

# **Optimality, not Perfection, Should Be the Goal of Election Administration**

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This paper is the text of an oral presentation at  
“Making Every Vote Count: a Colloquium on Election Reform Legislation,”  
at Princeton University on April 7, 2006,  
[http://region.princeton.edu/conference\\_20.html](http://region.princeton.edu/conference_20.html)

The pre-conference draft of the complete paper is here:  
[http://region.princeton.edu/media/pub/pub\\_5\\_32.pdf](http://region.princeton.edu/media/pub/pub_5_32.pdf)

The title of this conference is “Making Every Vote Count” and the title of this panel is “Equity in HAVA Implementation.” But what do these terms really mean? What would it mean to achieve true equality of voting rights in election administration, and is “making every vote count” really the same as counting every vote and doing so accurately? I want to suggest that there is an inevitable gap between the idealism of our “equal voting rights” rhetoric and the reality of whatever the best designed and best implemented system of electoral administration is capable of achieving.

The thesis of my paper is that it is imperative that we come to grips with this gap in a way we have not yet begun to do. We must figure out a way to modulate our idealism. And we must ratchet down public expectations of what the optimal electoral system can deliver—so that if and when we actually put the optimally feasible system into place, we can appropriately say that it is entitled to public acceptance and appreciation as satisfying the highest possible standard of demographic legitimacy, rather

than being condemned as inadequate in failing to live up to our professed ideals of equal voting rights.

Currently in this country, we are by no means yet at the level of an optimal electoral system. There is still much, much work to be done. But if we ever get there, it would not satisfy the rhetorical aspirations of “making every vote count” and would not guarantee complete equality of voting rights for all citizens, as that phrase is often used. Thus, we need a new way to define and describe the optimally feasible system, and as society we have hardly begun this essential task.

So let me describe the problem and illustrate it with several examples. Then, I will offer a tentative solution, or at least a way to begin thinking about a solution.

### **I. The Problem**

Our “equal voting rights” rhetoric, as well as the understanding of democracy it reflects, demands perfection from the electoral system. But perfection is unattainable, and not just because of technological limitations or the inevitability of human error, but because there are other important human values that necessarily compete with the ideal of “making every vote count.” As a society we appropriately will not give up our commitments to those other human values, and yet we are not yet ready, able and willing to admit to this values conflict and the sacrifice it demands to the achievement of equal voting rights.

Think of an election which is decided by just one vote, yet we know that two votes for the losing candidate, which should have been counted, were not. Perhaps they were misplaced provisional ballots, or provisional ballots that were not properly checked against original registration forms, as occurred in Washington State during its 2004

gubernatorial election. If this occurs, we say that the election process malfunctioned: the wrong candidate won. Indeed, we have procedures designed to rectify this error. It is in this important sense that our conception of democracy demands perfection, and it illustrates what we mean when we say that we are committed to making every vote count. If we find out that just two provisional ballots were mishandled, in an election decided by only one vote, we demand that the result be overturned and that the one rightful winner be declared victor and installed in office.

The same is true if there were two votes cast for the winning candidate that were ineligible ballots, and the margin of victory was again just one vote. Perhaps a married couple voted by absentee ballot—and then again in person—as occurred in a local election in Ohio a couple of years ago. This outcome is equally flawed, and equally in need of rectification. Two votes must be removed from the result. And if these two extra votes were for the candidate who won by just one vote, well then the wrong candidate prevailed. Democracy—the commitment to equal voting rights—demands reversal of the result. Again, in this situation, for the election to be fair it must be perfect.

Yet we know there is no such thing as a perfect election. Any election administrator will tell you that.

So why does our rhetoric and our understanding of democracy demand the impossible standard of perfection? It may come from the original town meeting idea of democracy. Or from our image of voting as it occurs among members of a legislature. If a Senator's vote is not counted, or a Representative votes twice, and either error makes the difference whether a law is enacted by Congress, we would say that the voting process in the legislature malfunctioned, with the error needing to be rectified. But in a

town meeting or a legislative session, democracy occurs on a scale small enough in which perfection is a reasonably attainable ideal. Not so in the context of a modern mass democracy, where millions cast votes for Governor or President.

## **II. Specific analysis of the problem.**

Perfection is not just unattainable in practice, it is unattainable in principle. Here are some examples from different areas of election administration.

### **A. Registration**

#### **1. Timing of the process.**

There needs to be enough time to evaluate the eligibility of new registrants. If officials try to do this before election day so that the new registrants can vote a regular ballot rather than a provisional ballot, then the system needs a cut-off date for closing the door on new registrants. For example, 30 days. But then anyone who moves after 30 days is shut out of the election.

#### **2. The Nature of the Eligibility Determination**

If we really wanted to make sure that no illegible votes are cast, we would need an ID regime much more stringent than anything currently contemplated. In addition to providing birth certificates or naturalization papers at time of registration, as Arizona has recently required (although the U.S. EAC has opined that doing so is impermissible under the National Voter Registration Act), we would need registrants to submit a DNA sample that matched a sample taken when the registrant was born or naturalized—and then we would need to take another DNA sample at time of voting. Obviously, we are going to do nothing of the sort: it would conflict with fundamental values of privacy and dignity that we rightly hold dear. But unless we were to take such measures, we kid ourselves if

we think that we are going to have an electoral system that is sufficiently protective against the possibility of fraud that it is capable of assuring that the outcome of no election will depend on the presence of fraudulent ballots.

### **B. Provisional Voting**

There is now evidence that shows what common sense would indicate: the more time after election day that election officials have to verify the eligibility of provisional ballots, the more provisional ballots are verified. Two weeks is much better than one week, and more than two weeks is even better. But the longer it takes, the bigger the problem it will be for the verification of provisional voting to meet the safe-harbor deadline in a presidential election, or even inauguration day in a gubernatorial race.

How long would it take to achieve perfection, to make sure that no provisional ballot was improperly excluded or improperly included? Apparently an infinite amount of time, because Washington State in 2004 took over seven months, only to reach the conclusion that, in the Governor's race where the margin of victory after two recounts was 129, there were 252 provisional ballots that were incapable of being verified but also incapable from being extracted from the certified election results. The certification itself did not occur until December 30, over eight weeks after election day and over three weeks passed the safe-harbor deadline for the presidential election.

At some point, in the interest of achieving finality of election results and inaugurating a winner whom the public believes is entitled to hold office, it becomes necessary to cut off the process of verifying the eligibility of provisional ballots, even if that process is imperfect.

### **C. Absentee ballots**

The problems with verifying the eligibility of registrants or provisional voters is nothing compared to the problem of securing the integrity of absentee ballots. Because absentee ballots are not secret, partisan operatives can watch voters fill them out and even pay voters to make sure that they vote for the “correct” candidate. Elections are thrown out when this kind of ballot tampering occurs, as it does with alarming frequency. There are reported judicial decisions, including recent ones, depicting schemes of this kind.

But for every case where such impropriety is caught, there are surely many more that go undetected. The only way to eliminate this problem entirely is to eliminate absentee ballots altogether, which we are not going to do, or develop some kind of Big Brother system where the government is watching you whenever and wherever you might fill out your absentee ballot. Even if this Big Brother system were feasible, which hopefully it is not (and not even NSA-type technology can snoop this much), it would be categorically unacceptable in a free society. Therefore, absentee ballot fraud will remain with us always, thereby potentially tainting the result of any close election.

### **III. The Solution**

What, then, are we to do about this inevitable conflict between electoral perfection and other values we cherish as a society? Simply put, we need to abandon electoral perfection as our standard of democratic legitimacy, and develop instead a standard of electoral optimality, a standard which is feasible and reflects our best judgment on how to compromise among our competing important values. Here are some thoughts about how we might begin to understand electoral optimality:

- 1) We should stop placing so much emphasis on the desirability of closely competitive elections. It is actually better for electoral results to be clear-cut and decisive.

- 2) Equality of voting rights can be meaningful even when an individual's vote is unable to be counted properly in order to be decisive in a razor-thin election.
- 3) The symbolism of casting a ballot is important and not to be discounted in light of the inability to make sure that every ballot is properly counted.
- 4) There is a crucial difference between the problems of Florida 2000 and Ohio 2004. Florida 2000 involved a razor-thin result that likely would have been within the margin of error even if the system had been well designed and well implemented. Ohio 2004, however, turned out to be not that close, and yet the system showed itself to be horrendously designed and riddled with implementation errors. Our immediate goal as a nation should be to design and implement an electoral system that avoids the problems of Ohio 2004—in other words, works well in a race that is not so close. It is too much to expect that a system will be flawless if the margin of victory is less than 100 votes where over 1 million ballots are cast.
- 5) The inevitability of some irreducible margin of error in a well-designed and well-implemented electoral system should not be shocking or disturbing. We understand the existence of margins of error in all sorts of other human endeavors, from flying airplanes to operating nuclear reactors. We should, therefore, determine what is an acceptable margin of error for an electoral system and then hold the system accountable to that standard.
- 6) It is important, too, that errors be randomly distributed, that there is no systematic bias built into the electoral system that would make one group of voters more likely to suffer from counting errors than other voters. As long as errors are truly random, then voters can accept the results of a close election as fair and legitimate, even if the

system was unable to guarantee that all eligible ballots were properly counted and no ineligible ballots tainted the result.

- 7) This criterion of democratic legitimacy is the crucial test of an electoral system. It is necessary that a properly functioning process work as expected, the way it is supposed to. Yet sometimes even the best designed and best operated process results in error. In this sense, the erroneous result was expected, and the system still worked as intended. In this way, an erroneous result may still have a legitimate democratic pedigree and be acceptable to the public as such.
- 8) As a consequence of this possibility, it is necessary to develop the attitude that, should a random error unfortunately occur in a close election (despite the proper functioning of an optimal process), the solution is to wait for the next election in the recurring operation of democracy. If the results of Florida 2000 (or the Governor's race in Washington in 2004) were so hard to take, it was because the system was so egregiously flawed and the errors were hardly random. But if we can decide democratically what an optimal electoral system would look like, and if we properly build and implement this optimal system, then should it produce a randomly erroneous result according to the design specifications we gave it, we at least know that it worked as well as could have been expected, and we will live to see it operate properly again.
- 9) Democracy always produces winners and losers, and a fair democratic process—in addition to treating both sides fairly with respect to the inevitable margin of error—gives the side that came up short this time a fair chance to prevail next time around.