued a resolution asking for the EAC to be disbanded after 2006.<sup>102</sup> Beyond having control over the distribution of HAVA funds, it is not clear how much power and desire the EAC will have to initiate and lead reform efforts.

What is even more disturbing from the perspective of fostering election administration reform is an increasing partisan divide over the issue. In the post-2004 election period, Democrats have had much more of an interest in election reform than Republicans. Democratic Senator Frank Lautenberg has offered a bill that would prevent secretaries of state from campaigning for presidential candidates.<sup>103</sup> Democratic Senator Dodd has introduced a more

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99. See Shambon, *supra* note 86, at 428 ("The EAC was designed to have as little regulatory power as possible.").

100. Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. (forthcoming 2005).

101. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004), available at <http://www.gpoaccess.gov/911/> (last visited June 14, 2005); see also Judy Keene & John Diamond, *Bush to Act on Some of 9-11 Report Today*, USA TODAY, Aug. 2, 2004, at 2A (noting political momentum and political pressure created by report), available at [http://www.usatoday.com/news/washington/2004-08-01-bushterror-usat\\_x.htm](http://www.usatoday.com/news/washington/2004-08-01-bushterror-usat_x.htm).

102. National Association of Secretaries of State 2005 Winter Conference, Position Regarding Funding and Authorization of U.S. Election Assistance Commission, at <http://www.electionline.org/site/docs/pdf/NASS.EAC.Feb.pdf> (Feb. 6, 2005). The Statement reads in full:

Recognizing the Election Assistance Commission's (EAC) task as a limited one, Congress, in the Help America Vote Act of 2002, (HAVA), wisely authorized the EAC for only three years. Any duties assigned to the EAC can be completed by the National Institute of Standards and Technology or by the state and local election officials who make up the HAVA Standards Board and its Executive Committee. The National Association of Secretaries of State encourages Congress not to reauthorize or fund the Election Assistance Commission after the conclusion of the 2006 federal election, and not to give the EAC rulemaking authority.

*Id.*; see also Robert Tanner, Associated Press, *Election Officials Work on Making Changes*, at <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2005/2/07/national/w121345S54.DTL> (Feb. 8, 2005) ("The association approved a resolution that asks Congress to dissolve its oversight organization, the federal Election Assistance Commission, after the 2006 elections.") (on file with the Washington and Lee Law Review).

103. Press Release, Frank Lautenberg, Lautenberg Introduces Legislation to Prevent Partisan Activity By Election Officials, at <http://lautenberg.senate.gov/~lautenberg/press/2003/01/2005215728.html> (Feb. 15, 2005) (on file with the Washington and Lee Law Review).

comprehensive election reform bill that would, among other things, provide for Election Day registration and a national write-in ballot for president.<sup>104</sup> Senators Clinton and Kerry proposed a similar bill, which includes a feature that would re-enfranchise felons who had completed their sentences.<sup>105</sup>

The left-leaning magazine *The Nation* recently editorialized its laundry list of desired election reform:

Nationally, we want a floor on voting mechanics and rights. We want a national right to vote, ideally enshrined in the Constitution, to guard against voter suppression or other basic unfairness. We want universal registration, recognizable in every election district in the country, and multiple opportunities before election time to prove required residence. We want consistency in ballot design, and maximum ease of use. We also want consistent, nationwide rules on voter ID requirements and on how to count and recount ballots. We want every state and national election day to be a public holiday. We want nonpartisan election administration. We want computer voting technology that can be examined by people outside the companies providing it and a secure paper trail on all votes cast. We want a nonpartisan national election commission—populated by recognized experts in voting machine technology, statistical analysis and polling, and national and comparative politics—to evaluate the accuracy and representativeness of our election performance regularly and make recommendations for improvement. We want Congress to come back to election reform as an issue in each session. And, however long it takes, we want to abolish the Electoral College and move to direct election of the President.<sup>106</sup>

A reform like Election Day registration is a perfect issue to divide Democrats and Republicans. Such a reform no doubt makes voting easier. To many Democrats, Election Day registration is desirable because it increases the chances that every voter's vote will count.

It is not clear, however, whether Election Day registration also would significantly lower the chances of electoral meltdown. On the one hand, Election Day registration removes the potential for litigation over registration rules. On the other hand, it might increase post-election litigation over claims of ineligible voters voting or claims of multiple voting.

Moreover, at least on a national level, Election Day registration is a non-starter.<sup>107</sup> To many Republicans, Election Day registration is undesirable

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104. S. 17, 109th Cong. (2005).

105. S. 450, 109th Cong. (2005).

106. Editorial, *A Step for Voting Reform*, THE NATION, Jan. 31, 2005, at 4. The *New York Times* published its own list in *What Congress Should Do*, N.Y. TIMES, Oct. 24, 2004, § 4, at 10, available at <http://www.nytimes.com/2004/10/24/opinion/24sun1.html>.

107. Adoption of Election Day registration appears more likely in states with a history of

because Election Day registration makes it harder to police claims of voter fraud. It also may be viewed as undesirable by Republicans who believe that barriers to voting are not necessarily bad, for reasons detailed in Part II.B.

Things might have turned out differently had John Kerry won the election in 2004. In that case, Republicans likely would have been the ones pushing for election reform, though likely the focus would have been on preventing vote fraud, rather than insuring that more voters' votes counted.<sup>108</sup> Before the election, Republicans clearly were getting ready to play the fraud card had George W. Bush lost by a narrow margin, with conservative editorialists John Fund and George Will leading the charge.<sup>109</sup> Indeed, in 2005, Republican Senators McConnell and Bond introduced a bill filled mostly with anti-fraud measures such as voter identification, and other measures that could make it difficult for eligible voters to vote, such as a requirement that all voters fill in registration forms completely.<sup>110</sup>

Democrats tend to dismiss claims of fraud as either exaggerated<sup>111</sup> or, more ominously, a pretext for the suppression of votes, particularly in the minority community.<sup>112</sup> The fundamental point that may still be lost on Democrats is that election reform that fails to address the potential for fraud has little chance of success in the Republican-dominated Congress (or in Republican-dominated state legislatures), and that there are certain anti-fraud measures (including those advocated below) that may be adopted as part of an overall package that have the potential to increase, rather than suppress, minority voter turnout. Similarly, Republicans may think that a focus on vote fraud alone will lower the chances of electoral meltdown, but this is unlikely:

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easy voter registration and in states dominated by Democrats.

108. Even with George W. Bush's victory, Republicans have stated that no election reform legislation should be considered in Congress without addressing concerns over vote fraud. *See* REPUBLICAN POLICY COMMITTEE, UNITED STATES SENATE, THE NEED FOR NEW FEDERAL REFORMS: PUTTING AN END TO VOTER FRAUD (2005), at [http://rpc.senate.gov/\\_files/Feb1504VoterFraudSD.pdf](http://rpc.senate.gov/_files/Feb1504VoterFraudSD.pdf) (noting the HAVA attempts to address the problem of voter fraud, but arguing that more should be done).

109. JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (2004); George F. Will, *Election Integrity at Stake*, WASH. POST, Oct. 24, 2004, at B7.

110. Press Release, Senator Kit Bond, Senators Bond and McConnell Introduce Election Reform Bill, at <http://bond.senate.gov/election2.cfm> (Feb. 17, 2005) (on file with the Washington and Lee Law Review).

111. *See infra* note 128 and accompanying text (discussing difficulty of proving vote fraud).

112. *See* Jodi Wilgoren, *Kerry Suggests Rivals Might Suppress Black Vote*, N.Y. TIMES, Sept. 12, 2004, § 6, at A28 (discussing Kerry's speech at a gala sponsored by the Congressional Black Congress Foundation, in which Kerry suggested that the Republican party had and would suppress black votes).

It will raise the partisan temperature around all aspects of election administration to the extent it is viewed as a matter of voter suppression rather than fraud prevention.

Both parties sometimes appear to act on this issue in a self-interested manner, advocating election administration changes that they believe would hike up the turnout of their voters or depress the other party's turnout. Much of that self-interest is caught up in rhetoric about voting "access" and "integrity." The remainder of this Part argues for reforms that stand a chance of significantly lowering the chances of electoral meltdown and that should be politically appealing to both Democrats and Republicans if they take their articulated concerns about election administration reform seriously. Of course, if it is all just rhetoric to mask partisan manipulation of election administration, then the arguments in the rest of this Article will fall on deaf ears.

America likely cannot eliminate the potential for electoral meltdown following a very close election. But there are significant steps that can be taken to lower significantly the likelihood of meltdown that could garner bipartisan support from politicians who truly wish to improve the system of election administration.

### *B. Voter Registration Reform*

This subpart advocates universal voter registration and government-issued voter identification cards with biometric information. Voter registration reform is the most promising area for lowering the chances of electoral meltdown. No rational election administrator would design the current hyperfederalized and nonintuitive system of voter registration.<sup>113</sup> Fundamental reform to make voting easier and prevent voter fraud would minimize opportunities for litigation.

On the ease of voting issue, the current registration system is very difficult to use, particularly for new voters or voters who have moved, no doubt depriving some number of voters of a chance to vote. Hyperfederalization means that there is a great variety among electoral jurisdictions in the rules for registration—from how to fill out the forms, to where the forms are available, to what information must be put on the form, to the deadlines for registration. Some states also impose technical hurdles as

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113. Cf. SCHIER, *supra* note 80, at 112 (stating that national voter registration "goes very much against the grain of American federalism . . . and has no vocal advocates at present. But it is worth considering").

well, requiring, for example, that registration forms be printed on a certain weight of paper<sup>114</sup> and that voters provide duplicate information on citizenship status.<sup>115</sup>

When a person moves from one state to another or even within a state, the voter must re-register, and the person often must comply with different registration rules. Those citizens who do not speak English may have difficulty finding registration information and forms in their language. Registration deadlines mean that by the time many people start paying attention to a campaign, even a presidential campaign, it may be too late to register to vote.

In many states, private individuals (sometimes those who collect signatures for ballot initiatives) collect voter registrations and submit those forms to elections officials. These individuals are often paid a fee, sometimes by political parties, to collect these registrations. Sometimes, these private individuals do not know the registration rules or do not check registration forms for errors, resulting in registration forms sometimes being rejected by elections officials. A person who attempts to register to vote may show up at the polls on election day and not in fact be registered.<sup>116</sup>

Even those voters who are properly registered may be mistakenly "purged" from voter rolls. Electoral jurisdictions differ in how they update voter registration information when a previously eligible voter becomes ineligible, as when, for example, a voter moves out of the jurisdiction or dies. Florida's recent history with purging felon voters from the rolls has been marred by controversy.

Before the 2000 election, Florida hired a private company to create a purge list of ineligible voters. The voter list included a number of "false positives," that is, persons who should not have been listed as felons. The error in part was caused by the name-matching program used by the private company, in which nonfelons with names similar to felons were placed on the purge list. It appears that somewhere between 1000 and 8000 eligible

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114. On the weight of the paper controversy in Ohio, see Mary Beth Beazley & Edward B. Foley, REGISTRATION RULES: SPECIAL COMMENTARY: STEALING VOTES BEFORE ELECTION DAY, in THE E-BOOK ON ELECTION LAW, at [http://moritzlaw.osu.edu/electionlaw/ebook/part1/eligibility\\_rules08.html](http://moritzlaw.osu.edu/electionlaw/ebook/part1/eligibility_rules08.html) (on file with the Washington and Lee Law Review).

115. Litigation over this issue took place in Florida and Ohio. See Rick Hasen, *Federal Court Rules Box 10 Litigation in Ohio Came Too Late*, Election Law Blog, at <http://electionlawblog.org/archives/002139.html> (last visited June 14, 2005) (linking to decisions in Florida and Ohio) (on file with the Washington and Lee Law Review).

116. Of course, this may happen with errors in processing registration forms by elections officials as well. It seems less likely, however, to happen when professionals conduct such registration efforts.

voters—many African-Americans with Democratic voter registrations—were removed from the list because they were incorrectly identified as ineligible former Florida felons.<sup>117</sup>

Controversy on felon purges continued in Florida in 2004.<sup>118</sup> The state hired a new consulting firm to provide a statewide database that would purge felons from the rolls. At the last minute before the consulting firm created the list, a state elections official made a decision on coding the software purge program that led to the exclusion of all Hispanic felons from the purge list.<sup>119</sup> "No one at the division of elections . . . recognized that Hispanics were almost non-existent on the list, which contained 24,197 whites and 22,084 blacks. Hispanics made up 61 names on the list, though they represent 17% of the state's population."<sup>120</sup>

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117. The 8000-person figure comes from U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION ch. 5, n.122 (June 2001), available at <http://www.usccr.gov/pubs/vote2000/reports/ch.5.htm>. The report proved controversial, and two commissioners issued a dissenting opinion challenging many of its conclusions, including the following. THE FLORIDA ELECTION REPORT: DISSENTING STATEMENT BY COMMISSIONER ABIGAIL THERNSTROM AND RUSSELL G. REDENBACH (Aug. 17, 2001), available at <http://www.usccr.gov/pubs/vote2000/report/appendix/dissent.htm>. On this point, the dissenters wrote:

The Commission heard from [the private company conducting the purge] that approximately 3,000 to 4,000 non-felons (out of approximately 174,000 names) were mistakenly listed on this so-called "purge" list provided to the state. The list identified 74,900 potentially dead voters, 57,770 potential felons, and 40,472 potential duplicate registrations. Under Florida law, the supervisors of elections were required to verify the ineligible-voter list by contacting the allegedly ineligible voters. Some supervisors believe the list to be unreliable, and did not use it to remove a single voter. It is regrettable that the commission made no effort to determine how many of the 67 supervisors of elections did or did not use the list. According to recent studies, the total number of wrongly-purged alleged felons was 1,104, including 996 convicted of crimes in other states and 108 who were not felons at all. This number contradicts the Commission's claim that "countless" voters were wrongly disenfranchised because of inaccuracies in the list.

*Id.* at 42.

118. For more extensive background on this controversy, see Posting of Publius, *Something's Rotten in the State of Florida*, Legal Fiction, at [http://lawandpolitics.blogspot.com/2004\\_09\\_01\\_lawandpolitics\\_archive.html#109625746958118590](http://lawandpolitics.blogspot.com/2004_09_01_lawandpolitics_archive.html#109625746958118590) (Sept. 27, 2004) (on file with the Washington and Lee Law Review).

119. *Felon List Doomed at Last Minute*, SARASOTA HERALD-TRIB., July 17, 2004, at A1, available at <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20040717/NEWS/407170404>.

120. Chris Davis & Matthew Doig, *Voter Purge Decision Could Haunt Jeb Bush*, SARASOTA HERALD-TRIB., July 13, 2004, available at <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20040713/NEWS/407130427/POLITICS0503>.

The decision to exclude Hispanics but not African-Americans had important partisan implications,<sup>121</sup> because African-Americans vote overwhelmingly for Democratic candidates and the Cuban-American community in Florida (a large portion of Florida's Hispanic population) is heavily Republican. The issue came to light when a local newspaper analyzed the purge list following a Freedom of Information request.<sup>122</sup> According to a later analysis by that newspaper, the decision to scrap the list in light of the unfavorable publicity "means that 28,000 Democrats who might have been banned from voting can cast their vote in November. By comparison, the list contained only 9,500 registered Republicans."<sup>123</sup>

The current system of voter registration also opens up the possibility of voter fraud. Some fraud results from the "bounty hunter" nature of voter registration. With political parties paying for completed voter registration forms, it should hardly be a surprise that elections officials receive a number of fraudulent voter registration forms. Republicans, for example, focused attention on reports that a man was paid with crack cocaine to register voters, and he turned in registration forms bearing the names of Mary Poppins, Dick Tracy, and star athletes.<sup>124</sup>

The partisan nature of payment for registration also may lead to the destruction of registration forms. Currently under investigation is an allegation that a voter registration group supporting Republican candidates in Nevada intentionally destroyed voter registration forms submitted by Democratic voters.<sup>125</sup>

Finally, hyperfederalization means that eligible voters may register, and potentially vote, in more than one jurisdiction. A recent *Kansas City Star* investigation found voters who voted in both Missouri and Kansas, and some who voted multiple times in Missouri.<sup>126</sup> Other reports have found hundreds

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121. Some questioned the political motives of the elections official; others questioned the fairness of Accenture, a company with strong Republican party ties. Chris Davis & Matthew Doig, *Shining Light on Company Behind Felon Voter List*, SARASOTA HERALD-TRIB., July 14, 2004, at A1, available at <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20040714/NEWS/407140620/POLITICS0503>. This issue is revisited in Part II.C below.

122. Chris Davis & Matthew Doig, *Felons*, 28 IREJ. 34, available at 2005 WL 11963209.

123. Davis & Doig, *supra* note 120.

124. James Dao, *No Kidding, Dick Tracy*, N.Y. TIMES, Oct. 20, 2004, at A22.

125. Sito Negron, *Feds' Help Sought in Voter Fraud Allegations*, LAS VEGAS SUN, Oct. 28, 2004, at B1.

126. Greg Reeves, *One Person, One Vote? Not Always*, KAN. CITY STAR, Sept. 5, 2004, at A1, available at <http://www.kansascity.com/mld/kansascity/news/9584013.htm?1c>.

of instances of double voting by voters living in two states, including "snowbirds" who are registered to vote in both New York and Florida.<sup>127</sup>

It is not clear how much registration fraud occurs, and there is even less knowledge of the extent to which registration fraud leads to voting fraud that potentially affects the outcome of elections.<sup>128</sup> Mary Poppins likely is not coming to the polling place with her umbrella to vote, even if she is registered hundreds of times. But it is certainly plausible that things like destroyed registration cards depriving one group of voters of the right to vote in a state like Nevada or double voting in a state like Florida could affect the outcome of the vote for president in a closely-contested state.

Both kinds of errors—eligible voters being denied the right to vote because of a registration mistake and ineligible voters casting ballots because the registration system failed to catch the attempted fraud—raise the specter of election-related litigation. Indeed, an examination of Electionline.org's February 14, 2005 Litigation Update<sup>129</sup> shows that of the 52 lawsuits brought in 2004 relating at least somehow to the conduct of the 2004 election, 32 involved registration controversies.<sup>130</sup> Similarly, much of the Washington

127. Russ Buettner, *Registration*, 28 IREJ. 1, available at 2005 WL 11963205.

128. See R. MICHAEL ALVAREZ & STEPHEN ANSOLABEHRE, CALIFORNIA VOTES: THE PROMISE OF ELECTION DAY REGISTRATION 14 (2002) ("Voter fraud is a persistent concern of those who run elections. Fraud is hard to detect and to measure. It may involve only enough ballots to win an election, and there may be no paper trail that would allow election officials to determine what exactly occurred."), available at [http://www.demos-usa.org/pubs/california\\_votes.pdf](http://www.demos-usa.org/pubs/california_votes.pdf) (last visited Sept. 13, 2005).

There seems little doubt that the extent of fraud is sometimes exaggerated, and sometimes for partisan purposes. See LORI MINNITE & DAVID CALLAHAN, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD (2003) (arguing that the actual impact of voter fraud is small compared to the impact of disenfranchisement through errors, mismanagement, and acts of partisan election officials), available at [http://www.demos-usa.org/pubs/EDR\\_-\\_Securing\\_the\\_Vote.pdf](http://www.demos-usa.org/pubs/EDR_-_Securing_the_Vote.pdf) (last visited Sept. 19, 2005). Still, few can question that some fraud in fact occurs, such as the double voting recently documented by journalists. See Ewald, *supra* note 53, at 84 n.119 ("Fraud today is almost certainly on a smaller scale than in the past, but fraudulent registration, use of absentee ballots, vote buying, and actual falsification of returns are not uncommon."); but see FUND, *supra* note 109, at 5 (stating, without empirical evidence, that election fraud "is probably spreading because of the ever-so-tight divisions that have polarized the country and created so many close elections lately"). For a particularly vivid example of election fraud—absentee votes being auctioned off to the highest bidder in front of the county courthouse—see *United States v. McCranie*, 169 F.3d 723 (11th Cir. 1999).

129. Electionline.org's Litigation Update, February 14, 2005, at <http://electionline.org/site/docs/pdf/litigation.update.Feb.14.05.pdf> (last visited Feb. 23, 2005).

130. The Electionline.org Litigation Update is not a complete list of all 2004 litigation related to the conduct of the election. For example, it omits the 18 states where lawsuits or administrative hearings concerned the right of Ralph Nader to appear on the presidential election ballot. See Richard Winger, *Did the Democrats Err on Nader?*, BALLOT ACCESS NEWS (Jan. 1, 2005) at <http://www.ballot-access.org/2005/0101.html#1> (presenting data on Nader's



State gubernatorial controversy comprised allegations of ineligible voters, including felons and non-registrants, casting votes.<sup>131</sup> There is no question that a significant chunk of potential litigation would be eliminated with sound registration reform.

As noted above,<sup>132</sup> HAVA seeks to help with registration problems in two ways. First, it allows a voter whose name does not appear on voter registration rolls to cast a "provisional ballot." Second, it requires each state to create a computerized voter registration database that elections officials can check on Election Day. If the databases are accurate, these reforms will help voters whose names do not appear on precinct lists on Election Day but who are in fact properly registered to vote. It should also minimize the number of voters who attempt to vote at the wrong precinct and whose votes are then not counted by elections officials. But HAVA does nothing to help voters who were deterred from registering because of filing deadlines, who were mistakenly purged from voter rolls, or who failed to fill out registration forms in compliance with legal requirements. Nor does the Act do much to prevent some kinds of voter fraud, such as double voting in two states.

This Article's proposal for registration reform is straightforward and has the potential to appeal to both Democrats and Republicans. The federal government—perhaps the Department of the Census—should undertake the universal registration of eligible voters,<sup>133</sup> and issue each voter a voter identification card that contains a name, signature, photograph, and biometric identification (such as a fingerprint).<sup>134</sup> Voters would not need to bring the

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electoral performance and arguing that the Democratic litigation to keep Nader off ballots was both unnecessary and harmful) (on file with the Washington and Lee Law Review).

131. See Postman, *supra* note 59 (noting that Washington Republicans were able to identify 240 felons who voted illegally, along with 44 votes cast under the names of dead people, and ten who voted twice).

132. See *supra* notes 95–97 and accompanying text (highlighting the most important provisions of HAVA).

133. In a cross-country survey of democratic countries, Louis Massicotte and his co-authors found that 20 countries relied upon voters to self-register and 34 countries had state-initiated registration. LOUIS MASSICOTTE ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES 73 (2004). "Every European country but two (France and Portugal) has state-initiated registration. Asian countries are also more inclined to that system, whereas none of the countries located in Oceania does so." *Id.* at 73. "Universal" registration need not imply "compulsory" registration; citizens may decline to register.

134. George Grayson has proposed a voter identification card for the United States based on the model recently adopted in Mexico. The Mexican card features:

(1) the registrant's digitized photograph through which the color yellow undulates and which reveals the initials of [the Mexican election agency] when exposed to an ultraviolet light, (2) various national shields and the voter's name when exposed to

card in order to vote, but voters who fail to do so would supply a fingerprint or other valid form of biometric identification which could then be checked against official records.<sup>135</sup> By cross-referencing information with Postal Service change-of-address cards, federal officials can insure that voter registration information is transferred to the appropriate electoral jurisdiction.<sup>136</sup> By cooperating with local entities that issue death certificates, the government can purge dead voters from the rolls efficiently. The federal government need not start from scratch. It can begin by verifying the information in HAVA-mandated state databases, adding information to insure that voters are not registered in more than one state.

There is much for both Democrats and Republicans to like. Universal voter registration along the lines described is even more appealing than Election Day registration to Democrats, because the government would go out and take over the job of voter registration. No longer would voters have to jump technical hurdles in order to register to vote, or to re-register upon moving. Nor would the parties and others need to raise massive funds for voter registration efforts. Campaigns would still focus on "get out the vote" activities: Voting would remain optional, not mandatory.<sup>137</sup>

Republicans, besides perhaps being in favor of ending the burden of voter registration, should be attracted to the voter identification nature of the proposal. By assigning individuals a unique voter identification (VID) number, it will be easier to police potential double voting. The possibility of fraudulent registrations would be minimized. VID will allow voting officials to verify that the correct voters voted.

A few objections to the proposal are foreseeable. First, some Democrats and civil libertarians (including some conservatives concerned about privacy) may object to VID. It will be harder for VID to reach the homeless, and those who are poor and uneducated may have a more difficult time obtaining the

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a black light, (3) his identification number on the front, (4) his identification number on the back, (5) the nine other numbers from the front and back combined form the citizen's optical character recognition or OCR, (6) an IFE hologram, (6) micro lines, (7) a thickness of exactly 0.76 millimeters, (8) a thumb print, and (9) a signature [sic].

George Grayson, *Registering and Identifying Voters: What the United States Can Learn from Mexico*, 3 ELECTION L.J. 513, 516 (2004).

135. Grayson does not consider the question whether it must be presented at the polling place in order to vote. *Id.*

136. In Mexico, a voter must notify election authorities if he moves so that his new address corresponds with the closest polling place. *Id.*

137. The potential benefits of mandatory voting are explored in Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996). Such a change, whether or not desirable, is not defensible on grounds of fixing problems with election administration.

VID. Second, VID, particularly with biometric information, starts to look like a national identity card, and it could get caught up in other issues, such as immigration politics.

These are serious objections, but they should not prevent Democrats from signing on for VID. Remember that this is a package deal: VID comes with universal voter registration conducted by the government, which Democrats should favor strongly. In addition, because voters can come to the polling place with nothing but their thumbprint to vote, once the card is obtained it will not be difficult for even the homeless to cast a vote. As far as privacy concerns, it is not clear that VID seriously increases the extent to which the government can obtain private information. By cooperating with data mining companies, the government already has the ability to obtain such information about many individuals.<sup>138</sup> The marginal privacy costs of VID do not seem all that high, especially if there are strict restrictions on who may access the data and for what purposes beyond registration of voting information.

This package deal implicates three objections from the Republican side. First, there is the cost associated with this government program. It will no doubt be expensive for the federal government to create and maintain this massive database and to provide VIDs with photographs and biometric information for every eligible voter.<sup>139</sup> Second, at least some Republicans maintain the notion that it should not be so easy for people to vote.<sup>140</sup> Under this view, registration barriers will segregate out those voters who are likely to be less intelligent or less concerned. Third, the plan has significant federalism costs by taking away registration powers from the 13,000 local electoral jurisdictions and placing that role in the hands of the federal government.

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138. See ROBERT O'HARROW, *NO PLACE TO HIDE: BEHIND THE SCENES OF OUR EMERGING SURVEILLANCE SOCIETY* (2004) (laying out post-9/11 "security-industrial complex" whereby cooperation between private data companies and government anti-terror groups yields unprecedented access to private information about American citizens); see also Grayson, *supra* note 134, at 519–20 (refuting "big brother" concerns accompanying voter identification card).

139. The VID could perhaps be sold as helpful for "homeland security" purposes as well. However, the extent to which VID becomes more like an all-purpose "national identity card," civil libertarian opposition should rise. The balance to be struck here depends upon issues beyond the scope of this article.

140. See, e.g., Jonah Goldberg, *The Cellblock Voting Bloc*, L.A. TIMES, Mar. 8, 2005, at B11 (suggesting that making voting easier would weaken government). Goldberg argues that:

[V]oting should be harder, not easier—for everybody. . . . If you are having an intelligent conversation with somebody, is it enriched if a mob of uninformed louts, never mind ex-cons and rapists, barges in? People who want to make voting easier are in effect saying that those who previously didn't care or know enough about the country to vote are exactly the kind of voters this country needs now.

*Id.*

On the cost point, good election administration is expensive. Consider the hundreds of millions that Congress has allocated for the replacement of antiquated voting machinery. The costs should not be compared to the cost of doing nothing, but to the expected value of the reduction in the chances of post-litigation meltdown created by enacting this proposal. Meltdown threatens the very fabric of our democracy, and the nation should be prepared to pay significant sums to avoid it.

Little can be said on the second point. There is a fundamental divide over the extent to which people view elections as a means for choosing the "best" candidate (where we want only the most "intelligent" or "qualified" voters voting) and elections as a mean of dividing power among political equals. Consider how the Texas Attorney General defended the state's onerous registration requirements back in 1971: "[T]hose who overcome the annual hurdle of registering at a time remote to the fall elections will more likely be better informed and have greater capabilities of making an intelligent choice than those who do not care enough to register."<sup>141</sup> By outlawing literacy tests in the Voting Rights Act, Congress has already rejected at least one means of measuring voter intelligence.<sup>142</sup> Even for those who might support some kind of intelligence or interest test for voting should reject the use of the Byzantine registration rules to accomplish this purpose: Far better tests of intelligence should be available than knowing how to check the right box on a form. But there is some extent to which this is an irreducible ideological divide that could doom this proposal. As Walter Dean Burnham noted, "there always have been a substantial number of Americans who have believed that voting is not a right but a privilege for which individuals must demonstrate their worthiness."<sup>143</sup>

On the federalism point, the problem can be avoided by limiting the requirement that jurisdictions use the registration database for congressional elections. The Constitution's Elections Clause gives Congress the power to set the rules for Congressional elections. In the analogous circumstance of Congress passing the National Voter Registration Act in 1993 (requiring that

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141. *Beare v. Smith*, 321 F. Supp. 1100, 1106 (D. Tex. 1971).

142. 42 U.S.C. § 1973b(e)(2) (2000).

143. Walter Dean Burnham, *The Turnout Problem*, in *ELECTIONS AMERICAN STYLE* 97, 109 (A. James Reichley ed., 1987). There is also a partisan dimension to the extent that nonvoters are more likely to vote Democratic, an empirical question without an easy answer. See Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 *PERSP. ON POL.* 507, 510–11 (2004) (concluding that "the partisan preferences of marginal voters, for whom variations in registration laws matter most, closely mirror those of voters" but noting that if "those disproportionately affected by registration laws . . . are politically distinct, the partisan effects would be larger").

jurisdictions make voter registration materials available in certain government offices), the courts have upheld Congress's power to dictate rules for conducting registration for congressional elections.<sup>144</sup> States would remain free to conduct elections for state and local offices using a separate database, though it is hard to believe any of them would go to the expense to do so.<sup>145</sup>

One particular administrative issue remains to be discussed. States have different rules for determining voter qualifications. For example, states differ over whether felons who complete their sentences regain the right to vote.<sup>146</sup> States also may differ on other qualifications, such as how they judge mental competency for purposes of disenfranchising incompetent adults (an area of inquiry virtually unmined by election law scholars).<sup>147</sup> Given how these standards differ, it might be best for states to continue to determine additional eligibility issues from an examination of the federal voter identification database.

Universal voter registration with VID will not eliminate the risk of electoral meltdown, but it would go a long way toward doing so.

### C. Nonpartisan Election Administration

This subpart advocates that states adopt nonpartisan, professionalized election administration on both the state and local levels of government.<sup>148</sup>

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144. See Ass'n of Cmty. Orgs. for Reform Now v. Edgar, 56 F.3d 791, 793–94 (7th Cir. 1995) (holding that Article 1, Section 4 of the United States Constitution grants Congress the power to determine how a state will register voters); Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1413–14 (9th Cir. 1995) (noting that Congress has the power to regulate the time, place, and manner of congressional elections, including registration).

145. See DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW—CASES AND MATERIALS 66 (3d ed. 2004) ("In order to avoid dual systems of voter registration, almost all states use the procedures mandated by the Motor Voter law for registration to vote in state and local as well as federal elections.").

146. See Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL. 491, 494 tbl.1 (2004) (summarizing state felon disenfranchisement restrictions).

147. For a recent preliminary inquiry that cites some of the earlier literature, see Jason H. Karlawish et al., *Addressing the Ethical, Legal and Social Issues Raised By Voting By Persons with Dementia*, 292 JAMA 1345 (2004).

148. In the system I envision, states enact a method for choosing a statewide nonpartisan election administrator, and that administrator would then choose local officials to assist in administering elections. The alternative, for those jurisdictions favoring more local control, is to replicate the statewide nonpartisan selection mechanism on the local level. The problem with this alternative is that it is much more likely that a local government appointing body will be completely dominated by a single party so that the proposed 75% supermajority approval requirement will not ensure a consensus, bipartisan candidate.

This is a common-sense suggestion: To the extent possible, the people running our elections should not have a vested interest in their outcome. In some states, this change would entail much more of a change than in other states, because in our hyperfederalized system there are a variety of means for choosing election administrators. In a number of states using partisan election officials, such a change could (or must) be accomplished through an initiated constitutional amendment. In that way, voters directly could adopt the measure even if it was opposed in the state legislature for partisan or other reasons.

In thirty-three states, the secretary of state (or other statewide official charged with responsibilities as the Chief Elections Officer of the state (CELO)) is elected through a partisan election process. No state currently elects the CELO through a nonpartisan election.<sup>149</sup> The remaining states use an appointments process. Many states let the governor appoint the CELO, sometimes subject to confirmation of a house or both houses of the state legislature. Some states use various appointments measures for boards or commissions to run elections. Most of these commissions use a bipartisan model that either splits representation on the board evenly between the two major parties, or gives an advantage to the majority party in the state. Table 1 summarizes each state's mechanism for choosing the CELO or state elections board.

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Another alternative that should be considered on the merits but appears politically dead is a national nonpartisan, professionalized system of election administration. Such a system would better ensure uniformity in election procedures than a state or local-based system. Putting such a system in place would be complex, because many state and local elections are consolidated with federal elections. Questions would be raised over, for example, how state and local candidates and issues would appear on a ballot. In places like Australia and Canada, which have national nonpartisan election administration, federal elections are separate from state and local elections. Nationalization would also meet with significant political resistance from state election administrators who would stand to lose power. *See supra* note 102 (noting NASS opposition even to the weak EAC). But this Article does not go into the details of such a change here, because Congress is not close to having the will to enact such a national system.

Cross-nationally, there are three models for election authority: the electoral commission, the single public official, and the government minister model. In their cross-national study, Massicotte and his co-authors found 43 democracies using a commission, ten using a single public official, and six (all in Europe) using a government minister. MASSICOTTE ET AL., *supra* note 133, at 94–97.

149. *See* Jeff Denham, *Secretary of Non-Partisanship*, SACRAMENTO NEWS & REV. (Dec. 23, 2004), at <http://www.newsreview.com/issues/sacto/2004-12-23/guest.asp> (advocating proposal of author, a California state senator, whereby the California secretary of state would be elected in a nonpartisan election and noting that "California would be the first state in the nation to have a nonpartisan secretary of state") (on file with the Washington and Lee Law Review).

**Table 1**  
**Method for Choosing State’s Chief Election Officer (CELO) or**  
**Top Election Board or Commission**

<b>CELO Elected in Partisan Election</b>	<b>CELO (or Board) Appointed</b>
<b>Alabama</b> (secretary of state (SOS))	<b>Delaware</b> (appointed by governor with majority vote of Senate)
<b>Alaska</b> (Lt. Governor)	<b>Florida</b> (appointed by governor)
<b>Arizona</b> (SOS)	<b>Hawaii</b> (board selected by state legislative members on bipartisan basis)
<b>Arkansas</b> (SOS)	<b>Illinois</b> (selected by governor on bipartisan basis)
<b>California</b> (SOS)	<b>Indiana</b> (selected by governor on bipartisan basis) (commission shares responsibility with SOS)
<b>Colorado</b> (SOS)	<b>Kentucky</b> (selected on bipartisan basis) (board shares responsibility with SOS)
<b>Connecticut</b> (SOS)	<b>Maine</b> (selected by vote of legislature)
<b>Georgia</b> (SOS)	<b>Maryland</b> (selected by governor with senate confirmation on bipartisan basis but with one party having 3 members to the other party’s two members)
<b>Idaho</b> (SOS)	<b>New Hampshire</b> (selected by vote of the legislature)
<b>Indiana</b> (SOS) (shares responsibility with co-directors of appointed board)	<b>New Jersey</b> (selected by governor with confirmation by senate)
<b>Iowa</b> (SOS)	<b>New York</b> (selected by governor on bipartisan basis upon recommendation of parties)
<b>Kansas</b> (SOS)	<b>North Carolina</b> (appointed by governor on bipartisan basis upon recommendation of parties)
<b>Kentucky</b> (SOS) (shares responsibility with bipartisan board)	<b>Oklahoma</b> (selected by governor on bipartisan basis with a 2 to 1 majority for political party with the largest number of registered voters)

<b>Louisiana</b> (SOS)	<b>Pennsylvania</b> (appointed by governor with senate confirmation)
<b>Massachusetts</b> (SOS)	<b>South Carolina</b> (appointed by governor on bipartisan basis, with at least one member of 5 member commission from minority party)
<b>Michigan</b> (SOS)	<b>Tennessee</b> (appointed by general assembly)
<b>Minnesota</b> (SOS)	<b>Texas</b> (appointed by governor with senate confirmation)
<b>Mississippi</b> (SOS)	<b>Virginia</b> (appointed by governor on bipartisan basis with 2 members from governor's party and one member from opposition party)
<b>Missouri</b> (SOS)	<b>Wisconsin</b> (1 member of board chosen by governor, one each chosen by chief justice of the supreme court, speaker of the assembly, senate majority leader, minority leader in each house of the legislature, and chief office of each political party whose candidate for governor received at least 10% of the vote)
<b>Montana</b> (SOS)	
<b>Nebraska</b> (SOS)	
<b>Nevada</b> (SOS)	
<b>New Mexico</b> (SOS)	
<b>North Dakota</b> (SOS)	
<b>Ohio</b> (SOS)	
<b>Oregon</b> (SOS)	
<b>Rhode Island</b> (SOS)	
<b>South Dakota</b> (SOS)	
<b>Utah</b> (Lt. Gov.)	
<b>Vermont</b> (SOS)	
<b>Washington</b> (SOS)	
<b>West Virginia</b> (SOS)	
<b>Wyoming</b> (SOS)	

Data sources: Federal Election Commission, state websites, state codes



On the county and other local levels, there is an even greater variation, and the state-based method of selection does not necessarily match the county level. In California, for example, the secretary of state runs in a partisan election, but on the county level the local elections official may either be a county clerk elected in a nonpartisan election or a registrar of voters appointed by and serving at the pleasure of the county board of supervisors.<sup>150</sup> In Florida, the secretary of state used to be a partisan elected position; the secretary now is appointed and serves at the pleasure of the Governor. But the county supervisor of elections still runs in a partisan election.<sup>151</sup> Generally speaking, there is no distinct pattern in the U.S. for the selection of county and local election officials. Some run in partisan elections,<sup>152</sup> a few run in nonpartisan elections,<sup>153</sup> and many are appointed; among appointed election officials, some are (at least nominally) required to remain nonpartisan<sup>154</sup> and some are chosen to achieve some sort of partisan ratio or balance.<sup>155</sup>

Usually officials on the local level resolve disputes over whether a challenged voter should be allowed to vote or whether a particular ballot should be counted as a valid vote for a candidate or issue. County canvassing boards in Florida, for example, resolve disputes over the counting of defective ballots, subject (since post-2000 legislation) to state regulations.<sup>156</sup> Such boards are made up of an elected supervisor of elections, a county court judge, and chairman of the county board of commissioners.<sup>157</sup> This situation may induce even more potential for partisan bias than first appears: Two of the

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150. CAL. GOV'T CODE § 26802 (West 2005); CAL. CONST. art. V, § 11.

151. FLA. STAT. ANN. § 98.015 (West 2005). This is not true in Miami-Dade County, where it is a nonpartisan appointment.

152. *See, e.g.*, WIS. STAT. ANN. § 59.20(2) (West 2004) (providing for the county clerk to be elected to a two-year term).

153. Nonpartisanship is rare on the local level. *See, e.g.*, N.D. CENT. CODE § 16.1-11-08 (2003) (providing for county officials, including county auditor, to be elected in nonpartisan election). The county canvassing board in North Dakota counties, however, is comprised of additional individuals, some of whom have a partisan affiliation. *Id.* § 16.1-15-15.

154. The elections supervisor in Alaska may not participate in partisan political activity. ALASKA STAT. § 15.10.105 (Michie 2004). But the elections supervisor is appointed by the state director of elections, who in turn is appointed by the Lieutenant Governor—who is elected in a partisan election. *Id.* §§ 15.35.010, 15.10.105, 15.10.110.

155. *See, e.g.*, N.C. GEN. STAT. § 163-30 (2004) (providing for three members to be appointed for two-year terms by the state board of elections). The state board of elections is a body itself appointed by the governor with certain partisan balance. *Id.* § 163-19; *see also infra* note 211 (describing Ohio's bipartisan local board structure).

156. *See, e.g.*, FLA. STAT. ANN. § 101.5614 (West 2005).

157. FLA. STAT. ANN. § 102.141 (West 2005).

three members run in partisan contested elections.<sup>158</sup> The third and presumably "neutral" member, the county judge, runs in a nonpartisan election, but a judge's partisan affiliation will tend to follow affiliations of the voters who reelect them. For example, in Broward County, 66 of the 75 county judges were registered as Democrats in 2002.<sup>159</sup>

The case for nonpartisan election administration begins with the 2000 Florida debacle. The Florida mess should have convinced both Democrats and Republicans that there is something wrong with having partisan election officials making discretionary decisions that could affect the outcome of a presidential election.

Democrats point to the controversial decisions made by Katherine Harris, Florida's then-Secretary of State. Harris made a number of controversial decisions during the 2000 election debacle, including the decisions not to extend the protest period to allow for recounts requested by Al Gore and not to accept late-filed returns from counties after a court gave her discretion to do so.<sup>160</sup> Much of the Democrats' distrust of Harris came from the fact that she served not only as the state's CELO; she concomitantly served as co-chair of Bush's election committee in Florida.<sup>161</sup> Phone records later revealed that Harris was in touch privately with George W. Bush's campaign and the candidate's brother, Florida's Republican Governor Jeb Bush, during the Florida dispute.<sup>162</sup>

Republicans focused on elected county canvassing boards, particularly those counties with Democratic-majority boards. Those boards made decisions about which punch card ballots should be counted as valid votes, decisions which changed through the course of the counting and recounting stages. Republicans charged that the decisions regarding which votes to count made by these boards were designed to help Democrat Al Gore get more votes.<sup>163</sup>

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158. FLA. STAT. ANN. § 124.011 (West 2005).

159. Schotland, *supra* note 16, at 227 n.78.

160. See GREENE, *supra* note 19, at 46–51, 56–60 (summarizing controversies involving Harris).

161. See *supra* notes 89–90 and accompanying text (discussing the relationship between Harris and Bush).

162. JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION 62, 70–82 (2002) (recounting the election night conversation between Harris and Jeb Bush involving the CNN appearance of a Florida electoral official).

163. See GREENE, *supra* note 19, ch. 5 ("Challenging the Hand Recounts in Court"). Florida's Democratic Attorney General also sent in an "opinion" to counteract the opinions of Harris.

The Florida example shows that discretionary decisions in the context of a recount can affect the outcome of a close election, and that there may be at least the appearance, if not the fact, of some discretionary decisions being made to benefit the decisionmaker's party and candidates.<sup>164</sup> Indeed, even if an election administrator chosen through partisan election or appointment makes a principled decision regarding recount rules that coincides with the interests of his or her party's candidates, opponents in today's highly charged partisan atmosphere will naturally accuse the official of bias. Even worse, an election administrator who makes a principled decision that contradicts the interests of his or her party will be accused of not being sufficiently loyal to the party.<sup>165</sup> The appearance of corruption—or more accurately, the actuality of a conflict of interest<sup>166</sup>—is apparent and unavoidable.

But the problem extends beyond discretionary decisions made by partisan officials in the context of recounts. Indeed, there are many discretionary decisions made by CELOs and local election administrators that can affect the outcome of close elections. Consider the HAVA "wrong precinct" question discussed earlier.<sup>167</sup> It may be a coincidence that Republican election officials in Ohio, Missouri, Michigan, and Florida took the position that "wrong precinct" votes should not be counted and that Democratic election officials in Iowa and New Mexico took the opposite position.<sup>168</sup> But there is at least an appearance of bias when such decisions are made by partisan election officials that coincide with their parties' apparent interests—Democrats to make it easier for people to vote whose names do not appear on registration rolls and Republicans to make it harder.

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164. See Schotland, *supra* note 16, at 234–43 (suggesting ways to decrease administrative discretion in the context of recounts).

165. See David Postman, *Republican Reed Faces GOP Wrath Over Recount Decisions*, SEATTLE TIMES, Jan. 3, 2005, at A1, (describing the party backlash against the Republican Washington secretary of state who certified the Democratic candidate as winner of a contested gubernatorial election), available at [http://seattletimes.nwsources.com/html/politics/2002138732\\_reed\\_03m.html](http://seattletimes.nwsources.com/html/politics/2002138732_reed_03m.html).

166. See Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 326 (1989) (contrasting an "appearance of impropriety" with "a reality of conflict of interest").

167. See *supra* note 85 and accompanying text (discussing legal controversy over whether election officials must count in the total a ballot cast by a registered voter who attempts to vote in an improper precinct).

168. See Tokaji, *supra* note 12 (summarizing litigation); Lynn Campbell, *Suit Seeks to Prevent Votes from Counting*, DES MOINES REG., Oct. 26, 2004, at 1 (noting litigation in Iowa); Jackie Calmes & Jeanne Cummings, *Legal Battles Loom in Seven Key States*, WALL ST. J., Oct. 28, 2004, at A1 (discussing litigation in Florida, Ohio, Missouri, and New Mexico); *The Lawyers Gather: Worse than Last Time?*, ECONOMIST, Oct. 30, 2004, at 90 (discussing litigation in Michigan).

Consider also the ongoing controversies over Florida's felon disenfranchisement list. Democrats and others have criticized the decision of Florida's Republican state election officials in 2000 to create a felon list from which to purge registered voters who had been convicted of a felony in Florida. The list allegedly contained many false positives in 2000; in 2004, the new list excluded Hispanics but included African-Americans. Much of the focus on partisan discretion has focused on the state level, but it extends well beyond the secretary of state's office. Although the state produces the list, local (partisan) election officials have the discretion whether and how to use the list, leading to further potential bias down the line.

A recent study by Guy Stuart found potential partisan bias on the local level in the purging of felons. During the Florida 2000 felon purge, "67 percent of people on the felons list were kept on the voter rolls in counties with Democratic supervisors, while 41 percent of people on the felons list in Republican counties were kept on the voter rolls."<sup>169</sup> Stuart notes two possible explanations: First, it was a "a cynical attempt" by Democratic county supervisors to protect their political base in a close election; or, second, it was a principled decision made because most supervisors thought the list was riddled with errors and would disenfranchise legitimate voters.<sup>170</sup> Until states can in fact produce accurate lists of ex-felons, there is at least the potential for bias in the way that election administrators use felon lists.<sup>171</sup> In the meantime, the potential for partisan bias perhaps best explains Republican attempts in Florida to shift the power for managing voter rolls from county canvassing boards—many of which are dominated by Democrats—to the Republican-appointed secretary of state.<sup>172</sup>

Partisanship concerns extend well beyond Florida. The 2004 election season was filled with allegations across the United States that partisan

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169. Guy Stuart, *Databases, Felons, and Voting: Bias and Partisanship of the Florida Felons List in the 2000 Elections*, 119 POL. SCI. Q. 453, 462 (2004).

170. *Id.*

171. Incompetence in the administration of felon lists also occurs. See Ewald, *supra* note 53, at 256 (citing problems in administration of felon disenfranchisement rules in New York, Minnesota, and Iowa).

172. See Editorial, *Radical Reform: Election Supervisors Whacked*, TALLAHASSEE DEMOCRAT, Feb. 17, 2005, at E4 (criticizing Florida Secretary of State Glenda Hood for her part in enacting legislation transferring power from local election administrators to a centralized board). A similar dynamic is occurring in Maryland. See John Wagner, *Senator Seeks to Ease Elections Bill 'Uproar,'* WASH. POST, Feb. 19, 2005, at B5 (noting the dispute between Maryland Democrats and Republicans over proposed legislation that would have done away with the five-member election panel and replaced it with two new boards). For a similar situation in Indiana, see *Compromising Elections*, FORT WAYNE J.-GAZETTE, Feb. 4, 2005, at 8, available at <http://www.fortwayne.com/mld/journalgazette/10816311.htm>.

election administrators were making decisions to gain partisan advantage. Because of its status as a very close battleground state, many people focused their attention on the decisions made by Kenneth Blackwell, Ohio's Secretary of State. Blackwell was elected as a Republican—he is now a candidate for the state's governorship<sup>173</sup>—and he served as a co-chair of President Bush's re-election campaign in Ohio. Democrats have criticized many aspects of his discretionary decisionmaking,<sup>174</sup> though much scorn was reserved for the local decisions related to allocating voting machines to precincts, which Democrats alleged resulted in longer lines in Democratic precincts than in Republican precincts.<sup>175</sup> Blackwell engaged in a fair amount of politicking during the election season, including taping a pre-recorded telephone message played to voters urging them to vote for an anti-gay marriage initiative on the 2004 ballot.<sup>176</sup>

Ohio was not the only scene of controversy this election season. The left-leaning *New York Times* editorial page, as part of its "Making Votes Count" series,<sup>177</sup> criticized Missouri's then-Secretary of State (and now Governor) Republican Matt Blunt for pushing for an anti-gay marriage initiative to appear on the November 2004 ballot, preventing Democratic-leaning St. Louis from instituting early voting, and making it easier for military overseas voters (presumably leaning heavily Republican) to vote by fax.<sup>178</sup> It criticized Florida's Secretary of State Glenda Hood, appointed<sup>179</sup> by Florida's Republican Governor, Jeb Bush, for trying to keep Ralph Nader on the Florida ballot, for using a highly-suspect felon voter list, and for

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173. Campaign Website, Ken Blackwell for Ohio Governor, at <http://www.kenblackwell.com> (last visited June 15, 2005) (on file with the Washington and Lee Law Review).

174. See PRESERVING DEMOCRACY, *supra* note 9, at 4–5 (listing litany of criticisms leveled at Blackwell).

175. Tokaji, *supra* note 12, at 1737–38.

176. Steven F. Huefner, *Independent Election Administration*, Election Law @ Moritz, at <http://moritzlaw.osu.edu/electionlaw/comments/2005/comment0215.html> (Feb. 15, 2005) (on file with the Washington and Lee Law Review).

177. An archive of editorials in this series, written by *Times*' editorial board member Adam Cohen, is available at <http://www.nytimes.com/ref/opinion/making-votes-count.html> (last visited June 15, 2005).

178. Editorial, *An Umpire Taking Sides*, N.Y. TIMES, July 9, 2004, at A28, available at <http://www.nytimes.com/2004/07/09/opinion/09FRI1.html?ex=1108098000&en=e3e1db3ccb034929&ei=5070>.

179. One of the reforms enacted after the 2000 Florida debacle was changing the position of secretary of state to one appointed by the governor. Susan A. McManus, *Goodbye Chads, Butterfly Ballots, Overvotes, and Recount Ruckuses! Election Reform in Florida, 2000 to 2003*, in ELECTION REFORM: POLITICS AND POLICY 37, 45 (Daniel J. Palazzolo & James W. Caesar eds., 2005).

imposing onerous voter identification rules.<sup>180</sup> It criticized the Republican Secretary of State of Colorado Donetta Davidson for allowing "wrong precinct" votes to count for the race for president but not for the close race for an open U.S. Senate seat.<sup>181</sup> But the newspaper's editorial page made no mention of election administration controversies related to New Mexico's Democratic Secretary of State Rebecca Vigil-Giron.

Republicans had their share of criticism of Democratic election officials. Before the 2004 election, Republicans virtually guaranteed they would launch a legal challenge to presidential election results in the state of New Mexico if President Bush lost the state, on grounds that only fraudulent voting acceded to by the Democratic Secretary of State Rebecca Vigil-Giron could account for such an outcome.<sup>182</sup> In Iowa, Republicans threatened a lawsuit and called for the resignation of Democratic Secretary of State Chet Culver based on his decision to accept voter registrations by mail from applicants who did not check a box affirming U.S. citizenship.<sup>183</sup> The secretary then reversed his decision.<sup>184</sup>

It is, of course, impossible to know in most instances the extent to which a discretionary decision made by a partisan elections official can best be explained by partisan bias rather than a reasoned decision on an issue on the merits. What is possible to measure is growing mistrust in the elections

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180. Editorial, *The Return of Katherine Harris*, N.Y. TIMES, Sept. 16, 2004, at A26, available at <http://www.nytimes.com/2004/09/16/opinion/16thu2.html?ex=1108098000&en=a2acf440a8e9311e&ei=5070>.

181. Editorial, *Playing With Election Rules*, N.Y. TIMES, Sept. 30, 2004, at A28, available at <http://www.nytimes.com/2004/09/30/opinion/30thu1.html?ex=1108098000&en=ec1aac5171e9a95a&ei=5070>.

182. Klaus Marre & Kari Lundgren, *Lawsuits Loom Over New Mexico Outcome*, THE HILL, Oct. 20, 2004, at 6, available at <http://www.thehill.com/news/102004/lawsuits.aspx>. President Bush won the state of New Mexico. Because of difficulties in counting provisional ballots, New Mexico was the last state to determine whether Bush or Kerry was entitled to the state's electoral votes. *In New Mexico, Bush vs. Kerry Is Still an Issue as Votes Trickle In*, N.Y. TIMES, Nov. 14, 2004, at 26.

183. Lynn Campbell, *Republicans Threaten Lawsuit Over Voter Registration Issue*, DES MOINES REG. (Oct. 25, 2004), at <http://desmoinesregister.com/apps/pbcs.dll/article?AID=/20041025/NEWS09/410250360/1001> (on file with the Washington and Lee Law Review). Republicans were also upset over Iowa Attorney General Tom Miller's recommendation that provisional ballots count if cast in the correct county but the wrong precinct. Lynn Campbell, *Five in Iowa Sue Over Ballots*, DES MOINES REG. (Oct. 26, 2004), at <http://desmoinesregister.com/apps/pbcs.dll/article?AID=/20041026/NEWS09/410260370&searchID=731881332256661> (on file with the Washington and Lee Law Review).

184. Colleen Kranz, *Iowa's Secretary of State Faces the Media Spotlight*, DES MOINES REG., Nov. 5, 2004, at 6A, available at <http://desmoinesregister.com/apps/pbcs.dll/article?AID=/20041105/NEWS10/411050363/1011>.

process, which must no doubt be driven in part by concerns over the partisan decisions of elected officials. Concerns about partisan manipulation of the process appear the most likely explanation for the large gap between Democratic and Republican faith in our system of election administration following President Bush's re-election. The fact is, however, that significant numbers of non-Democratic voters, including Republicans, have expressed concern about the integrity of the electoral process.<sup>185</sup>

The kind of mistrust the nation saw in the 2004 election is likely to continue unabated, with partisan election officials (and their discretionary decisionmaking) serving as lightning rods for criticism and litigation. After the 2004 election, California's elected Democratic secretary of state resigned while under investigation for, among other things, routing HAVA funds to support Democratic Party causes and supporting his own campaign coffers.<sup>186</sup>

What can be done? Removing the opportunity for partisan election officials to make discretionary decisions is a good first step. Registration reforms detailed above go a long way toward eliminating room for discretion, as do periodic election law audits through which states clarify potential ambiguities in election laws.

But it will be impossible to remove all ambiguities, and therefore the possibility of exercising discretion, from the hands of election administrators. For this reason, I advocate that states move toward a model of nonpartisan election administration so as to further minimize the chances of election meltdown and, along the way, restore some public trust in the process of election administration.

I propose we create a cadre of individuals, much as exists today in Australia and Canada, where the allegiance of the CELO is to the integrity of the process itself, and not to any particular electoral outcome. The difficult question is how to create a truly nonpartisan, professional administrator and lower staff to do the job on the state and local level.

Simply making the process an appointed one does not appear to help. Glenda Hood, who was appointed secretary of state by Florida's Republican Governor Jeb Bush, has proven just as controversial a figure as her predecessor, Katherine Harris.<sup>187</sup> The desired model is that of Alan

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185. See *supra* Figure 1 and accompanying text (charting over the last decade the percentage of Americans believing the prior presidential election had been unfair).

186. Herbert A. Sample, *Shelley Resigns*, SACRAMENTO BEE, Feb. 5, 2005, at A1, available at <http://www.sacbee.com/content/politics/shelley/story/12245634p-13109584c.html>.

187. See Andrew Gumbel, *Something Rotten in the State of Florida*, THE INDEPENDENT (London), Sept. 29, 2004, at 2 ("Glenda Hood has become a particular object of attack in the

Greenspan, not Katherine Harris.<sup>188</sup>

Appointment, rather than election (even a nominally nonpartisan election),<sup>189</sup> does seem the best way to choose a neutral CELO, but the danger is that the appointee could be just as partisan as the formerly elected candidate. For this reason, it makes sense to require that the CELO be nominated by the governor and approved by a large supermajority of the state legislature (say a 75% vote), insuring that only a consensus candidate who is seen as above politics will gain enough bipartisan support to be awarded the position.

Once the CELO position is created, it will be necessary to insulate him or her from political pressure. This should be done in two ways: First, the CELO should receive a long term without the possibility of reappointment. A CELO could be removed by the legislature only under the rules for impeaching a state executive. This model best assures the independence of the administrator.<sup>190</sup> Second, the state's constitution should guarantee a certain budget level for the office, so that the CELO is not dependent on legislators for favorable treatment.

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campaign to hold Florida accountable for its voting practices. Unlike her predecessor, Katherine Harris, who was at least nominally independent because she was elected to the post of secretary of state, Hood is a direct gubernatorial appointment. In the words of Congressman Wexler, a particularly ardent critic: "She is the political mouthpiece of Jeb Bush, a true partisan using her office to the best possible advantage of the Republican Party. She is the mechanism Jeb and George Bush have employed to do everything in their power to make Florida a Bush state."), available at <http://news.independent.co.uk/world/americas/story.jsp?story=566688>.

188. Cf. Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent Protecting Gerrymanders*, 116 HARV. L. REV. 649, 677 (2002) (titled a section of his article: "Do we really want Alan Greenspan drawing districts?"). A number of readers have argued that Alan Greenspan's recent pronouncements make him look like more of a partisan hack than a neutral administrator of our monetary policy. But given how long he has been in place, the nation could do worse than someone with Greenspan's track record of neutrality running our elections.

189. *But see* Shorstein, *supra* note 89, at 375 (favoring nonpartisan election over gubernatorial appointment because it "creates a bit of distance between the political parties and those running for offices related to the election process").

190. This point is demonstrated in Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305 (1997). In exchange for the long term, the CELO (and his or her staff) must agree to strict conflict of interest provisions, so that the retiring CELO does not seek to curry favor with others in the hopes of landing a favorable job afterwards. California's former Secretary of State, Bill Jones, was generally seen as doing a good job in office, but he raised eyebrows when, soon after leaving office, he became a paid consultant for a voting machine company. Elise Ackerman, *E-Voting Regulators Often Join Other Side When Leaving Office*, SAN JOSE MERCURY NEWS, June 15, 2004, at 1A, available at <http://www.mercurynews.com/mld/mercurynews/business/technology/8925946.htm>.



Given the American history of decentralization and partisan administration of elections, these measures appear necessary to ensure true nonpartisanship, and may be more necessary than in other countries that have long histories of nonpartisan administration. But the point is that every country is different, and that what might be required for nonpartisanship to work in parts of the United States<sup>191</sup> may be unnecessary in countries like Australia and Canada with their stellar records of election administration.<sup>192</sup>

The Australian and Canadian systems differ in many particulars from each other, but both apparently command widespread support among their citizenry.<sup>193</sup> The Australian system relies upon a three-member commission, the Australian Electoral Commission (AEC), consisting of a judge or retired judge as chair, the electoral commissioner, and one other nonjudicial member, which so far has always been Australia's statistician.<sup>194</sup> The members are appointed by the Governor General acting on the advice of the Prime Minister, without formal consultation with the opposition.<sup>195</sup>

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191. Parts of the U.S. do appear to have a good record of nonpartisan election administration, such as Los Angeles County. But it may be hard to replicate the Los Angeles experience elsewhere without adequate safeguards.

192. Michael Maley has written a great deal on the difficulty of transplanting election law from one country to another. See, e.g., Michael Maley, *Australian Electoral Law: Not a Model for Others*, in REALISING DEMOCRACY: ELECTORAL LAW IN AUSTRALIA 40 (Graeme Orr et al. eds., 2003); Michael Maley, *Transplanting Election Regulation*, 2 ELECTION L.J. 479 (2003) (contrasting the challenges faced by established democracies with those faced by developing countries); see also Andrew C. Geddis, *It's a Game that Anyone Can Play: Election Laws Around the World*, 4 ELECTION L.J. 57 (2004) (reviewing MASSICOTTE ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTORAL LAWS IN DEMOCRACIES (2004)). Although Maley has focused on transfer of election law to the developing world, his points apply across established democracies as well. The long history of hyperfederalized partisan election administration in the United States cannot be ignored in a call to move to a system closer to the centralized nonpartisan Australian model.

193. See Michael Maley, *The Australian Electoral Commission: Balancing Independence and Accountability*, 38 REPRESENTATION 25, 27 (2001) ("A crucial factor underpinning public support for the Commission in carrying out its functions has been the widespread acceptance that it acts in a neutral and impartial manner."). A 2001 survey of Australian voters conducted by the AEC found that 99% of voters viewed the AEC staff as "honest," 97% as "efficient," 96% as "friendly," and 94% as "helpful." AEC Advertising Campaign: Evaluation and Post-Election Research—Final Project Report, Research Forum, Dec. 2001, Project no. 51 at 52 (on file with the Washington and Lee Law Review). Research has found no survey evidence on elections in Canada, but one knowledgeable observer recently remarked that "Canada's electoral machinery is, in many respects, second to none." JOHN C. COURTNEY, ELECTIONS 125 (2005).

194. MASSICOTTE ET AL., *supra* note 133, at 99.

195. *Id.* There is widespread agreement that the AEC is well respected for its independence. See, e.g., Colin Hughes, *The Independence of the Commissions: The Legislative Framework and Bureaucratic Reality*, in REALISING DEMOCRACY: ELECTORAL LAW IN AUSTRALIA 205 (Graeme Orr et al. eds. 2003) (noting the high opinion accorded the AEC). For

The Canadians rely on a single officer "appointed by a resolution of the House of Commons (the elected chamber of the Canadian Parliament) that requires a simple majority."<sup>196</sup> "Although the appointment procedure would theoretically empower a majority government to impose its nominee on opposition parties, in practice all appointments have been agreed to by other parties and have not occasioned a vote in the House of Commons."<sup>197</sup> "The Governor General may dismiss the CEO, but only for cause and at the request of both Houses of Parliament, including the unelected Senate."<sup>198</sup>

In neither case have the country's election administrators been caught in much controversy. The AEC's actions have not attracted any serious objections from the opposition.<sup>199</sup> The Canadian chief elections officer also has been above reproach.<sup>200</sup> The United States itself has endorsed independent election administration in other countries as a means of promoting democracy.<sup>201</sup>

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an earlier history, see Colin Hughes, *The Bureaucratic Model: Australia*, 37 J. BEHAV. & SOC. SCI. 106 (1992). In interviews with Australian election law experts, all agreed on the AEC's independence in matters of electoral administration. There is more controversy over the AEC's role in campaign finance disclosure. See, e.g., MARGO KINGSTON, NOT HAPPY JOHN ch. 16 (2004) (expounding on complaints about the AEC); Graeme Orr et al., *Australian Electoral Law: A Stocktake*, 2 ELECTION L.J. 383, 396-97 (2003) (noting the Australian Electoral Commission's role in reforming Australian campaign finance laws, which allow unlimited disclosure subject to disclosure requirements). Of course, as some Australian colleagues pointed out, the Australian system has never been tested under the stress of an extremely close election along the lines of Florida 2000, though twice in the last 15 years the balance of power in state governments rested on a court petition. E-mail from Graeme Orr, Lecturer in Law, Griffith Law School, to author (Feb. 4, 2005) (on file with the Washington and Lee Law Review).

196. MASSICOTTE, *supra* note 133, at 97. Some lower-level officials are appointed on the equivalent of a bipartisan basis, but all work under the Chief Elections Officer and "are prohibited from engaging in politically partisan conduct, including contributing to a candidate or party or being an employee of or holding a position in a party." *Id.* at 98-99.

197. *Id.* at 97.

198. *Id.* The officer is expected to maintain the position until age 65. *Id.*

199. *Id.* at 101.

200. For a self-assessment from Canada's current Chief Electoral Officer, see Jean-Pierre Kingsley, *The Administration of Canada's Independent, Non-Partisan Approach*, 3 ELECTION L.J. 406 (2004); see also COURTNEY, *supra* note 193, at ch. 5 (discussing the history of election administration in Canada); Louis Massicotte, *Refereeing the Political Process: The Chief Electoral Officer of Canada* (Dec. 2001) (unpublished manuscript, on file with the Washington and Lee Law Review).

201. See *Final Warsaw Declaration: Toward a Community of Democracies*, 39 I.L.M. 1306 (2000) (agreeing "to respect and uphold the following democratic principles" including "free and fair elections with universal and equal suffrage, open to multiple parties, conducted by secret ballot, monitored by independent electoral authorities, and free of fraud and intimidation"), available at <http://www.state.gov/g/drl/rls/26811.htm>.

The main anticipated objection to this proposal is that—unlike in Australia and Canada—it is impossible to get truly nonpartisan administration through an appointments process in the U.S., and that it therefore is better to have elections where top election administrators are truly accountable to the people, or, on the local level, to use a bipartisan, rather than nonpartisan solution.<sup>202</sup> These changes could serve as better checks on manipulation of the process.

There is certainly some force to the argument. After all, much of the criticism of decisionmakers in the Florida 2000 debacle was directed not at partisan election administrators (including Katherine Harris and the county canvassing boards), but at an appointed, life-tenured, ostensibly neutral body, the United States Supreme Court. In *Bush v. Gore*, the five more conservative justices sided with the conservative Republican candidate and agreed to end the Florida recount, handing the election to the Republican. The four more liberal judges sided with the more liberal Democratic candidate.<sup>203</sup> If the Supreme Court cannot be neutral, why should the nation expect a nonpartisan neutral election administrator to be?

In addition, on top of this concern there is the issue of subconscious partisan bias. Consider the coders for the National Opinion Research Center (NORC), who engaged in a scholarly examination of Florida ballots after the 2000 debacle was over, for journalistic and academic purposes. It turns out that coders who were Democratic were more likely to code a vote for Gore than coders who were Republican, even though there was nothing else on the line and the only task of these coders was to accurately record the condition of each ballot.<sup>204</sup>

There is good reason, however, to believe nonpartisanship can be achieved by election administrators. First, the supermajority requirement insures that these administrators necessarily will be chosen from a group of people who can command respect on both sides of the political aisle. These

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202. See the views of former California State Senator Barry Keene, posted at <http://www.sacbee.com/static/weblogs/insider/archives/001754.html> (last visited June 15, 2005) (arguing for a bipartisan board to control an appointed election administrator) (on file with the Washington and Lee Law Review).

203. Of course, there was much criticism, particularly from Republicans, of the actions of the Florida Supreme Court as well. This body, made up of six Democrats, sided primarily with Gore, the liberal Democratic candidate. But Florida Supreme Court justices run for re-election, and therefore they are not analogous to the appointed nonpartisan position this Article advocates for election administrators.

204. See Einer Elhauge, *Florida 2000: Bush Wins Again!*, WKLY. STANDARD, Nov. 26, 2001, at 29 ("Republican counters were 4 percent more likely than Democratic counters to deny a mark was for Gore. Even more striking, Democrats were 25 percent more likely to deny a mark was for Bush.").

likely will be people with high bipartisan reputations for integrity and competence. Many may also have earlier election administration experience in which they would have had a chance to demonstrate their evenhandedness. The more prestige that can be created for the integrity of the position, moreover, the more one can expect election administrators to seek to achieve neutrality and fairness in administration. In these ways, both the confirmation process and incentives differ between nonpartisan election administrators on the one hand, and Supreme Court Justices and NORC coders on the other.

Moreover, the fundamental principles of neutral election administration are not subject to serious debate.<sup>205</sup> Every eligible voter should be allowed to vote,<sup>206</sup> and votes should be counted accurately, in a system that is as free from fraud as possible. It should go without saying that such administrators should play no role in politics, nor do anything to favor one candidate, party, or issue in an election,<sup>207</sup> much less co-chair a presidential committee or make phone calls supporting a controversial ballot measure.

In this way, neutral election administration is easier to achieve than neutral redistricting principles or neutral campaign finance issues. In those

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205. IDEA, the International Institute for Democracy and Electoral Assistance, has promulgated a Code of Conduct for election administrators with ethical principles which form the basis of election administration:

1. Election administration must demonstrate respect for the law.
2. Election administration must be nonpartisan and neutral.
3. Election administration must be transparent.
4. Election administration must be accurate.
5. Election administration must be designed to serve the voters.

IDEA CODE OF CONDUCT 9, at [http://www.idea.int/publications/conduct\\_admin/upload/adm\\_eng.pdf](http://www.idea.int/publications/conduct_admin/upload/adm_eng.pdf) (last visited June 15, 2005). Each of these principles is spelled out in detail in the Code. For another very useful set of principles of election administration, see COLIN HUGHES, INSTITUTIONALISING ELECTORAL INTEGRITY IN ELECTIONS: FULL, FREE & FAIR 142 (Marian Sawer ed., 2001).

206. Despite comments such as Goldberg's, see *supra* note 140, it is no longer a generally accepted principle, even in Republican circles, that voting should be made difficult so as to weed out less competent or intelligent voters. To the extent this point is incorrect, it undermines the argument in this paragraph.

207. Among IDEA's fuller description of its "nonpartisan and neutral" principle, the Code of Conduct notes that election administrators should "[d]o nothing that could indicate, or be seen as indicating, partisan support for a candidate, political party, political actor or political tendency," "not participate in any unauthorized activity, including any private activity, that could lead to an actual or perceived conflict of interest with their duties as election administrators," "not participate in any activity, including any private activity, that could lead to a perception of sympathy for a particular candidate, political party, political actor, or political tendency," "not express a view on any subject that is likely to be a political issue in the election," and "not communicate with any voter on a matter of partisan significance." CODE OF CONDUCT, *supra* note 205, at 11–12.

contexts, there are fundamental disagreements on goals to be achieved: For example, how should the competitiveness of districts be weighted against preserving communities of interest in the redistricting context, or how much should regulators limit the ability of individuals to contribute to independent groups that seek to influence the outcome of presidential elections?<sup>208</sup> Neutral election administrators will inevitably have discretion, but they should (and likely would) exercise that discretion to maximize voter participation, minimize voter fraud, and ensure public confidence in the integrity of the election process.

The obvious alternative reform is a bipartisan model rather than a nonpartisan model for election administration.<sup>209</sup> This approach is inferior in two ways, though better than the pure partisan approach in many states. First, bipartisan election administration may encourage election administrators to explicitly consider their partisan interests in making election administration decisions, raising the possibility of deadlock or increased partisan tensions. In other words, if one is appointed as the "Democratic" member of a county canvassing board, that person may see it as his or her role to promote Democratic interests, rather than promote neutral administration. If boards are equally staffed, then deadlock is a serious danger.<sup>210</sup> If boards give an advantage to one party and the party votes break down on party lines, they will exacerbate the tensions the nation has already seen.

Second, the method for choosing bipartisan members raises serious fairness problems. First, the job might be given to the major political parties. If the job is given to party loyalists, as one might expect, this will run contrary to the goals of neutral election administration. Each party's judges will be expected to favor that party, and both parties might be expected to discriminate against third parties or favor certain third parties or independent candidates when that is in the major party's self-interest.

If the method of choice is to let a partisan official choose election judges from both major political parties, there is the danger that the partisan official might choose candidates who are from the other party in name only. Consider in this regard Ohio's election law, which gives the partisan secretary of state

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208. See Persily, *supra* note 188, at 677–79 (disputing the role for nonpartisan redistricters).

209. See, e.g., FUND, *supra* note 109, at 147 (advocating that "local registration and election boards should have equal representation from both major political parties and at least one independent or third party member").

210. In Illinois and New Jersey, bipartisan redistricting has led to deadlock. The Illinois deadlock is broken with a coin toss, and this has led to persistent litigation. See LOWENSTEIN & HASEN, *supra* note 145, at 323–24 (discussing Illinois). The New Jersey commission appointed a political scientist as a tie-breaker, and that plan, too, was challenged in court. *Id.* at 235–36.

the power to choose two members from each major party to serve on boards that choose bipartisan election judges.<sup>211</sup> One Democratic election judge in Franklin County, Ohio was the county's Democratic Party Chair, William Anthony. Yet Mr. Anthony was attacked by some on the left as being "an unethical, gutless, Republican sycophant who does the bidding of the rich and powerful."<sup>212</sup> Another analysis described Anthony as a "fake 'Democrat[]'" who "symbolizes a party with no apparent principles or convictions."<sup>213</sup> It was the conservative *National Review* that came to Mr. Anthony's defense: "William A. Anthony Jr. is an unlikely candidate to help steal an election for President Bush. But that is what he's essentially being accused of by a band of left-wing conspiracy theorists who can't accept the idea that John Kerry lost the state of Ohio—and the election—fair and square."<sup>214</sup> These of course are the comments of intense partisans, and it is difficult to evaluate how fairly, for example, a Democratic administrator appointed by a Republican secretary of state has acted. But the nation should never be put in this position.

Nonpartisan appointment, rather than bipartisanship or election, can reduce the heat created by the current partisan election system. It may not be a perfect solution, but experiences from Australia and Canada, not to mention successful nonpartisan election administration in the U.S., make this an achievable goal that can seriously lower the risk of electoral meltdown.

A reform that professionalizes and neutralizes election administration also has the potential to diffuse the current controversies over the use of electronic voting. Critics of electronic voting worry that the system is subject to security breaches and manipulation by hackers. At the least, these critics want

211. Ohio law provides that the secretary of state appoints four members of county boards of elections for four year terms. See OHIO REV. CODE ANN. § 3501.06 (West 2005) ("Two members, one from each major political party, are appointed every two years."). The board then appoints two election judges from each party. *Id.* § 3501.22(a).

212. *Free Press Heroes*, THE FREE-PRESS JOURNAL, at <http://www.freepress.org/journal.php?strFunc=display&strID=286&strJournal=31> (Jan.–Feb. 2005) (on file with the Washington and Lee Law Review).

213. Bob Fitakis et al., *Together, We Moved Three Mountains*, FREE PRESS, at <http://www.commondreams.org/views05/0108-25.htm> (Jan. 8, 2005) (on file with the Washington and Lee Law Review). The analysis continued:

All "bi-partisan" appointments to Ohio's boards of elections are made by the GOP Secretary of State. As chair of the Franklin County Democratic Party, Anthony has led joint Democrat-Republican campaigns against grassroots independent candidates for local offices. He epitomizes the listless elite that's driven the once-powerful state party into near oblivion.

*Id.*

214. Rich Lowry, *Recount 2004*, NATIONAL REVIEW ONLINE, at <http://www.nationalreview.com/lowry/lowry200411300832.asp> (Nov. 30, 2004) (on file with the Washington and Lee Law Review).

electronic voting systems to produce a printout that may be used in case of a recount or challenge to the results. Yet some in the disability community and election administration world worry that a paper requirement will make electronic voting too onerous, leading to less accurate (and disability-friendly) voting systems remaining in place for longer.<sup>215</sup> The vast majority of those interested in this issue (including the Author) lacks any technical expertise to evaluate the seriousness of the security threat and therefore the costs and benefits of alternative approaches. The key to solving the problem is trusting election administrators to undertake the balancing fairly, with the integrity of the process as the heart of the decision.<sup>216</sup>

#### *D. The Timing of Court Challenges*

The final reform this Article advocates relates to the timing of court challenges to election administration practices: Courts should be more willing to entertain pre-election challenges and less willing to entertain post-election challenges, at least for those issues that could reasonably have been foreseen and raised before the election. The argument for the timing change is two-fold, considering both the benefits of pre-election review and the costs of post-election review.<sup>217</sup>

Turning first to the benefits, in some cases—particularly those involving presidential elections—pre-election adjudication remains the only way to give an effective remedy to an aggrieved plaintiff. Consider Palm Beach County's 2000 "butterfly ballot." There is strong evidence that its design cost Al Gore

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215. For additional background on the current controversies, see Tokaji, *supra* note 12.

216. This point appeared in Richard L. Hasen, *Crisis of Trust Over Voting Difficulties Must Be Addressed*, ROLL CALL, Jan. 10, 2005, available at <http://electionlawblog.org/archives/7718-1.html>. The Article argued that:

The issue of trust in election administration is especially important when it comes to electronic voting, which is increasingly being used in the United States. Those of us lacking technical sophistication cannot judge how secure such systems are from hackers. Although an auditable paper trail may help, the real solution is a cadre of professional election officials with loyalty to the process, not the candidates.

*Id.*

217. Part of the ease of the judicial solution depends upon the second proposal, nonpartisan election administration, being adopted. If courts can trust election administrators to follow the law and act fairly, courts can defer more to the state in the context of election litigation. Conversely, if courts cannot trust election administrators, they will need to act more aggressively and be wary of using laches in the face of intentional delays by elections officials to prevent meaningful review of their discretionary decisions.

the election in Florida.<sup>218</sup> After the election, a group of plaintiffs brought suit challenging the butterfly ballot and asking for a re-vote in Palm Beach County to correct the error. Unsurprisingly, the trial judge denied the request for a re-vote: "[B]ecause Presidential elections are the only national elections held in our country, our forefathers included clear and unambiguous language in the Constitution of the United States which require [sic] that Presidential 'electors' be elected on the same day throughout the United States."<sup>219</sup> "While a re-vote or new election may not give other States 'undue advantage' in the instant action, the danger of one candidate benefiting from an undue advantage in a re-vote or new election is always a strong possibility."<sup>220</sup>

Imagine if someone had gone to court before the election, making a claim that the design of the ballot would be confusing and could affect the outcome of the election. Had that kind of suit been heard on the merits, it is possible that the problem could have been avoided, and a redesign of the ballot would have greatly increased the chances for thousands more voters to cast votes matching their intent. Pre-election review thus presented the only possible opportunity to afford a remedy for potential disenfranchisement of Florida's voters.

It may be that under certain circumstances a court could order a re-vote even in the context of a presidential election. Imagine a terrorist attack on Election Day, where only part of a state gets to cast a vote for President, and many people stay home out of fear of additional attacks (or more prosaically, a hurricane that prevents voting in part of a Gulf state).<sup>221</sup> In any case, courts can consider other remedies that could affect the outcome of a presidential

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218. See Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793, 803 (2001) (concluding that in view of powerful statistical evidence, the butterfly ballot used in Palm Beach County was the cause of significant numbers of unintended votes for reform candidate Patrick Buchanan).

219. *Fladell v. County Canvassing Comm'n*, CL 00-10965 AB; CL 00-10970 AB; CL 00-10988 AB; CL 00-10992 AB; CL 00-11000 AB at 5 (Fla. 15th Cir. Ct. Nov. 20, 2000), available at <http://election2000.stanford.edu/fladell1120.pdf>.

220. *Id.* at 13. On appeal, the Florida Supreme Court did not reach the remedial question, ruling that the butterfly ballot was in substantial compliance with Florida law. *Fladell v. Palm Beach County Canvassing Bd*, 772 So. 2d 1240, 1242 (Fla. 2000). For an argument in favor of a partial re-vote in Palm Beach County, see Steven J. Mulroy, *Right Without a Remedy? The "Butterfly Ballot" Case and Court-Ordered Federal Election "Revotes"*, 10 GEO. MASON L. REV. 215 (2001).

221. See Richard L. Hasen, *Florida 2000: The Sequel; Five Ways the Election Could End Up in Court, Again*, SLATE, at <http://slate.com/Default.aspx?id=2108339&> (Oct. 18, 2004) (discussing states' failure to pass laws to deal with possible delay in election caused by terrorist threat) (on file with the Washington and Lee Law Review); John C. Fortier & Norman J. Ornstein, *If Terrorists Attacked Our Presidential Elections*, 3 ELECTION L.J. 597, 608-12 (2004) (proposing specific legislation to deal with such contingencies).



election (as in *Bush v. Gore*), and courts do consider re-votes with some frequency in the context of problems with elections other than president.<sup>222</sup>

But consider the costs associated with post-election challenges, where a court is asked to overturn the result of an election or take a step that can affect the outcome of an election. Such litigation puts courts in a difficult position. A court asked to decide a question of statutory or constitutional law that affects the outcome of an already held election is injected in the worst way into the political thicket. Journalists immediately question the partisan background of the judges, and partisan motives are immediately questioned and dissected no matter what the judges do.

Putting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts.<sup>223</sup> Moreover, when judges second-guess decisions made by legislators and votes cast by the people, the legitimacy of the election process itself can suffer. The nation does not want it to become the norm that no close election results are considered final until the courts have had their say, but the nation is coming perilously close to that situation given the increased use of election law as political strategy.

Of course, there are situations where pre-election review is impossible because the election problem that materializes is not reasonably foreseen: Consider the Carteret County, North Carolina problem, where election administrators made a mistake about the capacity of their electronic voting machines to hold electronic votes.<sup>224</sup> Nor does it make sense to require campaigns to take extraordinary and costly steps to ferret out all potential election administration problems, such as a problem with felon voters being left on the voting rolls who may later cast illegal votes.<sup>225</sup> But putting aside

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222. See *Fladell*, CL 00-10965 AB; CL 00-10970 AB; CL 00-10988 AB; CL 00-10992 AB; CL 00-11000 AB at 4–5 (noting court cases in which courts have ordered new elections in congressional and mayoral races).

223. The Supreme Court's decision in *Bush v. Gore* appears to have done much more to hurt the Court's legitimacy in the eyes of legal academics than in the public at large. See HASEN, *supra* note 77, at 18 (discussing criticism of *Bush v. Gore*).

224. See *supra* note 49 and accompanying text (describing the difficulties experienced by North Carolina).

225. For a different view on this point, see Edward B. Foley, *When to Redo an Election?*, Election Law @ Moritz, at <http://moritzlaw.osu.edu/electionlaw/comment0125.html> (Jan. 25, 2005) (on file with the Washington and Lee Law Review). Foley argues that:

Once the list of participants has been finalized, as flawed as it may be, the results should not be set aside on the ground that some of the participants should not have participated after all. Settling upon the list of eligible participants is something that should occur ahead of time, before the event is held. Mistakes can be made in this determination, as they can in any human endeavor. But some mistakes cannot, or

those cases that would require clairvoyance or an onerous undertaking, there are many reasons to favor pre-election review and disfavor post-election review.

Allowing post-election review when pre-election review would have been relatively easy to request essentially gives a campaign the "option" whether to sue: The campaign identifying a potential election problem can sit on its hands until it sees the election results, and if it does not like the election results it can use the problem as an excuse to get a more favorable outcome. It is far better to have a legal system that discourages such speculation and encourages preventing harm in elections that would prove difficult to undo after the fact.

Although the arguments for pre-election review over post-election review are (arguably) unassailable, getting courts to move in this direction is doctrinally difficult. First, federal courts are limited to considering cases and controversies. Doctrines such as standing and ripeness can prevent such courts from reaching issues before they are sufficiently concrete and an identifiable plaintiff or group of plaintiffs have suffered a cognizable injury.<sup>226</sup> Moreover, because courts are reluctant to get involved in election disputes unless absolutely necessary, many courts use these doctrines and others "prudentially" so as to avoid injecting the courts in the political thicket.<sup>227</sup>

Two recent examples show courts in this mode of avoiding pre-election review. The first example concerns punch card litigation surrounding the California recall.<sup>228</sup> In 2002, the California secretary of state agreed to decertify punch card machines in time for the March 2004 elections in settling an equal protection case brought by Common Cause.<sup>229</sup> When the parties settled the litigation, no one expected that a statewide election would again take place in California using punch card ballots; the next scheduled election was March 2004, the date by which the machines would be decertified. Once

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should not, be rectified if intervening circumstances dependent on the mistake have subsequently occurred. The undertaking of an election, based on an openly verified list of eligible participants, is one such event that should not be undone on the ground that there was an antecedent mistaken in assembling the eligibility list. Or at least it can be so argued.

*Id.*

226. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-10, 3-14 (3d ed. 2000).

227. *See id.* §§ 3-14, 3-17 (noting prudential standing issues).

228. A more detailed discussion of the California punch card recall litigation appears in Hasen, California Punch Card Recall, *supra* note 64.

229. *See Southwest Voter Registration Educ. Project v. Shelley*, 278 F. Supp. 2d 1131, 1134-35 (C.D. Cal. 2003) (recounting history of earlier litigation). The more courts are willing to use pre-election review, the less they will be open to charges in post-election litigation that they have dismissed a case on laches grounds out of a hidden political motivation.

the recall qualified for the ballot in a special election in October 2003, some questioned whether it was constitutional for the vote to take place using punch card voting machines.

The ACLU, on behalf of a coalition of voting rights organizations, filed suit in federal court arguing that the selective use of punch card voting machines violated both the Equal Protection Clause of the United States Constitution and Section 2 of the Voting Rights Act.<sup>230</sup> The district court denied the ACLU's request for a preliminary injunction,<sup>231</sup> and the ACLU appealed to the Ninth Circuit. A three-judge panel of the Ninth Circuit reversed the district court, citing *Bush v. Gore*.<sup>232</sup> The Ninth Circuit heard the case en banc, and reversed the panel, restoring the district court's judgment and allowing the recall to go forward as scheduled, with punch card machines used in just part of California.<sup>233</sup>

The en banc panel was ambiguous about whether there was a viable equal protection claim, but thought that a Voting Rights Act claim appeared stronger. Nonetheless, the court concluded that the district court did not abuse its discretion in concluding that the public interest weighed in favor of holding the election: "If the recall election scheduled for October 7, 2003 is enjoined, it is certain that the state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the election's proceeding on the announced date."<sup>234</sup> The court left open the possibility of a post-election challenge:

We must of course also look to the interests represented by the plaintiffs, who are legitimately concerned that use of the punch-card system will deny the right to vote to some voters who must use that system. At this time, it is merely a speculative possibility, however, that any such denial will influence the result of the election.<sup>235</sup>

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230. *See id.* at 1133. Governor Davis himself first raised the question whether the use of punch card voting machines in only some California counties raised an equal protection problem under *Bush v. Gore*. The California Supreme Court summarily denied his writ raising this and other issues, a decision that was not on the merits. *Davis v. Shelley*, No. S117921, 2003 Cal. LEXIS 6103 (Cal. Aug. 7, 2003).

231. *Shelley*, 278 F. Supp. 2d at 1146.

232. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894 (9th Cir. 2003). I filed a pro-bono amicus brief on my own behalf supporting the ACLU's position in the litigation. The brief is posted at <http://news.findlaw.com/hdocs/docs/elections/svrepvshlly82703amirh.pdf> (last visited June 21, 2005).

233. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc).

234. *Id.*

235. *Id.* at 919–20.

Fortunately for California, the results of the recall election were not close. Had they been close, the error rates of punch card machines could have been at the center of a bitter court battle. Henry Brady reports that the non-vote rate in the five largest counties using punch cards was over 5%, with Los Angeles coming in just under 9%. Contrast this with a non-vote rate of 0.74% in Alameda County, a county using electronic voting.<sup>236</sup>

Along similar lines, just before the 2004 election, Democrats went to court for an injunction to bar Republicans from challenging thousands of voter registrations in Ohio. Two district courts each issued injunctions preventing Republican voters from mounting challenges at the polls, but the Sixth Circuit Court of Appeals reversed the district courts, issuing an emergency stay of the district courts' injunctions.<sup>237</sup> One judge held that plaintiffs lacked standing to pursue the claim: "The plaintiffs have pleaded and the district courts have found a possible chamber of horrors in voting places throughout the state of Ohio based on no evidence whatsoever, save unsubstantiated predictions and speculation."<sup>238</sup> Two judges reached the merits on the admittedly hasty schedule created by the exigent circumstances, but reached opposite conclusions. One judge held that the possibility of longer lines at the polls did not unconstitutionally burden the right to vote.<sup>239</sup> Together with the judge who

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236. Henry E. Brady, *Postponing the California Recall to Protect Voting Rights*, 37 PS: POL. SCI. & POL. 27, 27–32 (2004). Of course, to prove that voting technology was responsible for a difference in the non-vote rate would require a statistical study that controls for other factors. For example, voters in counties with punch cards might have been more likely to have deliberately abstained. But this explanation seems unlikely, especially given exit polling data showing similar reported non-vote rates across voting methods in California. Michael P. McDonald, *California Recall Voting: Nuggets of California Gold for Voting Behavior*, 1 FORUM 4, art. 6, at <http://www.bepress.com/forum/vol1/iss4/art6/> (2003) (on file with the Washington and Lee Law Review). Common sense also suggests rejecting the idea that voting technology has nothing to do with the variance in non-vote rates. After all, Los Angeles and Alameda counties are fairly comparable counties in terms of political leanings and ethnic makeup, but the disparities in non-votes on the first recall question is huge. The idea that nearly 9% of Los Angeles voters would go to the polls in this highly salient election and willingly not cast a vote on the question of recall is preposterous.

237. *Summit County Democratic & Cent. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).

238. *Id.* at 552 (Ryan, J., concurring).

239. *Id.* at 551. The judge noted that:

The lower court orders do not rely on the likelihood of success of plaintiffs' challenges to the procedure that will be used by precinct judges once a challenge has been made. Longer lines may of course result from delays and confusion when one side in a political controversy employs a statutorily prescribed polling place procedure more vigorously than in previous elections. But such a possibility does not amount to the severe burden upon the right to vote that requires that the statutory authority for the procedure be declared unconstitutional.

held that plaintiffs lacked standing, a majority of the court stayed the lower court orders.

The third judge dissented on both standing issues and the merits, arguing that deference to the district court opinions was in order: "The burden on the right to vote is evident. In this case, we anticipate the arrival of hundreds of Republican lawyers to challenge voter registrations at the polls. Behind them will be hundreds of Democrat lawyers to challenge these challengers' challenges. This is a recipe for confusion and chaos."<sup>240</sup> Given the intense partisan atmosphere, it is noteworthy that the dissenting judge pointedly noted that one of the lower court judges issuing the injunction was appointed by a Democratic president and the other by a Republican.<sup>241</sup> Following the 2–1 vote on the Sixth Circuit, Justice Stevens, ruling in the middle of the night just before the polls opened on Election Day, declined to reinstate the district court injunctions, citing the press of time and uncertainty as to the facts.<sup>242</sup>

It is unfortunate that the deciding vote cast in the Sixth Circuit was not on the merits, but on standing grounds. Had the challenges materialized<sup>243</sup> and long lines resulted, deterring an unknown number of voters from coming to the polls, there would have been no relief a court could have granted—just as there was no relief courts could have granted for the long lines that did materialize in Ohio on Election Day unconnected to any challenges. It does a disservice to potentially aggrieved litigants and to the process of electoral

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*Id.*

240. *Id.* at 554 (Cole, J., dissenting).

241. *Id.* at 552.

242. *Spencer v. Pugh*, 125 S. Ct. 305 (2004) (Stevens, J., in chambers). Justice Stevens examined the case at the last minute, and decided that:

The allegations of abuse made by the plaintiffs are undoubtedly serious—the threat of voter intimidation is not new to our electoral system—but on the record before me it is impossible to determine with any certainty the ultimate validity of the plaintiffs' claims.

Practical considerations, such as the difficulty of digesting all of the relevant filings and cases, and the challenge of properly reviewing all of the parties' submissions as a full Court in the limited timeframe available, weigh heavily against granting the extraordinary type of relief requested here. Moreover, I have faith that the elected officials and numerous election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots.

Because of the importance of providing the parties with a prompt decision, I am simply denying the applications to vacate stays without referring them to the full Court.

*Id.*

243. Although there were many reports of long lines in Ohio on Election Day 2004, the expected Republican challengers did not show up at the polls. The reasons are not clear and those with theories on the failure would not speak on the record.

administration not to reach the merits in these circumstances, even in the absence of a complete record and given the press of time.

Allowing more pre-election review is not a recipe for more overall election litigation. Courts should make clear that a willingness to reach issues before the election will be accompanied by a strict application of laches after the election. "[L]aches is unreasonable delay by the plaintiff in prosecuting a claim or protecting a right of which the plaintiff knew or should have known, and under circumstances causing prejudice to the defendant."<sup>244</sup> But it is subject to some exceptions, including an exception that prevents its application "to defeat the public interest."<sup>245</sup> This exception threatens to swallow the rule in election law litigation, because the public has an interest that election law disputes get their day in court.

Courts should see it as in the public interest in election law cases to aggressively apply laches so as to prevent litigants from securing options over election administration problems. This rule will promote the public interest by insuring public confidence in the election process. Judge Posner saw it that way in a lawsuit brought by Ralph Nader to allow him to file petitions late getting him on the presidential ballot in Illinois in 2004:

[I]t would be inequitable to order preliminary relief in a suit filed so gratuitously late in the campaign season. It wasn't filed until June 27, only a little more than four months before the election. If when he declared his candidacy back in February Nader had thought as he now does that the Illinois Election Code unconstitutionally impaired his chances of getting a place on the ballot, he could easily have filed suit at the same time that he declared his candidacy—especially as he had filed a similar suit the last time he ran for President, in 2000, when he obtained a preliminary injunction that got him on the Illinois ballot by allowing him to submit petitions collected after the deadline, though no final judgment was ever entered.<sup>246</sup>

Judge Posner recognized that the public interest in fact militated in favor of a laches holding:

We are mindful that the right to stand for office is to some extent derivative from the right of the people to express their opinions by voting; it was doubtless to remind us of this that Nader's lawyers added two prospective voters as plaintiffs. But nothing is more common than for the denial of an

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244. DAN B. DOBBS, *LAW OF REMEDIES* § 2.4(4) (1993).

245. *Id.*

246. *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (internal citation omitted). Judge Posner added: "By waiting as long as he did to sue, and despite the strenuous efforts by the district court and this court to expedite the litigation, Nader created a situation in which any remedial order would throw the state's preparations for the election into turmoil." *Id.*

injunction to harm innocent nonparties, such as people who would like to vote for Nader but unlike the two voter plaintiffs are not complicit in his decision on the timing of the suit. But there are innocents on the other side as well—namely the people who will be harmed if a last-minute injunction disrupts the Presidential election in Illinois. And Nader's supporters can of course cast write-in votes for him in November.<sup>247</sup>

### III. Conclusion

Conflict in election administration may be inevitable during periods of intense partisan conflict.<sup>248</sup> Unfortunately, there is nothing that can be done to absolutely prevent such conflict from resulting in a presidential election meltdown. But the three serious steps outlined in Part II could greatly reduce the chances of such meltdown.

Outside the perception of a crisis, and with political self-interest high when it comes to legislative reform of the election administration process, proposals for reform may fall on deaf ears in Congress and in state legislatures.<sup>249</sup> But two of the three changes proposed here can be accomplished with little or no help from legislatures. Voters acting through the initiative process and the courts can play a substantial role in minimizing the threat of post-election meltdown. Courts can issue rulings that change the timing of successful election litigation in a way that lowers the chance of post-election meltdown. Legislators can help as well, however, if they can move beyond self-interest and toward an examination of election administration reform with an eye not toward political advantage, but toward insuring that free and fair elections and peaceful transitions of presidential power continue well into the twenty-first century.

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247. *Id.* at 737 (internal citation omitted).

248. See Peter H. Argersinger, *Electoral Reform and Partisan Jugglery*, 119 POL. SCI. Q. 499 (2004) (contrasting 2000 Florida controversy with earlier controversies at the end of the 19th century).

249. See Doug Chapin & Daniel J. Palazzolo, *Beyond the End of the Beginning*, in ELECTION REFORM: POLITICS AND POLICY, 225, 227–28 (Daniel J. Palazzolo & James W. Ceaser eds., 2005) (finding evidence from an eleven-state study calling into question the hypothesis that the possibility of a very close presidential election is positively correlated with support for election reform); see also *id.* at 225 ("[U]nified party control, commission recommendations, and effective leadership are the most important factors that distinguish major reform states from late-developing reform states.").