

“CELEBRATING” THE TENTH ANNIVERSARY OF THE 2000 ELECTION CONTROVERSY: WHAT THE WORLD CAN LEARN FROM THE RECENT HISTORY OF ELECTION DYSFUNCTION IN THE UNITED STATES

NATHANIEL PERSILY*

INTRODUCTION

For scholars in the United States who study election law and administration, the 2000 presidential election represented a watershed event. It humbled those who thought that the world’s leading democracy had mastered the mechanics of running an election. It also generated interest to look outward for best practices and models to emulate. When U.S. scholars and reformers did so, however, we realized that certain intransigent structural features of the U.S. political system made reform particularly challenging. By highlighting these obstacles, however, this exploration of different modes of administration lent itself to an assessment of the various dimensions of the problem that all democracies encounter. This Article describes the multiple facets of the election administration “problem” that all democracies confront, in light of the decade of introspection the United States has undertaken.

This Article begins by summarizing the controversy that led to the current era of reform of the U.S. electoral system. It then moves to a discussion of the categories of administrative and technical challenges that all successful democracies must confront on some level. It then concludes with a description of metrics by which we can measure democratic success.

Before entering into that discussion, it may be worth summarizing three features of the U.S. electoral system which exist to a greater or lesser extent in other countries, but which, in combination, make reform particularly formidable for the United States. The first glaring institutional feature evident to even the most casual observer of the U.S. electoral system is the extreme decentralization of administrative responsibilities and policymaking.¹ Most decisions concerning

* Charles Keller Beekman Professor of Law and Political Science, Columbia Law School. Thanks to Michael Pitts for helpful comments. Thanks to Shawn Crowley and Jessica Riggins for excellent research assistance. This Article is adapted from lectures given to the Electoral Institute of Veracruz, Mexico, on October 15-16, 2009.

1. ERIC A. FISCHER & KEVIN J. COLEMAN, CONG. RESEARCH SERV., ELECTION REFORM AND LOCAL ELECTION OFFICIALS: RESULTS OF TWO NATIONAL SURVEYS 1 (2008), *available at* <http://www.fas.org/sgp/crs/misc/RL34363.pdf>; HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 1 (2009); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 952 (2005); George M. Guess, *Dysfunctional Decentralization: Electoral System Performance in Theory and Practice* 6 (Ctr. for Democracy and Election Mgmt., Working Paper No. 6, Apr. 20, 2009), *available at* <http://www1.american.edu/ia/cdem/pdfs/Dysfunctional%20Decentralization%204-20.pdf>.

election administration are made at the local, usually county, level.² Localities are most often in charge of decisions concerning ballot design and technology, as well as those dealing with polling place allocation and administration.³ The result is a patchwork quilt where the quality of democracy often varies according to the fortuity as to where one lives.⁴

Related to the emphasis on localized control is the reliance on relatively untrained volunteers as the point of contact for most voters on Election Day. For the most part, the people manning the polling places and overseeing the voting process are unpaid volunteers who have had minimal (a few hours worth of) training.⁵ In contrast to countries where civil servants administer the polls or citizens are chosen by lot,⁶ the United States relies on volunteers, often individuals chosen or courted by the political party leaders competing in the election.⁷

Indeed, the extent to which partisans—either elected or appointed—are in charge of U.S. elections at the state level sets the United States apart from virtually all other democracies.⁸ This unenviable distinction seems to be the most entrenched and pernicious of the three pathologies—excessive decentralization,

2. FISCHER & COLEMAN, *supra* note 1, at 1.

3. *Id.*; U.S. Elections Procedures: Reforming the System Will Help America Vote Act, AMERICA.GOV (Apr. 2, 2008), <http://www.america.gov/st/usg-english/2008/April/20080423224318caifas0.8196635.html>.

4. See Hasen, *supra* note 1, at 952; see also David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 REV. OF POL'Y RES. 1257, 1258 (2006) (identifying different reasons why elections are implemented differently in different locations).

5. See Hasen, *supra* note 1, at 953; see also Deborah Hastings, *High Voter Turnout Ups Risk of Election Day Errors*, USA TODAY, Feb. 25, 2008, available at http://www.usatoday.com/news/politics/2008-02-24-pollworker-problems_N.htm; Alan Wirzbicki, *Lines, Malfunctions, and Untrained Poll Workers Plague Some States*, BOS. GLOBE, Nov. 8, 2006, available at http://www.boston.com/news/nation/articles/2006/11/08/lines_malfunctions_and_untrained_poll_workers_plague_some_states/; Michael C. Dorf, *Florida Strikes Again: What the Latest Election Snafu Says About Machines and Humans*, FINDLAW (Sept. 18, 2002), <http://writ.news.findlaw.com/dorf/20020918.html>; Heather Gerken, *The Invisible Election*, ELECTION L. BLOG (Nov. 16, 2008, 5:10 PM), <http://electionlawblog.org/archives/012471.html>.

6. CTR. FOR DEMOCRACY & ELECTION MGMT., BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 55 (2005), available at http://www1.american.edu/ia/cfer/report/full_report.pdf.

7. See Christian M. Sande, *Where Perception Meets Reality: The Elusive Goal of Impartial Election Oversight*, 34 WM. MITCHELL L. REV. 729, 730 (2008); see also Kimball & Kropf, *supra* note 4, at 1261 (finding that most local election officials are partisan elected administrators).

8. R. Michael Alvarez et al., *Who Should Run Elections in the United States?*, 36 POL'Y STUD. J. 325, 328 (2008); Shaheen Mozaffar & Andreas Schedler, *The Comparative Study of Electoral Governance—Introduction*, 23 INT'L POL. SCI. REV. 5, 16-17 (2002) (identifying democracies that have established “structures of mutual restraint” in which political parties “concur in the appointment of members of the national election commission”).

unprofessional management of the polling place, and partisan control of election administration at the state level—of the U.S. electoral system identified here.⁹ To highlight the most telling example of this phenomenon, during the 2000 election controversy in Florida, the elected secretary of state, who was the chief supervisor of the elections in the state, was also the co-chair of the campaign of one of the candidates (George W. Bush).¹⁰ For some reason, the states have had very limited success in creating authentic nonpartisan institutions to oversee the administration of elections.¹¹ Actual, apparent, or alleged bias has thereby become an expected feature of every critical decision made by states' chief elections officers.¹² This is particularly true when the decisions concern recounts or other exercises of discretion after the votes have been cast and when the likely beneficiaries of such decisions are well-known.¹³ Even before the vote, however, decisions concerning voter registration, eligibility, or ballot access will be seen as advancing partisan interests if a partisan official is the decision maker.¹⁴

I. CRISIS AND REFORM: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION CONTROVERSY AND ITS AFTERMATH

It often takes a crisis to expose the fragility of a system that under normal circumstances appears stable and relatively problem-free. The 2000 U.S. presidential election presented such a crisis, and it illustrated a number of problems with the American electoral system. For election lawyers, the crisis is often viewed through the lens of the Supreme Court's resolution of *Bush v. Gore*: a controversial decision that focused on the constitutional problems inherent

9. 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, 1276-77 (1994).

10. Sande, *supra* note 7, at 733.

11. Kimball & Kropf, *supra* note 4, at 1263 ("We find that while public opinion indicates that an elected nonpartisan board of elections is the most preferred local election authority by a national sample of citizens, our data indicate that common practice is not consistent with public opinion." (internal citation omitted)).

12. See Hasen, *supra* note 1, at 938-42, 958; Sande, *supra* note 7, at 733-38.

13. Richard L. Hasen, *Eight Years After Bush v. Gore, Why Is There Still So Much Election Litigation and What Does This Mean for Voter Confidence in the Electoral Process?*, FINDLAW (Oct. 20, 2008), http://writ.news.findlaw.com/commentary/20081020_hasen.html.

14. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181, 191, 203 (2008) (upholding newly-enacted voter identification laws which plaintiffs contended were in part motivated by partisan interests and noting that the rules were supported by all Republicans in the General Assembly and not a single Democrat); Hasen, *supra* note 1, at 945; see also Editorial, *A Step for Voting Reform*, NATION, Jan. 31, 2005, at 4, available at <http://www.thenation.com/doc/20050131/editors2> (calling for election reforms that include "nonpartisan election administration . . . technology that can be examined by people outside the companies providing it and a secure paper trail on all votes cast . . . [and] a nonpartisan national election commission . . . to evaluate the accuracy and representativeness of our election performance regularly and make recommendations for improvement").

when recounts of paper ballots are not conducted according to uniform standards.¹⁵ But the controversy entailed so much more than its final resolution would suggest, and its lessons for the United States and other countries should not be limited to the headlines created to describe its final resolution.¹⁶ The crisis highlighted the three meta-problems described above—decentralization, partisan administration, and incompetence of varying forms. But it also forced us to think about critical questions of ballot design and technology, voter error, registration problems, absentee ballots, and classic barriers to access.¹⁷

There are many ways to tell the story of the 2000 election controversy, but few will seem relevant to an international audience seeking lessons that can be universalized for other electoral systems. At its core, the 2000 election revealed that in close contests within the margin of human or mechanical error, all aspects of the system may appear dysfunctional. Beyond that, however, the sheer variety of mishaps exposed the multiple dimensions of an “election ecosystem”¹⁸ that must perform well when the system is under stress. What follow are short descriptions of the individual problems discovered in 2000 and the reforms enacted or discussed in the wake of the controversy. Each situates the American experience in an international context, describing some phenomena and regulations that are unique and others that are more widely shared.

A. Voter Registration

The United States is unique among democracies in the relative absence of government-initiated action to register voters.¹⁹ The burden of registration falls

15. See generally Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004) (summarizing legal scholars’ writings on the Supreme Court’s *Bush v. Gore* opinion).

16. See, e.g., Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975, 976 (2001).

17. Helen Norton, *What Bush v. Gore Means for Elections in the 21st Century*, 2 WYO. L. REV. 419, 420-22 (2002); see also Jo Becker & Dan Keating, *Problems Abound in Election System: Outmoded Machinery Is Still Widespread*, WASH. POST, Sept. 5, 2004, at A1 (highlighting main problems that arose in the 2000 election and explaining how many have still not been resolved); *Bad Ballot Design Results in Staggering Numbers of Lost Votes*, BRENNAN CTR. FOR JUSTICE (July 21, 2008), available at http://www.brennancenter.org/content/resource/bad_ballot_design_results_in_staggering_numbers_of_lost_votes/. The Center reported:

In the most egregious and well-known case, the “butterfly ballot” used in Palm Beach County, Florida during the 2000 presidential election, the presidential race was split into two columns, which . . . likely caused more than 2,000 Democratic voters to mistakenly vote for Pat Buchanan and threw out an additional 20,000 votes due to double-voting—in a race that was decided by fewer than 600 votes.

18. See STEVEN F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 11-17 (2007).

19. See generally JENNIFER S. ROSENBERG & MARGARET CHEN, BRENNAN CTR. FOR JUSTICE, EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 9 (2009), available at

almost exclusively on the voter, although the actual requirements vary from state to state. This allocation of burdens has great consequences for the U.S. population, which is one of the most mobile in the world with more than a quarter of the population moving every two years.²⁰ Whenever citizens in most states change their address, they must re-register with the local government if they wish to vote in their new community.²¹ As a result, demographic characteristics that negatively correlate with mobility (such as age and education) are also powerful predictors of voter turnout.²² More importantly, the frequent movement of U.S. citizens presents great challenges to maintaining reliable registration lists.²³ Different states have adopted different strategies to “purge” ineligible, deceased, or no longer resident voters from their lists.²⁴

The criticism lodged against Florida in 2000 was that the state, in an effort to clear felons from its list of registered voters, purged a number of legitimate voters as well.²⁵ Although many countries in the world allow prisoners to vote, only two American states do,²⁶ and some, such as Florida, disenfranchise many felons for extended periods even after they have served their time in prison.²⁷ The state purged voters with names that matched a list of felons, but that purge list

http://www.brennancenter.org/content/resource/expanding_democracy_voter_registration_around_the_world/; see also MARTIN P. WATTENBERG, WHERE HAVE ALL THE VOTERS GONE? 16 (2002) (“It is frequently said of American voter registration that it places a greater burden on those seeking to vote than do the requirements of any other democracy.”); Craig Leonard Brians & Bernard Grofman, *Election Day Registration’s Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 170, 170 (2001) (“Among modern democracies, U.S. voter registration provisions require a nearly unique degree of individual citizen responsibility, encumbering Americans with greater turnout costs.”).

20. Peverill Squire et al., *Residential Mobility and Voter Turnout*, 81 AM. POL. SCI. REV. 45, 45-46 (1987) (finding that the increased mobility of the U.S. population is directly correlated with low voter turnout rate).

21. WENDY WEISER ET AL., BRENNAN CTR. FOR JUSTICE, VOTER REGISTRATION MODERNIZATION: POLICY SUMMARY 1 (2009), available at http://brennan.3cdn.net/b75f13413388b2fcc_ynm6bn112.pdf.

22. See *id.* at 5; John A. MacLeod & Merle F. Wilberding, *State Voting Residency Requirements and Civil Rights*, 38 GEO. WASH. L. REV. 93, 95 (1969).

23. See Squire et al., *supra* note 20, at 46.

24. *Id.*; see also WEISER ET AL., *supra* note 21, at 5.

25. Guy Stuart, *Databases, Felons, and Voting: Bias and Partisanship of the Florida Felons List in the 2000 Elections*, 119 POL. SCI. Q. 453, 469-73 (2004); Gregory Palast, *Florida’s Flawed “Voter-Cleansing” Program*, SALON (Dec. 4, 2000, 10:19 PM), http://www.salon.com/news/politics/feature/2000/12/04/voter_file/.

26. Wilson Ring, *Vermont, Maine Only States to Let Inmates Vote*, BOS. GLOBE (Oct. 22, 2008), http://www.boston.com/news/local/main/articles/2008/10/22/vermont_maine_only_states_to_let_inmates_vote/.

27. Erik Eckholm, *States Are Growing More Lenient in Allowing Felons to Vote*, N.Y. TIMES (Oct. 12, 2006), <http://www.nytimes.com/2006/10/12/us/12felons.html> (“[T]hree states, Florida, Kentucky and Virginia, still have lifetime bans on voting by felons.”).

also contained many legitimate voters, which Democrats argued included a disproportionate number of African Americans.²⁸

In the wake of the 2000 election, Congress adopted two principal reforms to deal with registration problems. The Help America Vote Act established a system of statewide voter registration lists and provisional balloting.²⁹ States were required to establish a single authoritative automated list of registered voters that could be publicly scrutinized.³⁰ Indeed, in this respect, the United States became more like other countries in which such lists are nationally centralized.³¹ Because the federal government plays a very small role in voter registration, however, this function was centralized at the state level.³² While still an oddity as a comparative matter, this was an improvement over the previous system, where such lists may have been kept by county officials.³³

The second innovation—provisional ballots—was seen as a way of solving the problem of voters incorrectly turned away from the polls.³⁴ By allowing voters whose registration status was in question to cast provisional paper ballots that were segregated from the normal ballots, the system would leave the question as to whether such ballots should be counted until after the election.³⁵ Such a system recognizes the difficulty in resolving such controversies in real time in a busy polling place on Election Day. At least with provisional ballots, the threat of actual disenfranchisement (literally preventing an eligible voter from voting) is greatly diminished, even if the likelihood of the vote being counted is less than one hundred percent.³⁶ However, the more ballots that are deferred for later decision, the more likely that provisional ballots could determine the outcome of

28. See Stuart, *supra* note 25, at 464; U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), <http://www.usccr.gov/pubs/vote2000/report/ch9.htm>.

29. Help America Vote Act (HAVA) of 2002, 42 U.S.C. §§ 15301-15545 (2006 & Supp. 2008).

30. *Id.* § 15483(a)(1)(A).

31. See CAL. INST. OF TECH. & MASS. INST. OF TECH., VOTING: WHAT IS, WHAT COULD BE 14-15 (July 2001), available at http://vote.caltech.edu/drupal/files/report/voting_what_is_what_could_be.pdf.

32. 42 U.S.C. § 15483(a)(1)(A) (“[E]ach State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State. . . .”).

33. See CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 9.

34. 42 U.S.C. § 15482; Daniel Tokaji, *Provisional Voting: Federal Law and Ohio Practice*, in THE E-BOOK ON ELECTION LAW § 5.4 (July 2, 2010), available at http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_rules01.html.

35. Wendy R. Weiser, *Are HAVA's Provisional Ballots Working?*, BRENNAN CTR. FOR JUSTICE 2-3 (Mar. 29, 2006), http://www.brennancenter.org/page/-/d/download_file_39043.pdf.

36. *Id.* at 2.

a close election, and therefore, that litigation would result to contest the legitimacy of such ballots. Moreover, since 2000, states and localities have enforced inconsistent standards as to which provisional ballots will be counted.³⁷

In subsequent elections, however, new problems with the voter registration system have emerged to become the chief challenges for election reformers in the United States. In particular, private organizations that have filled the void caused by the government's absence in registering voters have come under scrutiny for registering fictitious or duplicate persons.³⁸ At the same time, state parties have also developed strategies for challenging the status of voters—for example, by comparing the voter registration list to other lists such as driver's license, Social Security, change of address, or home foreclosure lists—to question the residency of voters.³⁹ If Congress revisits election reform during the Obama presidency, it will likely grapple with both the activities of outside groups that register voters and the permitted reasons for challenging voters. If the United States were to move toward the international consensus position on voter registration, which is to have greater government involvement in registering voters, many such problems would be solved.⁴⁰ However, the United States is unique among nations in that the government does not keep a list of citizens, nor does it provide all citizens with identification that demonstrates citizenship. That failure hampers the government's ability to develop lists of eligible citizens for other purposes, such as voting.⁴¹

B. Ballot Technology

The 2000 election controversy is defined in the popular imagination by images of cross-eyed vote counters examining holes punched on paper cards. The recount brought into stark view the nineteenth century technology that was being used to run modern U.S. elections. Reforms in the wake of the 2000 election led to the elimination of punch-card ballots and significant federal subsidies for new technology, such as Direct Recording Electronic (DRE) voting machines.⁴² Many

37. See PEW CTR. ON THE STATES, SOLUTION OR PROBLEM? PROVISIONAL BALLOTS IN 2004, at 7-8 (Apr. 2005), available at <http://www.pewcenteronthestates.org/uploadedFiles/ERIP10Apr05.pdf>; Weiser, *supra* note 35, at 5.

38. Mike Pesca, *Politicizing the Process of Registering Voters*, NAT'L PUB. RADIO (Oct. 19, 2004), <http://www.npr.org/templates/story/story.php?storyId=4116462&ps=rs>; Steve Friess, *Acorn Charged in Voter Registration Fraud Case in Nevada*, N.Y. TIMES, May 5, 2009, at A18, available at <http://www.nytimes.com/2009/05/05/us/05acorn.html>.

39. Christopher Cooper & Evan Perez, *Voting-Rights Conflicts Intensify*, WALL ST. J., Sept. 17, 2008, at A22, available at http://online.wsj.com/article/SB122161670293146325.html#articleTabs_interactive; Michael Moss, *Big G.O.P. Bid to Challenge Voters at Polls in Key State*, N.Y. TIMES, Oct. 23, 2004, available at <http://www.nytimes.com/2004/10/23/politics/campaign/23vote.html>.

40. See ROSENBERG & CHEN, *supra* note 19, at 26.

41. See CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 9-11.

42. Ron Word, *Florida Rids Itself of Punch-Card Ballots*, A.P. ONLINE (Sept. 5, 2001),

procurement decisions made in the wake of the 2000 controversy were later a source of regret as a lack of confidence in the security of electronic machines led many states to abandon them.⁴³

Ballot technology and error rates constituted the most studied phenomena in the wake of the 2000 controversy. The Caltech/MIT Voting Technology Project (“the Project”) examined the error rates of different voting methods and concluded that punch-card ballots were far inferior to other technologies, such as optical scan ballots or electronic voting machines.⁴⁴ However, the Project also found that the quality of election administration was a more important factor in the number of lost votes (votes that end up not being counted) than the technology used by voters to cast their ballot.⁴⁵ In other words, from the standpoint of reliability in translating voter intentions to counted ballots, it was better to have better administration with inferior technology than superior technology with poor administration. Indeed, that lesson is one that reformers both within and beyond the United States should take to heart.

With respect to ballot technology, however, many jurisdictions that switched quickly to electronic voting machines came to regret that decision. Concerns about security and reliability of certain machines led some to abandon them.⁴⁶ Fear of hackers, as well as reports of breakdowns, led other jurisdictions to rely on technological advances that had paper backups in the event of a recount.⁴⁷ In particular, experience since 2000 has led many to conclude that one of the critical features of reliable balloting technology is guaranteeing a voter’s ability to verify that the ballot accurately reflects his or her intentions. So-called precinct-based

<http://www.highbeam.com/doc/1P1-46675150.html>; see Daniel Tokaji, *Voting Technology*, in THE E-BOOK ON ELECTION LAW § 4.1, available at http://mortizlaw.osu.edu/electionlawbook/part4/equipment_machines06.html (last visited Nov. 18, 2010); Hasen, *supra* note 1, at 950-51.

43. See CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 25-26; John Ingold, *Colorado Set to Abandon Electronic Voting: How Will Colorado Vote?*, DENV. POST (Jan. 16, 2008, 8:44 AM MST), http://www.denverpost.com/breakingnews/ci_7981616; Pam Fessler, *Several States Abandon Electronic Voting for Paper*, NAT’L PUB. RADIO (Jan. 25, 2008), <http://www.npr.org/templates/story/story.php?storyId=18399431>.

44. HENRY E. BRADY ET AL., UNIV. OF CAL., BERKELEY, COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES 32 (2001), <http://www.sos.wa.gov/documentvault/UniversityofCaliforniaBerkeleyCountingAlltheVotesSeptember2001-1020.pdf>; R. Michael Alvarez et al., A Preliminary Assessment of the Reliability of Existing Voting Equipment 12-13 (Feb. 1, 2001) (unpublished manuscript), available at <http://e-voto.di.fc.ul.pt/docs/A%20Preliminary%20Assessment%20of%20the%20Reliability%20of.pdf>.

45. See CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 8-9 (finding that of the four to six million votes lost in the 2000 election, 1.5 to two million were lost because of faulty equipment and confusing ballots, while the rest were lost because of registration mix-ups, poorly conducted polling place operations, and absentee ballot problems).

46. Fessler, *supra* note 43.

47. Stephanie Desmon & Stephen Kiehl, *Security of Ballot Not 100%: Critics Expect Flaws as Maryland Switches Systems*, BALT. SUN (Jan. 19, 2008), http://articles.baltimoresun.com/2008-01-19/news/0801190221_1_paper-ballots-voting-machines-optical-scan-machines.

optical scan technology allows a voter to place a paper optical scan ballot into a machine, which will reject it if the ballot is unreadable for some reason, such as an accidental vote for more than one candidate.⁴⁸ Electronic voting machines will prevent a voter from double voting in an election and will often require voters to verify that they intend to undervote if they intentionally leave one of the offices blank.⁴⁹

In addition to highlighting problems with the technology itself, the 2000 election brought to the fore the importance of ballot design in preventing voter error. Although many remember the 2000 election as turning on punch-card ballots, it was the defective Palm Beach butterfly ballot that received the most attention in the days following the election.⁵⁰ Because of the placement of names on that ballot, thousands of voters who believed they were voting for Al Gore ended up voting for Reform Party candidate Patrick Buchanan.⁵¹ Also, as later analysis of the ballots revealed, another design error in Duval County led voters inadvertently both to vote for Al Gore and to write his name as a write-in candidate, subsequently leading to thousands of disqualified votes.⁵²

No technology is exempt from potential errors in ballot design, although allowing voters to verify their vote will reduce the impact of such errors. We have learned in subsequent elections that even electronic voting machines can lead voters to miscast their votes based on misunderstandings concerning, for example, which candidates are running for which offices.⁵³ These design

48. Tigran Antonyan et al., *State-Wide Elections, Optical Scan Voting Systems, and the Pursuit of Integrity*, 4 IEEE TRANSACTIONS ON INFO. FORENSICS & SEC. 597, 597 (2009).

49. *Id.*

50. STAFF OF H. COMM. ON THE JUDICIARY, 107TH CONG., HOW TO MAKE OVER ONE MILLION VOTES DISAPPEAR: ELECTORAL SLEIGHT OF HAND IN THE 2000 PRESIDENTIAL ELECTION 38 (Comm. Print 2001); John-Thor Dahlburg, *Designer of Florida's Butterfly Ballot Loses Job; She Was Blamed for Confusion in 2000 Presidential Election*, L.A. TIMES (Sept. 2, 2004, 4:00 PM PST), http://articles.sfgate.com/2004-09-02/news/17442939_1_butterfly-ballot-howard-dean-conservative-reform-party-candidate.

51. 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, 793 (2001) (finding that the butterfly ballot caused over 2000 Democratic voters to mistakenly vote for Buchanan instead of Gore); *Newspaper: Butterfly Ballot Cost Gore White House*, CNN (Mar. 11, 2001, 8:43 AM), <http://edition.cnn.com/2001/ALLPOLITICS/03/11/palmbeach.recount/index.html?iref=storysearch>.

52. See Alan Agresti & Brett Presnell, *Misvotes, Undervotes and Overvotes: The 2000 Presidential Election in Florida*, 17 STAT. SCI. 436, 438 (noting that “more than 20% of the ballots in predominantly African-American precincts in Duval County were tossed out”); see generally Kirk Wolter et al., *Reliability of the Uncertified Ballots in the 2000 Presidential Election in Florida*, 57 AM. STATISTICIAN 1 (2003), available at <http://www.amstat.org/misc/presidentialelectionballots.pdf> (discussing a study that conducted a comprehensive review of all uncounted ballots in Florida and found that had the recount been limited to the counties Gore contested, Bush still would have won the election).

53. Clive Thompson, *Can You Count on Voting Machines?*, N.Y. TIMES (Jan. 6, 2008), <http://www.nytimes.com/2008/01/06/magazine/06Vote-t.html>.

problems, as well as the technology problems noted above, are more pronounced in the United States given the large number of offices and propositions appearing on ballots.⁵⁴ In many countries, voters vote for one or two offices in a given election, often on long ballots that simply list parties participating in that election. In the United States, it is not uncommon for voters to vote for three federal offices, five state offices, multiple local offices, judges, and referenda on the same ballot.

C. Modes of Voting

In addition to problems with the balloting on Election Day itself, the 2000 election included controversies concerning the counting of absentee ballots, particularly ballots cast by soldiers overseas.⁵⁵ As each ballot was scrutinized in the litigation following the vote, the technical requirements for absentee ballots became a fertile source of disagreement as to which ballots were legally cast and as to how much help administrators should provide voters who made technical errors.⁵⁶ That lesser-known aspect of the controversy presaged the recent controversy in the U.S. Senate race in Minnesota in which as many as five percent of absentee ballots were rejected as invalid.⁵⁷

54. See LAWRENCE NORDEN ET AL., BRENNAN CTR. FOR JUSTICE, BETTER BALLOTS 18-59 (July 2008), available at http://brennan.3cdn.net/d6bd3c56be0d0cc861_hlm6i92vl.pdf (summarizing problems with ballot design in the United States).

55. Kosuke Imai & Gary King, *Did Illegal Overseas Absentee Ballots Decide the 2000 U.S. Presidential Election?*, 2 PERSP. ON POL. 537, 537-49 (2004) (arguing that although Al Gore received more votes than George W. Bush in Florida, Bush won the election due to overseas absentee ballots that came in and were counted after election day); David Barstow & Don Van Natta Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, available at <http://www.nytimes.com/2001/07/15/national/15BALL.html>. Barstow and Van Natta noted that

[i]n an analysis of the [2490] ballots from Americans living abroad that were counted as legal votes after Election Day, The Times found 680 questionable votes. Although it is not known for whom the flawed ballots were cast, four out of five were accepted in countries carried by Mr. Bush, The Times found. Mr. Bush's final margin in the official total was 537 votes.

56. See *Gore on the Defensive*, SALON (Nov. 19, 2000, 1:07 PM), http://www.salon.com/news/politics/trail/2000/11/19/trail_mix/index.html (explaining how the GOP had alleged that the Democratic Party was engaged in a campaign to disqualify 1420 overseas ballots based on technicalities); Richard L. Berke, *Examining the Vote; Lieberman Put Democrats in Retreat on Military Vote*, N.Y. TIMES, (July 15, 2001), <http://www.nytimes.com/2001/07/15/us/examining-the-vote-lieberman-put-democrats-in-retreat-on-military-vote.html?sec=&spon=&pagewanted=all>; Michael Moss, *Absentee Votes Worry Officials as Nov. 2 Nears*, N.Y. TIMES (Sept. 13, 2004), <http://www.nytimes.com/2004/09/13/politics/campaign/13vote.html>.

57. *Courts May Decide Minn. Senate Seat*, USA TODAY (Nov. 28, 2008, 4:04 AM), http://www.usatoday.com/news/politics/election2008/2008-11-28-minnesota-senate-race_N.htm ("Secretary of State Mark Ritchie estimated that 12,000 absentee ballots were rejected for various

The rising trend in absentee and early voting threatens to revolutionize the way the United States manages its elections.⁵⁸ In some respects, these alternative modes of voting have brought the United States closer to the majority of nations that allow for voting on more than one day. Historically, most voters in the United States, unless they had a compelling reason for nonattendance at the polls, could only vote on the Tuesday (not a national holiday as in many other countries) when elections were conducted.⁵⁹ In the modern era, with the rise of absentee and early voting, elections in some states now begin several weeks before the official date.⁶⁰ Many states have moved toward these innovations in order to mitigate the frenzy and long lines that can accompany a single election day.⁶¹

Just as voters on Election Day cast ballots by many methods, so too do early voters. In the western states, early voters disproportionately vote by absentee ballot; they mail in their request for a ballot and then return the ballot by mail before Election Day.⁶² Such is the case for overseas and military voters, as provided by federal law.⁶³ Some states will allow absentee ballots to be faxed or emailed as well. In other states, polls open days or weeks in advance so voters have an extended period by which to cast their ballot, or the state opens a limited number of vote centers in advance of Election Day.⁶⁴ Looming on the horizon, of course, is Internet voting. The United States recently has experimented with some overseas military voters voting on-line, but the limited success of that effort has yet to assuage those concerned about the method's security.⁶⁵

reasons. That's between 4% and 5% of all the absentee ballots cast.”).

58. See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 512 (2003) (“The rise in absentee voting, the ease of obtaining absentee ballots, and the role of the parties in the process could easily lead to increased fraud and the loss of protections of the secret ballot.”).

59. David S. Broder, *Why Vote on Tuesdays?*, WASH. POST (Nov. 10, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/09/AR2005110901650.html>; Jesse McKinley, *A Push to Supplement Tuesday Voting with Weekends*, N.Y. TIMES, Mar. 10, 2010, at A18, available at <http://www.nytimes.com/2010/03/10/us/10vote.html>.

60. Mary Fitzgerald, *Greater Convenience but Not Greater Turnout: The Impact of Alternative Voting Methods on Electoral Participation in the United States*, 33 AM. POL. RES. 842, 846-48 (2005); see also CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 33 (“While only [eight] percent of ballots were cast before Election Day in 1994, by 2004 the percentage of ballots cast before Election Day had risen to [twenty-two] percent.”).

61. See Fitzgerald, *supra* note 60, at 846-49.

62. Paul Gronke et al., *Early Voting and Turnout*, 4 POL. SCI. & POL. 639, 639-40 (2007); Scott Helman, *Minds Made Up, Millions Voting Early*, BOS. GLOBE (Sept. 30, 2008), http://www.boston.com/news/nation/articles/2008/09/30/minds_made_up_millions_voting_early/ (“Interest in early and absentee voting has grown since the 1970s, especially in Western states, which have been the pioneers, researchers say.”).

63. 42 U.S.C. § 1973ff-2 (2006).

64. See Gronke et al., *supra* note 62, at 639-41.

65. R. MICHAEL ALVAREZ & THAD E. HALL, POINT, CLICK, & VOTE: THE FUTURE OF

These alternative methods of voting have raised a new set of concerns that should caution other countries moving in a similar direction. Some worry that early voters do not have the benefit of basing their decisions on late-breaking developments in a campaign.⁶⁶ The more serious problem, as noted above, concerns the error rates on absentee ballots, which sometimes lead to a great number of uncounted votes.⁶⁷ This high rate of spoilage results from the failure of voters to comply with the technical requirements of requesting and submitting such ballots, as well as errors in actually casting their vote.⁶⁸ Without the aid and supervision of election officials, ballots cast in private (as absentee ballots are) are ripe for both fraud and error.⁶⁹

In-person early voting poses a separate set of challenges, principally for the candidates and parties wishing to have observers in the polling place throughout the early voting period. When elections were held on a single day, staffing polling places with representatives from the campaigns was easy. Placing people there for two weeks when they are most needed for the final days of campaigning presents administrative challenges that political operatives have only just begun to confront. Nevertheless, given their popularity, these forms of “convenience” voting are here to stay and will only gain greater acceptance.⁷⁰ Whether the states begin to move toward the next stage (Internet voting) depends on whether both insiders and the public become convinced of its reliability and security.

D. Counting and Recounting Votes

In the end, the 2000 presidential election controversy was about the fairness of standards used to count ballots. The U.S. Supreme Court found that the recount process ordered by the state court in Florida treated similar ballots differently, such that voters in parts of the state with more permissive standards would be more likely to have their votes counted than those in other parts of the state.⁷¹ The unbounded discretion left in the hands of those counting the votes could lead to impermissible discrimination based simply on the fortuity of which

INTERNET VOTING 1-8 (2004); Alan Boyle, *Pentagon Launches Internet Voting Effort for Overseas Americans*, MSNBC (June 3, 2003), <http://www.msnbc.msn.com/id/3078931/>; CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 14-15; John Dunbar, *Internet Voting Project Cost Pentagon \$73,809 Per Vote*, THE CTR. FOR PUBLIC INTEGRITY (Aug. 9, 2001), <http://projects.publicintegrity.org/telecom/report.aspx?aid=297>.

66. JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS 61 (2006); Steve Kornaki, *The Big Problem with Early Voting*, N.Y. OBSERVER (Feb. 12, 2008, 3:47 PM), <http://www.observer.com/2008/big-problem-early-voting>.

67. See *Courts May Decide Minn. Senate Seat*, *supra* note 57.

68. See CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 38.

69. See Fortier & Ornstein, *supra* note 58, at 512-13.

70. See Fitzgerald, *supra* note 60, at 847-48 (finding that fifteen states had implemented in-person early voting between 1970 and 2002); Gronke et al., *supra* note 62, at 640 (“Election officials are strong advocates of early voting reforms.”).

71. *Bush v. Gore*, 531 U.S. 98, 105-07 (2000).

vote counter may have counted which ballot.⁷²

Although the Supreme Court's opinion spoke the language of discrimination and equal protection, underlying it was a concern about partisan administration and incomplete legal regimes.⁷³ Some number of similarly situated ballots will always be treated differently in any election where millions of votes must be tabulated. Random error, which is inevitable, would not raise constitutional concerns.⁷⁴ Bias, or the potential for bias, triggers more fundamental concerns (well known within and beyond the United States) about use of the power to count votes to determine election outcomes.

The potential for political favoritism grows when the legal regime is not designed for the task of recounting ballots in a close election. Such was the case in Florida in 2000. Gaps in the statute needed to be filled either by state officials or the courts, with charges of bias being lodged depending on the suspected party affiliation of the decision maker. The U.S. Supreme Court was not immune to such charges either, but public opinion polling in the year after the Court's resolution of the controversy showed that it had not suffered any long-term damage to its credibility among the mass public.⁷⁵

In these respects, the 2000 presidential election controversy looked like most election controversies in other parts of the world. Although ballot box stuffing and classic forms of fraud may be more pronounced elsewhere, these controversies ultimately follow a script of insiders using their power to tilt election outcomes in their favor. As in other countries, the actual and perceived independence of those overseeing the counting of votes is critical to accord legitimacy to the process.⁷⁶ As detailed in the introduction, the United States has proven uniquely incapable of developing nonpartisan institutions to oversee its democracy.⁷⁷ Not only the chief election officials of states, but even our judges are either elected or appointed by partisans.⁷⁸ In stark contrast, most countries

72. *Id.*

73. *See id.* at 128 (Stevens, J., dissenting) ("What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit."); Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in *THE VOTE: BUSH, GORE & THE SUPREME COURT* 77, 91-92 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (arguing that the Supreme Court's decision in *Bush v. Gore* was based on an underlying mistrust of all other actors in the political process).

74. Karlan, *supra* note 73, at 91-92.

75. Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After Bush v. Gore: Implications for Institutional Legitimacy and Effectiveness*, 13 *STAN. L. & POL'Y REV.* 101, 112 (2002).

76. *See generally* CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 49.

77. *See supra* notes 1-14 and accompanying text.

78. Hasen, *supra* note 1, at 974 ("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

have found ways to insulate bureaucrats and election judges from the normal partisan pressures of the electoral environment.⁷⁹ To be sure, losers in any contested process often feel unfairly treated, no matter how cordoned-off the decisionmakers may be.⁸⁰

II. GOALS FOR AN ELECTION REFORM AGENDA

The recent U.S. experience with crisis and reform teaches lessons that, to some extent, can be universalized for other countries. Of course, every electoral system is different, and the cultural, economic, and institutional context will greatly affect the goals and capabilities of reform. Nevertheless, each electoral system seeks to further common values, even if they necessarily must strike the balance in different ways.

As a threshold matter, an electoral system must accurately capture the preferences of those who cast ballots.⁸¹ Perfect accuracy can never be achieved, and resources spent to ensure an accurate result are often traded off against those necessary to further other values, such as participation, competition, and representation. Reformers must recognize that no perfect electoral system exists and that the best technology with the finest administrators operating under the best set of rules will not produce results that perfectly translate voter intentions into counted ballots. Although perfection may be illusory, minimizing errors to the extent possible given other pressing values remains the defining feature of a working election system.

This concern with accuracy might also be seen as a value implicit to representativeness—that is, the election results must accurately represent the preferences of those who cast votes. This does not necessarily imply that all votes must be counted, but rather that any errors in vote tabulation should be random and not biased against identifiable subgroups of the population. Different electoral systems attempt to achieve representativeness in different ways—for example, by choosing between proportional and plurality-based systems. Indeed, in the United States, the Electoral College system has made it possible for a candidate to win the presidency, as George W. Bush did,⁸² while receiving fewer

nonpartisan election. The remaining states use an appointments process.”); David G. Savage, *Elected Judges Make a Case for ‘Appearance of Bias’*, CHI. TRIB. (Feb. 22, 2009), http://articles.chicagotribune.com/2009-02-22/news/0902210111_1_recusal-justices-judges (“In [thirty-eight] states, some judges are elected. Nineteen states besides West Virginia and Illinois elect the justices of their supreme court.”).

79. See CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 5.

80. *Id.* at 49 (“The losing side, not surprisingly, is unhappy with the election result, but what is new and dangerous in the United States is that the supporters of the losing side are beginning to believe that the process is unfair.”).

81. See *id.* at 1.

82. R. Michael Alvarez, *Measuring Election Performance* 1 (Caltech/MIT Voting Tech. Project, Working Paper No. 94, 2009), available at http://vote.caltech.edu/drupal/files/working_paper/wp_94_pdf_4b676033ef.pdf (noting that although Gore received approximately 550,000

votes than his opponent.⁸³ At a minimum, though, when it comes to electoral administration, representativeness requires that decisions made by administrators should not skew outcomes and that avoidance of bias in the inevitable inaccuracies exist as a paramount goal.

Beyond counting votes accurately and fairly, a well-functioning electoral system must allow for widespread participation. Gone are the days when limiting the vote to white, male property owners, for example, could qualify a country as a robust democracy. Even among those that putatively accord universal suffrage, countries continue to disenfranchise whole groups of adult citizens based on their status (such as prisoners,⁸⁴ ex-prisoners, the mentally incompetent,⁸⁵ or recent residents⁸⁶), and most limit the vote to adult resident citizens. Contemporary debates focus more on the barriers to participation through identification, registration, and other requirements.

Especially in the United States, the value of participation appears in tension with values of electoral integrity and accuracy. In particular, many argue that lowering the barriers to participation represents an invitation for voter fraud.⁸⁷ Such is the criticism made by those favoring a move (quite common throughout

more votes than Bush, Bush won the 2000 presidential election).

83. See generally John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968) (critiquing the inequality in voting power inherent in the Electoral College system). But see NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 23 (2001), available at <http://election2000.stanford.edu/full.report.8.2001.pdf> (acknowledging the traditional critiques of the electoral college but reminding citizens that the electoral college "was a delicate compromise that solved one of the most difficult problems of the Constitutional Convention").

84. See generally Mandeep K. Dhami, *Prisoner Disenfranchisement Policy: A Threat to Democracy?*, 5 ANALYSES OF SOC. ISSUES & PUB. POL'Y 235 (2005). For an overview of international prisoner disenfranchisement laws, see generally CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE (Alec C. Ewald & Brandon Rottinghaus eds., 2009).

85. Forty-four American states disenfranchise some individuals with cognitive and emotional impairments. Kay Schriner & Lisa A. Ochs, *Making Exceptions to Universal Suffrage: Disability and the Right to Vote*, in ENCYCLOPEDIA OF CRIMINOLOGY AND DEVIANT BEHAVIOR 179, 179 (Charles E. Faupel & Paul M. Roman eds., 2000).

86. See ROSENBERG & CHEN, *supra* note 19, at 16 n.62 (noting that while a number of other countries have used data-sharing arrangements among government agencies to ensure that eligible voters can vote even if their personal information has changed, the United States has used such techniques to identify citizens who may be ineligible to vote locally).

87. Crawford v. Marion Cnty. Election Bd., 533 U.S. 181, 191-93 (2008) (supporting the legitimacy of the state interest in preventing in-person voter fraud, despite the lack of evidence suggesting it is an issue); Purcell v. Gonzales, 549 U.S. 1, 4 (2006) ("Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."); Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1738 (2008) (concluding that "perceptions of fraud have no relationship to an individual's likelihood of turning out to vote").

the world where governments provide their citizenry with identification or citizenship papers) to require photo identification in order to vote.⁸⁸ A similar criticism is often raised against different forms of convenience voting, such as absentee ballots,⁸⁹ which have been the most amenable to manipulation and fraud by political entrepreneurs.⁹⁰ On the one hand, the opportunity to vote at home, in private, at a convenient time ensures that some voters will end up voting who otherwise would not (although the empirical evidence suggests that such measures do not appreciably increase turnout).⁹¹ On the other hand, removing such hurdles presents enforcement challenges to ensure that these votes are cast by the voters themselves and are not cast under duress or for reward.⁹²

Of course, participation as a value extends beyond voters to candidates and parties, and it is thereby often reinterpreted as “competitiveness.”⁹³ Like representativeness, competitiveness is a value open to radically different interpretations. It could imply mere contestation, as reflected in the sheer number of candidates or parties that appear on the ballot.⁹⁴ It could also entail genuine rivalry, as in the number of candidates or parties with a realistic chance of winning control.⁹⁵ Alternatively, it could be assessed according to the results of elections, such as the margins of victory.⁹⁶ Competition, however we define it,

88. CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 18 (“There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.” (footnote omitted)).

89. For a discussion on the impact of the vote-by-mail system implemented in Oregon, see generally Priscilla L. Southwell & Justin Burchett, *Vote-by-Mail in the State of Oregon*, 34 WILLAMETTE L. REV. 345 (1998).

90. See Fortier & Ornstein, *supra* note 58, at 512-13 (detailing the theoretical problems with absentee ballots and noting actual instances of absentee ballot fraud).

91. Fitzgerald, *supra* note 60, at 856 (noting that a study spanning thirty years, all fifty states, and presidential and congressional elections found that early voting procedures, such as unrestricted absentee ballots, do not increase voter turnout.); see also Gronke et al., *supra* note 62, at 644 (“There may be good reasons to adopt early voting—more accurate ballot counting, reduced administrative costs and headaches, and increased voter satisfaction—but boosting turnout is not one of them.”).

92. Fortier & Ornstein, *supra* note 58, at 512-13.

93. See generally THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS (Michael P. McDonald & John Samples eds., 2006) (examining why electoral competition in the United States is in decline and hypothesizing about what might be done to increase competition).

94. Nathaniel Persily, *The Place of Competition in American Election Law*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 171, 172 (Michael P. McDonald & John Samples eds., 2006).

95. *Id.* at 173.

96. *Id.*

may be an indispensable element of democracy, even though close elections place great stress on almost any electoral system. The 2000 presidential election controversy in the United States, like the one in Mexico six years later,⁹⁷ must be a relatively rare event if the system is to withstand the inevitable allegations of malfeasance that accompany any razor-thin victory.⁹⁸

This discussion leads to the final value reform should further: preserving public confidence in the electoral system. Public confidence and trust in the system, while foundational to accord legitimacy to the government, turns out to be very difficult to achieve in some deliberate way.⁹⁹ Of course, at the margins, a system that is completely non-transparent and seems to produce repeated results that fly in the face of what majority preferences would seem to predict will be crippled by a lack of confidence. Beyond the obvious cases of faux democracies, however, few agreed-upon strategies exist to maintain public confidence when the system is under stress. This is not to say that all countries have populations with equal degrees of skepticism of their political system. Rather, the predictors of the levels of mistrust vary greatly based on cultural¹⁰⁰ and institutional contexts¹⁰¹ and the nature of political cleavages in the democracy. Confidence in the electoral system will often vary with confidence in government and public structures more generally,¹⁰² and election administration and law can only do so much to address those larger concerns.

Losers in close elections will often challenge the validity of the process that

97. Manuel Roig-Franzia, *Contender Alleges Mexico Vote Was Rigged*, WASH. POST, July 9, 2006, at A1.

98. NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 83, at 17 (noting that in 1996, three-quarters of the population felt that the electoral process was fair, which then dropped to one-half after the 2000 election).

99. See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, HOW AMERICANS VIEW GOVERNMENT: DECONSTRUCTING DISTRUST (Mar. 10, 1998), available at <http://people-press.org/report/95/> (noting that Americans' distrust of government tends to remain relatively constant throughout the decades, with slight vacillations due to political scandals and economic downturns); see generally WHY PEOPLE DON'T TRUST GOVERNMENT (Joseph S. Nye et al. eds., 1997) (analyzing likely causes of declining public confidence). In fact, public trust in government and political institutions has declined in all industrialized democracies since the 1990s, although in varied patterns and levels. See PERI K. BLIND, BUILDING TRUST IN GOVERNMENT IN THE TWENTY-FIRST CENTURY: REVIEW OF LITERATURE AND EMERGING ISSUES 8 (Nov. 2006), available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan025062.pdf>.

100. Blind, *supra* note 99, at 8 (finding that the decrease in public trust in government was blamed on a variety of reasons, such as continuing tensions on nationalism and separatism in Canada and the strains of unification in Germany).

101. *Id.* at 7 (finding that, for example, civic engagement and political trust are positively correlated in the industrialized world, but in developing countries like the Dominican Republic and Morocco, civic engagement actually decreases trust, as it exposes citizens to the corrupt and illegitimate daily practices of government).

102. *Id.* at 11-12, 20 (concluding that economic challenges and political scandal appear to be two major contributors to the declining trust in government).

determined the victor. Whether valid or not, supporters of the loser will express a lack of confidence in the process.¹⁰³ The critical question is whether those feelings of mistrust subside over time or produce widespread apathy or organized violence.¹⁰⁴ This will depend in part on whether the institutions overseeing elections have built up a repository of goodwill that allows them to survive the stress of close elections.¹⁰⁵ To be sure, a record of nonpartisanship and institutional buffers against political pressures may help, just as would inclusion of all potentially critical parties in decision making processes and institutional design in the pre-election period. Even the most cautionary, well-meaning designers of institutions, however, should not overestimate their ability to prevent the inevitable loss of confidence among sore losers in a close election.¹⁰⁶ Rather than worry about perceptions of fairness and accuracy, reformers would do well to focus on actually making the process fair and accurate with the hope that the public will recognize it as such.

III. METRICS FOR SUCCESS

Listing the values that an election administration system ought to achieve, even while recognizing that they are in tension, is easier than providing agreed-upon metrics to evaluate the fulfillment of such goals. What follow in this subsection are potential metrics that different democracies have employed to measure fulfillment of those goals. As with the values themselves, it may be impossible to maximize along all metrics simultaneously, and basic features of the political or electoral system may make achievement more difficult in some contexts. That said, these metrics can often be adjusted to accommodate local institutional capabilities and political realities.

103. After the 2000 presidential election, three-quarters of Democrats doubted the fairness of the process. NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 83, at 17.

104. See, e.g., Allan J. Cigler & Russell Getter, *Conflict Reduction in the Post-Election Period: A Test of the Depolarization Thesis*, 30 W. POL. Q. 363, 363-64 (1977) (finding that with one exception, polarization in the United States has not led to violent resistance to a regime); Steve Inskeep & Gwen Thompkins, *Kenya's Post-Election Violence Kills Hundreds*, NAT'L PUB. RADIO (Jan. 2, 2008), <http://www.npr.org/templates/story/story.php?storyId=17774507> (reporting on the violence that surrounded the 2008 presidential election in Kenya).

105. Cigler & Getter, *supra* note 104, at 363 ("Continued citizen support in the post-election period depends on the widespread belief that the electoral contest has been resolved legitimately and that the mantle of authority has been conferred upon the regime in a manner deserving of respect and support for the collective decision.").

106. One author notes that the cognitive dissonance resulting from the preferred candidate's loss (i.e., "my candidate is the best candidate" versus "my candidate lost") may be psychologically dealt with by denying that the preferred candidate actually lost at all, thus resulting in greater polarization of political sentiments after the election (e.g., "the other candidate only won because of voter fraud"). *Id.* at 366-67.

A. Lost Votes

In the wake of the 2000 U.S. presidential election controversy, the Caltech/MIT Voting Technology Project (“the Project”) developed a measure of lost votes to calculate the total number of voters whose votes were not counted or were otherwise prevented from voting.¹⁰⁷ The measure identifies the number of ballots cast that were not counted plus the number of voters who were prevented from voting due to problems with their registration.¹⁰⁸ The Project estimated that according to this measure, four to six million votes were lost in the 2000 presidential election.¹⁰⁹

Calculating the number of lost votes requires good data on the number of voters who attempt to vote, the number of ballots that are cast, and the number that are counted. These constitute basic pieces of information that any election system ought to maintain, but they require some kind of uniform, centralized clearinghouse for the information.¹¹⁰ Moreover, to record voter intentions and the reasons for failing to vote may require comprehensive surveys in the wake of an election.¹¹¹ Official totals can only calculate the pieces of paper—whether actual votes or names on a turnout tally—that were in fact delivered. For those who failed to participate in the system, surveys may be the only way to assess their number and reasons for nonparticipation.

For the most part, the number or share of votes that are lost provides a gauge for assessing the failure of the electoral regime to translate voter intentions into actual votes. The measure does not distinguish intentional fraud from unintentional malfunction. Votes could go uncounted either because the machines do not register a vote¹¹² or because vote counters do not count them.¹¹³

107. CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 8.

108. *Id.* (finding that 7.4% of the forty million registered voters who did not vote listed registration problems as the cause).

109. *Id.*

110. The Voting Technology Project recommends that the federal government fund an independent agency for election administration that “would perform the sort of information clearinghouse function that it would see as necessary in order to establish best practices and to improve the information that counties have when they purchase equipment.” *Id.* at 54.

111. For many years, the only data source for studies on voter registration problems was the U.S. Census Bureau’s Current Population Survey Voting Supplement, which asked eligible citizens if they voted, and if they did not vote, if they were registered. Alvarez, *supra* note 82, at 4. If a voter was registered but did not vote, he was then given the opportunity to choose one reason from a list of reasons for not voting. *Id.* Recently, however, a Voting Technology Project research team developed the first major survey-based research effort to study voter experience and election performance. *Id.* at 5-6. According to the researchers, this survey allows for a much more nuanced examination of voter problems, including the types of problems faced as well as where those problems are occurring and the magnitude of the problems. *Id.* at 4-7.

112. For example, in the 2000 election, 678 votes were not counted in New Mexico’s Rio Arriba County, and the state had the narrowest winning margin of only 366 votes. Despite the fact that voters utilized state-of-the-art push-button electronic voting machines, it appears that a

Similarly, problems with the registration system could reflect either negligence or intentional efforts to register some voters and not others. The potential recommended policy changes will depend on the cause of the lost votes.¹¹⁴ They could range from a change in balloting or registration technology to better training of election workers.¹¹⁵ If intentional malfeasance is the suspected cause of lost votes, then it may be appropriate to recommend measures to increase transparency and bring multiple stakeholders into the process of administration and vote counting.¹¹⁶

B. Turnout

Voter turnout may be the election phenomenon political scientists have studied most intensely, and it may be the metric most easily measured to gauge a democracy's health. Although many questions still remain (such as why voter turnout seems to have declined across the world over the last generation¹¹⁷), many of the causes and correlates for high voter turnout are well-known. At the same time, methodological controversies often exist in how to measure voter turnout. The number of voters is often well-known from official statistics, but assessing the appropriate denominator to measure turnout often proves more difficult than one might think at first blush.

Although many denominators could be contrived, the most popular employed are the voting age population, the citizen voting age population, and the eligible voting population. The choice among denominators—that is, turnout of *which* population—will affect one's inferences as to potential causes for lower turnout. For example, people have speculated for years as to why voter turnout has decreased in the United States over the past four decades.¹¹⁸ Upon closer

programming error resulted in the permanent loss of these votes. Dan Keating, *Lost Votes in N.M. a Cautionary Tale: As Election Day Nears, a Look at Problems in 2000 Shows Fallibility of Machines*, WASH. POST, Aug. 22, 2004, at A5.

113. For a discussion of ways to improve the training and recruitment of poll workers, see CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 6, at 54-55.

114. CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 10 (distinguishing between the “social problem” of fraud and the “engineering problem” of error).

115. See NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 83, at 6-14 (setting forth fourteen policy recommendations, including the implementation of statewide voter registration lists and provisional voting, the creation of a national holiday for presidential and congressional elections, and the drafting of federal standards for voting equipment).

116. CAL. INST. OF TECH. & MASS. INST. OF TECH., *supra* note 31, at 10 (suggesting penalties for electoral fraud and improved detection methods to deter fraudulent voting practices).

117. Michael McDonald, *Voter Turnout*, UNITED STATES ELECTIONS PROJECT, http://elections.gmu.edu/voter_turnout.htm (last visited July 17, 2010).

118. See generally WARREN E. MILLER & J. MERRILL SHANKS, *THE NEW AMERICAN VOTER* (1996) (a comprehensive attempt to explain electoral behavior in presidential elections); RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* (1992) (empirically analyzing why voter turnout rates have declined and examining potential ways to increase turnout); Paul R. Abramson & John

analysis, it appears that a statistical quirk has been responsible for much of the alleged recent decrease.¹¹⁹ The share of the voting-age population that has turned out in each election does appear to have declined, but the share of the eligible population turning out has remained relatively constant. The perceived decrease has resulted from an increase in the share of non-citizens and prisoners in the voting age population due to high levels of immigration and incarceration.¹²⁰ Neither group can vote; therefore, increases in the ineligible share of the voting age population make it appear that a lower share of the population is actually turning out.

Correlates and causes of low voter turnout can be divided into institutional and individual characteristics. The institutional characteristics can be further divided according to electoral system features and election law regimes. The features of the electoral system concern the way votes are translated into seats or offices, whereas election law regimes tend to vary according to the ease with which eligible voters can vote.

Cross-national studies have identified a range of features of electoral systems that affect levels of voter turnout.¹²¹ The clearest demarcation is between proportional representation systems and single-member district (SMD) plurality-based systems. Proportional systems, in which votes are directly translated into seat shares in the legislature, tend to produce higher levels of turnout than SMD systems, in which votes for losing candidates are effectively “wasted.”¹²² Similarly, the number of viable political parties in a system seems to affect the turnout rate up to a point.¹²³ Increasing the number of parties past five or so

H. Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502, 502 (1982) (suggesting that declining voter turnout is substantially the result of “weakening of party identification and declining beliefs about government responsiveness”).

119. The denominator for the voter turnout rate typically relies on the U.S. Census Bureau, which measures voting-age population (VAP), including people ineligible to vote, such as non-citizens, felons, and the mentally incompetent. Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 964 (2001).

120. *See id.* at 963.

121. *See generally* André Blais, *What Affects Voter Turnout?*, 9 ANN. REV. OF POL. SCI. 111 (2006) (reviewing the Powell and Jackman articles, as well as more recent research on voter turnout); Robert W. Jackman, *Political Institutions and Voter Turnout in the Industrial Democracies*, 81 AM. POL. SCI. REV. 405, 407-09 (1987) (discussing five major factors that influence voter turnout: nationally competitive districts, electoral disproportionality, multipartyism, unicameralism, and compulsory voting); G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17, 18 (1986) (arguing that the American institutional setting, particularly its party system and registration laws, severely inhibits voter turnout).

122. Powell, *supra* note 121, at 21 (“With proportional representation from the nation as a whole or from large districts, parties have an incentive to mobilize everywhere. With single-member districts, some areas may be written off as hopeless.”).

123. *See* AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 106-14 (1984) (describing benefits and critiques of the

appears to have a dampening effect on turnout.¹²⁴ This curvilinear relationship might be explained by the effect of the party system on attitudes toward political efficacy. Voters may prefer three or four parties to two, given that they may find in that range at least one party that effectively represents them.¹²⁵ As the number of parties grows beyond that, the translation of voter preferences gets blurred by deals made to secure a governing coalition, such that voters may sense that their individual vote is far removed from the actual choice of who will govern the country.¹²⁶ Fragile governing coalitions lead to greater uncertainty in how an individual's vote will translate to a shift in government policy.

As electoral systems may vary in the way they translate votes into seats, election law regimes vary in how easy they make voting. Of course, countries that explicitly disenfranchise groups of voters, such as prisoners, new residents, or mentally incompetent people¹²⁷ (let alone women or racial minorities), may have marginally lower turnout due to such measures. The same could be said for countries where voters are intimidated from voting. But as discussed above, the main source of variation concerns the voting obstacles that different democracies impose. The frequent requirement of compulsory voting found in Latin America and elsewhere—such as Australia and Belgium—has an obvious effect on raising voter turnout, even when the penalties for not voting are quite low or the law goes unenforced.¹²⁸ Conversely, burdensome voter registration laws and a lack of government effort to register voters will suppress turnout. Beyond that, measures that make voting convenient represent a somewhat mixed bag. In the United States, it appears that same-day registration—that is, allowing new voters to register on the same day that they vote—somewhat heightens.¹²⁹ Early and absentee voting innovations, however, do not seem to have affected turnout much;¹³⁰ it appears that voters who choose those methods of voting would probably have voted anyway without those innovations.¹³¹

Although laws and electoral systems affect turnout levels, we know that demographic characteristics strongly predict whether an individual will vote.

two-party system versus the multiparty system).

124. *Id.* at 120-23 (using the Laakso-Taagepera index to find that across twenty-two democracies, the effective number of parties ranged from two to five).

125. *Id.* at 113-14.

126. *See id.* at 110. *But see generally* AINA GALLEGÓ ET AL., NUMBER OF PARTIES AND VOTER TURNOUT: EVIDENCE FROM SPAIN (2009), available at http://polnet.wikispaces.com/file/view/Number_of_parties_and_voter_turnout.pdf (finding that the number of political parties has a positive effect on voter turnout, as those less in politics are more likely to vote when they have more choices).

127. *See supra* notes 84-86.

128. *See* Jackman, *supra* note 121, at 409 (noting that mandatory voting laws will, even if not enforced, lead to higher, but not perfect, voter turnout).

129. *See* Brians & Grofman, *supra* note 19, at 170 (finding that election day registration results in an increase in voter turnout of approximately seven percentage points in the average state).

130. *See* Fitzgerald, *supra* note 60, at 854-56.

131. *See* Gronke et al., *supra* note 62, at 642-43.

Education¹³² and age tend to be the strongest predictors of turnout, with more educated and older voters being more likely to vote.¹³³ Unsurprisingly, those with a heightened sense of civic responsibility,¹³⁴ political efficacy,¹³⁵ and social connectivity¹³⁶ are more likely to turn out to vote. Those who have frequent contact with the government, either because they work closely with government¹³⁷ or in economic sectors highly dependent on government benefits,¹³⁸ are more likely to vote. The same is true for those with close connections to political parties or for members of groups who are closely aligned with political parties.¹³⁹ Of course, in countries where groups boycott elections or widespread fraud makes voting appear inconsequential, turnout will suffer.

C. Incidences of Fraud

Fraud is the most difficult, and perhaps most important, electoral phenomenon to measure. Scholars have tried their best to do so with limited success. When successful, fraud by its nature will go undetected. Thus, capturing the amount of fraud in an electoral system requires fine-tuned assessments of what a fraud-free election would produce so that irregularities can be eradicated.

One must define fraud to measure it, and many definitions abound.¹⁴⁰ Fraud refers to more than election irregularities or the failure to count every vote; otherwise, a whole host of dysfunctions would be considered fraudulent. Moreover, officially sponsored disenfranchisement could be seen as fraud, but for the most part, fraud refers to efforts in secret or when those committing the fraud do not acknowledge the fraud. It generally refers to intentional, illegal action to alter vote totals so as to change the outcome of an election.¹⁴¹ This could be done

132. Similarly, education is positively correlated with citizen trust. R. Michael Alvarez et al., *Are Americans Confident Their Ballots Are Counted?*, 70 J. POL. 754, 763 (2008).

133. Carol A. Cassel & David B. Hill, *Explanations of Turnout Decline: A Multivariate Test*, 9 AM. POL. Q. 181, 186-87 (1981).

134. *Id.* at 182.

135. *Id.*

136. Marvin E. Olsen, *Social Participation and Voting Turnout: A Multivariate Analysis*, 37 AM. SOC. REV. 317, 317 (1972).

137. M. MARGARET CONWAY, *POLITICAL PARTICIPATION IN THE UNITED STATES* 31 (3d ed. 2000).

138. *Id.* at 30.

139. Cassel & Hill, *supra* note 133, at 182.

140. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD* 4 (Nov. 9, 2007), available at http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib0hl.pdf; LORRAINE C. MINNITE, PROJECT VOTE, *THE POLITICS OF VOTER FRAUD* 6, available at <http://www.bradblog.com/Docs/PoliticsofVoterFraudFinal.pdf> (last visited Sept. 3, 2010) (noting that there is no single accepted definition of voter fraud).

141. See MINNITE, *supra* note 140, at 6.

by traditional ballot box stuffing,¹⁴² changing vote tallies, destroying votes, or obstructing voters who support particular candidates or parties.¹⁴³

One way to “measure” fraud is to rely on official reports. One can look at the number of fraud prosecutions or incident reports at polling places.¹⁴⁴ One can also perform surveys of voters and election administrators to gather their assessments as to the extent of fraudulent action in a given election. Finally, post-election audits of ballots may shed light on irregularities occurring in certain areas.

The data and measurement challenge becomes how to identify patterns for which no reasonable alternative other than fraudulent behavior explains irregularities in the data. If an “unnatural” or aberrant number of votes appears to have been cast for a particular party in an area where the party should not have so performed, an inference of irregularity might be supportable. Moreover, if a pattern emerges—for example, when one party is in charge of the vote counting and a surprising number of votes appears to have been cast for its candidates—then similar inferences might be appropriate. In other words, the burden of proof might shift to those who would explain the irregularity as produced by something other than fraud.¹⁴⁵

The more incompetent the fraud, the easier it is to detect. In some countries, it will be easy to point out that many more or many fewer ballots were counted in an election as compared to the number of voters who appeared at the polls or even the number of voters in a jurisdiction. When fraudsters are more sophisticated, statistical models can provide the necessary tools to unearth systematic irregularities. Such has been the case in recent elections in Russia,¹⁴⁶ Iran,¹⁴⁷ and Afghanistan,¹⁴⁸ for example. By comparing reported vote totals to what a statistical model would predict based on past behavior, turnout in the election, exit polls, and comparable statistics from around the country, one can

142. For an example of absentee ballot box stuffing, see *United States v. Boards*, 10 F.3d 587 (8th Cir. 1993).

143. For a discussion of the different categories of voter fraud, see Levitt, *supra* note 140, at 12-22.

144. See, e.g., ATT’Y GEN., U.S. DEP’T OF JUSTICE PUB. INTEGRITY SECTION, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2006, at 40-42 (2006), available at <http://www.justice.gov/criminal/pin/docs/arpt-2006.pdf> (describing a number of prosecutions for voter fraud cases).

145. See, e.g., Levitt, *supra* note 140, at 7-11 (compiling a list of the methodological flaws that result in allegations of voter fraud when in fact no such fraud exists).

146. Luke Harding & Tom Parfitt, *Fraud, Intimidation and Bribery as Putin Prepares for Victory*, GUARDIAN, Nov. 30, 1997, at 24, available at <http://www.guardian.co.uk/world/2007/nov/30/russia.politics>.

147. Farnaz Fassihi, *Iran Council to Investigate Election-Fraud Claim*, WALL ST. J. (June 16, 2009), <http://online.wsj.com/article/SB124505670198214769.html>.

148. Joshua Partlow & Pamela Constable, *Accusations of Vote Fraud Multiply in Afghanistan*, WASH. POST (Aug. 28, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/27/AR2009082704199.html>.

raise serious questions as to the legitimacy of reported results.

D. Popular Trust and Confidence in the System

Because fraud is difficult to prove with the specificity required by official observers, it is popular for critics to rely on perceptions of fraud. More generally, those seeking to combat fraud rely on popular confidence as the measure of a functioning electoral system. An electoral system cannot produce legitimate outcomes if the people do not trust the reported results. However, because a lack of confidence in the system can be the result of factors unrelated to actual administrative failures or intentional wrongdoing,¹⁴⁹ officials may find that popular confidence is a tricky value to satisfy.

One can measure such confidence at the level of elites or the mass public. In some democracies, elite boycotts of elections or mass protests could signal a lack of confidence. The propensity for litigation or criticism from the media or non-governmental organizations might also signal a lack of confidence. We can measure popular confidence by asking a representative sample of the population a series of survey questions directed at measuring their attitudes toward the electoral system. Questions such as “How much confidence do you have that your vote will be counted?” or “How confident are you that the declared winner in this election received the most votes?” can be complemented by more specific queries as to attitudes about polling place practices and election administration.¹⁵⁰

To reiterate, attitudes toward the “system” often reflect respondents’ predispositions as to who they believe should have won the election. “Sour grapes” over legitimate election results are often expressed as a lack of confidence in the system. Isolating legitimate grievances against the election administration regime from mere complaints that the less preferable candidate won proves to be quite challenging.¹⁵¹ Moreover, such feelings of confidence in the system are often reflective of attitudes toward government and the economy. The happier one is with government, the more likely one is to trust its election results. Those feelings toward government and social institutions will be affected by much more than behavior during elections. Tweaking the election administration regime can do little to assuage the concerns of people as to their position in life or the government’s responsibility for it.

149. See *supra* notes 99-106 and accompanying text.

150. For example, one study designed to determine voters’ confidence in their vote being recorded correctly asked, “How confident are you that your ballot for president in the 2004 [, 2000 where applicable.] election was counted as you intended?” Respondents could choose from the following options: very confident, somewhat confident, not too confident, or not at all confident. These responses were then categorized into two groups: confident and not confident. After the 2000 election, 90.9% were confident their votes were counted, and after the 2004 election, 88.2% were confident that their votes were counted. See Alvarez, *supra* note 132, at 758.

151. See *supra* notes 99-106 and accompanying text.

CONCLUSION

Generalizing international lessons from one country's experience is always a tricky business. Because of the panoply of problems it revealed in the electoral system of a leading democracy, the 2000 U.S. presidential election provides a useful template for categorizing the challenges each democracy faces in running elections. When elections are decided by a small number of votes, we feel the need to examine many features of the system that could have altered the outcome. Such inquiries can improve the functioning of the electoral system when it is not in the throes of a crisis.

While recognizing that every country is unique and its problems are embedded in a specific cultural, political, and institutional context, several lessons from the U.S. experience can be instructive beyond its shores. Most famously, the United States learned in 2000 how faulty technology (in this instance, punch-card ballots) can lead to millions of votes going uncounted.¹⁵² The same could be said for problems with ballot design, which led to thousands of voter mistakes.¹⁵³ Fixing those technological problems proved more difficult than people first thought, as precipitous adoption of electronic voting came under fire for raising security questions and other concerns.¹⁵⁴ Nevertheless, the academic study of lost votes in the wake of the 2000 election provided a continuing gauge of the success of technological changes in translating expressed voter preferences into counted votes.

Those studies, however, revealed the importance of looking at the whole voting process—from “registration to recounts,” as one set of authors describes the “election ecosystem”¹⁵⁵—to assess the proper functioning of an electoral system. Once those studies were done, the broader challenge of effective election administration came into sharp relief. The extreme decentralization of the U.S. system,¹⁵⁶ coupled with the lack of adequate expertise¹⁵⁷ and creeping partisanship at every stage,¹⁵⁸ constitute impediments to effective, widespread change that might ameliorate well-recognized problems. For international observers of the American experience, one lesson to take away is the disconnect between the law on the books and the practices on Election Day. As with technology, the impact of the finest and most specific laws will ultimately depend on the diligence and expertise of those administering them. The registration system is a case in point. Fixes put in place following the 2000 election have had a mixed impact, as localities and even polling places have varied considerably, for example, as to when they will grant a person the opportunity to vote by provisional ballot.¹⁵⁹

152. *See supra* Part I.B.

153. *See supra* text accompanying notes 50-53.

154. *See supra* notes 46-47 and accompanying text.

155. *See* HUEFNER ET AL., *supra* note 18, at 11-17.

156. *See supra* notes 1-4 and accompanying text.

157. *See supra* notes 5-7 and accompanying text.

158. *See supra* notes 8-14 and accompanying text.

159. *See* PEW CTR. ON THE STATES, *supra* note 37, at 5-6.

The same could be said for a variety of legal reforms governing elections in the United States and beyond: Any system that ultimately relies on humans to guide voters through the process and count their votes will fall prey to a series of potential human errors.

Although errors may be an inherent part of the electoral process, they can be minimized, and reforms can target errors with particular biases. Such efforts to ameliorate the types of problems that disadvantage particular communities, parties, or demographic subgroups should be the highest priority for a reform agenda in the United States and elsewhere. Although politicians and the public should relax their expectations of perfection for election administration, they have a right to expect that the imperfections will not put a thumb on the electoral scale for a particular group of people. With luck, focusing on that category of reforms will translate into widespread public confidence in the electoral system. Even if reformers are not so lucky, as can often be the case when confidence is tied to general attitudes toward government, addressing problems before they arise in the heat of an election can ward against the worst allegations of illegitimacy regarding the electoral process.