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Beyond the Symbolic Suffrage?

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In the presidential election of 2004, more than a few individuals went to the polls knowing that they were ineligible to vote. Although adult citizens who could have registered to vote, they had not done so in time, and now they had no hope of helping to choose the nation's leader for the next four years. Nonetheless, they went to the polls having heard that anyone who showed up would be permitted at least to fill out a provisional ballot. It did not matter that their provisional ballots almost certainly would not be counted, they told interviewers afterwards. They wanted to cast these ballots anyway, as a symbolic gesture of their presidential preference.¹

Similarly, when the issue arose as to what would happen when registered voters showed up at the wrong precinct, in a state where a provisional ballot cast in the wrong precinct would not be counted, the courts nonetheless required that these voters be permitted to cast a provisional ballot if they asked for one. As long as these voters

¹ Cite to news accounts.

received warnings that these out-of-precinct ballots would not be counted, and as long as voters received instructions on how to find their proper precinct, the courts concluded that if a voter preferred to cast a futile provisional ballot rather than get to the proper precinct—perhaps the voter had run out of time before needing to attend to child care responsibilities—then the voter was entitled to engage in this purely symbolic exercise.²

It is not so strange to think of casting a ballot as a largely symbolic act. After all, almost everyone who goes to the polls does so knowing that there is but an infinitesimal chance that his or her individual vote will make a difference in the outcome of the election. Indeed, a primary reason why voter turnout is perennially so low is the rational understanding of voters that their individual ballot is unnecessary for their preferred candidate to prevail. Knowing this, many citizens go to the polls anyway, not under the illusion that their single ballot will swing the election, but instead in a symbolic display of civic solidarity: each of them alone is irrelevant, but collectively they determine the fate of their country.

The Importance of the Symbolic Suffrage

We should not denigrate the significance of the symbolic suffrage. The historical protection of equal voting rights has been premised in large part on the symbolism of civic equality connected with the extension of the suffrage to previously disenfranchised citizens. African-Americans, women, eighteen-year-old adults—they all needed equal voting rights as a matter of basic dignity, even if giving them the franchise would not

² Cite to court decisions.

cause them as a group, much less each of them individually, to determine the outcome of future elections.³

The symbolic importance of electoral equality is most clearly demonstrated by the famous Poll Tax Case, *Harper v. Virginia Board of Elections*, the 1966 case in which the U.S. Supreme Court invalidated Virginia's \$1.50 tax on the state's registered voters. The Court's ruling did not depend on a showing that a substantial number of voters would be precluded from participation by the tax. Even a penny poll tax would have been rejected, as the Court concluded that a citizen's relative poverty or affluence had nothing to do with his or her ability to vote in democratic elections. The Court's goal was to protect the symbolic equality of citizens, rich and poor alike, by removing any wealth-based impediment to the exercise of the franchise.⁴

No one, not any single individual, is to be denied access to the voting booth because of insufficient funds. It matters not that this individual's vote is likely never to make a difference in any election in which the individual might participate throughout his or her lifetime. What the Constitution's guarantee of electoral equality protects is the equal right of this individual, as much as any other in the state, to cast a ballot.

Symbolism has continued to play a significant role in the Supreme Court's voting rights jurisprudence. Indeed, a whole line of cases elevated the *appearance* of electoral

³ While I am unaware of previous scholarship using the term "symbolic suffrage," there is much invocation of this concept. Lani Guinier, for example, has Justice Thomas's jurisprudence under the Voting Rights Act as being consistent with "an alternative theory of democracy, one in which the right to vote conveys only symbolic, not necessarily real privileges." *Racing Democracy*, 108 Harv. L. Rev. 109, 126 (1994). Likewise, Pam Karlan has distinguished between the "largely symbolic" purpose of voting, which consists in participating in the electoral process, from the "instrumental" purpose of voting, which is to have one's preferences aggregated with those of other citizens. *All Over the Map*, 1993 Sup. Ct. Rev. 245, 249. And Adam Winkler has coined the related term "expressive voting" to describe the value of the symbolic exercise of casting a ballot without regard to whether it actually counts. *Expressive Voting*, 68 N.Y.U. L. Rev. 330 (1993).

⁴ 383 U.S. 663, 667 (1966).

fairness as the primary consideration in the Court's deliberations. These cases, starting with *Shaw v. Reno*⁵ in 1993 and continuing up to the pending case concerning the redrawing of district lines in Texas,⁶ examine the maps made to divide a state's citizens into equally populated districts for the purpose of electing representatives to Congress or the state's legislature. If the shape of a district is too bizarre, and if it appears that the main reason for the anomalous shape is to place voters of the same race in the same district, then the district's boundaries will be invalid unless the state can show some overriding justification for its race-based line-drawing. There is no need to show that the voting power of one racial group has been diluted relative to another's to make this kind of challenge. It is enough that the map looks weird.

Symbolism also played an important role in *Bush v. Gore*.⁷ The sight on national television of the Florida recount teams holding up punch card ballots to the light, to see if a dimpled or punctured chad should be counted as a vote, surely influenced the Supreme Court's decision that the recount process denied equal protection to the state's voters. As the Court itself stated,

“A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.”⁸

⁵ 509 U.S. 630 (1993).

⁶ *League of United Latin American Citizens v. Perry* (and consolidated cases), <http://moritzlaw.osu.edu/electionlaw/litigation/henderson.php>.

⁷ 531 U.S. 98 (2000).

⁸ 531 U.S. at 106-107 (citation omitted).

In ordering the end to the Florida recount, the Court evidently was concerned as much with the appearance of electoral equality as with its actuality.

The Inability to Guarantee the Symbolic Suffrage

Florida 2000 showed that the nation was unable to safeguard even the symbolism of equal voting rights. Not only did the differential recount standards transgress this symbolic equality, but the spectacle of voters showing up at the polls only to be turned away because their names were erroneously purged from registration lists was a glaring sign that the system cared little about protecting voting rights equally. The Help America Vote Act of 2002 (HAVA), if it did nothing else, was supposed to end such ugly displays of disenfranchisement.

Despite HAVA's enactment, however, the 2004 election revealed a continued inability to provide even symbolic equality of voting rights. The extraordinary disparity in the length of lines at different polling places within the same state, even within the same county, was the most visible evidence of this ongoing electoral inequality. In Ohio, some voters breezed in and out of their polling places in as little as fifteen minutes, whereas many other voters waited in line for two to three hours, and there were even polling places where voters endured over seven hours of waiting before being able to cast a ballot!⁹ A disparity among precincts in the number of voting machines per voter, as provided by county boards of election, contributed to this severe inequity.¹⁰ To echo the

⁹ Cite to news accounts. See generally Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. L. Rev. 1206, 1238-39 (2005).

¹⁰ See Foley, *Voting Machines Per Capita: a Bush v. Gore Issue?* (Nov. 5, 2004), <http://moritzlaw.osu.edu/electionlaw/analysis/2004/041105.php>. This precinct-by-precinct variation in

Court in *Bush v. Gore*, the procedures used to allocate available voting machines among precincts was “not a process with sufficient guarantees of equal treatment.”

But the problem of excessively and disproportionately long lines was not the only evidence that voting rights were not safeguarded equally in 2004. The infamous 80-pound card stock decree, although quickly rescinded after a huge public outcry, was an indication that some new voters would face registration hurdles not imposed on others. Likewise, the use of a largely forgotten procedural device for challenging a registered voter’s eligibility, invoked in 2004 on an unprecedentedly large scale to challenge 35,000 new registrants, was nipped in the bud by judicial intervention, but not before raising the specter that many registered voters would be removed from the rolls selectively and without adequate procedural safeguards. The mere fact that these manipulations of the voting process could be attempted exposed the insufficiencies of HAVA and related laws.¹¹

Indeed, the inadequacies and inequities of the electoral system in Ohio as revealed in 2004 were so extreme that the League of Women Voters, aided by civil rights groups and major law firms from around the country, filed suit in federal court in 2005 asking that the state’s electoral system, being essentially dysfunctional, be put in judicial

voters-per-machine does not necessarily entail an allegation that this disparity had the effect of being racially discriminatory (for that it would be necessary to show that the precincts with higher voters-to-machine ratios tended to have greater percentages of minority voters), much less that the machine allocation was motivated by a racially discriminatory intent. The U.S. Department of Justice, while acknowledging the disparity among precincts in voters-per-machines, found that this disparity was not racially discriminatory. See DOJ Letter (6/29/05), http://www.usdoj.gov/crt/voting/misc/franklin_oh.pdf. Furthermore, although more voters for each machine tends to cause longer lines (unless the machine-underserved voters cast their ballots more quickly), it does not necessarily follow that these long lines disenfranchised voters (because they may have preserved despite the duration of the wait). A recent statistical analysis of data from Franklin County, Ohio, concludes, however, that as many as 22,000 votes may have been lost because these individuals could not wait any longer. See Benjamin Highton, *Long Lines, Voting Machine Availability, and Turnout: The Case of Franklin County, Ohio in the 2004 Presidential Election*, PSONline (Jan. 2006), <https://www.apsanet.org/imgtest/PSJan2006Highton.pdf>.

¹¹ See Tokaji, *Early Returns*, at 1227-28, 1234-36.

receivership until its deficiencies are remedied.¹² This lawsuit, which expressly relies on the Equal Protection principle articulated in *Bush v. Gore*, is potentially a major test of that precedent's scope and significance. Although the Court might balk at the degree of judicial supervision needed to bring a state into compliance with even "the minimum requirement[s] for nonarbitrary treatment of voters," the logic of *Bush v. Gore* seemingly would insist that states at least exhibit a symbolic commitment to the equality of voting rights.¹³

Protecting the Symbolic Suffrage

What, then, is necessary for a state, like Ohio, to comply with the symbolism of electoral equality?

Eliminating Overt Inequities. Most obviously, each component of the voting process—from registration procedures, including challenges to a registrant's eligibility and maintenance of voter databases, to the accessibility of polling places and voting machines, to recount rules and processes—must be free from overt forms of discrimination or inequity.

The current debate over voter identification provides a clear example. The reason why there was such hostility to Georgia's initial attempt at imposing a new photo identification requirement, including the entry of a preliminary injunction blocking its

¹² *League of Women Voters v. Blackwell*, <http://moritzlaw.osu.edu/electionlaw/litigation/lwv05.php>.

¹³ In denying the state's motion to dismiss in the new *League of Women Voters* case, the district court specifically cited *Bush v. Gore* as the key precedent for permitting the case to go forward. "A state's failure to exercise [available] power, where such inaction foreseeably impairs the fair and free exercise of the franchise, gives rise to an equal protection claim." Order (12/2/05), at 5, <http://moritzlaw.osu.edu/electionlaw/litigation/documents/OrderMotiontoDismiss.pdf>.

enforcement, was that it functioned as the equivalent of a poll tax, denying the suffrage to those who could not afford to pay for the photo ID.¹⁴ The symbolism of the discrimination was what was so objectionable. Opponents of the new law were not so much protesting the idea of voter ID in principle, but rather the blatantly discriminatory means of implementing an ID requirement. The lesson of this experience should be that any new ID requirement should be well designed so that it is easily understood as consistent with equal voting rights for all eligible citizens.

The same point applies to the design of voting machines so that disabled as well as abled citizens can use them on essentially equivalent terms. The whole issue of accessibility for disabled voters is largely one of symbolism. Even if disabled voters were effectively barred from polling places, they still could participate in the franchise if able to vote absentee. But being confined to absentee voting would not give the disabled equal voting rights, and the symbolism of this inequality is a severe blow to the equal dignity of disabled citizens. The pressing necessity under HAVA to make sure that polling places have voting machines suitable for disabled voters shows just how important it is to achieve the symbolism of electoral equality.¹⁵

Transparency of Electoral Systems and Their Operations. To secure the symbolic suffrage for all voters, it is necessary also that the voting process be comprehensible to the public and seen as operating in the way that it should.

¹⁴ *Common Cause/Georgia v. Billups*, order granting preliminary injunction (10/25/05), at 104, 121, <http://moritzlaw.osu.edu/electionlaw/docs/CommonCause/injunction.pdf>.

¹⁵ See Ruth Colker, *Voting and Disability* (8/30/04), http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_rules06.html. Litigation is pending or threatened in several states to make sure that the purchase of new voting equipment is HAVA-compliant in providing access to disabled voters. See *Holder v. McPherson*, Complaint, at 33-34 (California suit), http://www.votetrustusa.org/pdfs/Diebold%20Folder/VoterAction_CalDieboldLawsuit_032106.pdf; electionline.org, *Election Reform: What's Changed, What Hasn't and Why 2000-2006*, at 11 (threat of litigation in Ohio), <http://www.electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf>.

This is the clear lesson of the recent debate over voter verified paper trails (VVPT). Voting machines equipped with VVPT may be no more accurate or secure than well-design electronic machines with alternative, non-paper methods of recording and verifying their counts. In fact, the reintroduction of paper-based voting with VVPT-equipped machines may be less accurate and secure than some purely digital systems.¹⁶

But this fact is beside the point. The public does not understand, and therefore does not trust, purely electronic voting machines. Voters need to see a piece of paper in order to believe that their votes have been recorded. Because the symbolic essence of the right to vote is the ability to cast a ballot in the election, voters must have tangible evidence that their ballot has indeed been cast in order for the exercise of this symbolic suffrage to be meaningful to them. It matters not that their need to examine this tangible evidence may interfere with the accuracy of the count and thus prevent their ballots from participating decisively in determining the winner: casting the ballot would do no good from the voter's point of view if the voter could not be sure that he or she actually registered a preference. Since the equal ability of all citizens to register a preference on who their leaders should be lies at the core of their understanding of democracy, it is perhaps more important to the average citizen that the equality of the symbolic suffrage be protected than it is to guarantee the reality of equal voting rights.

Transparency will also be an increasingly important value with respect to the implementation of HAVA's requirement for statewide centralized voter registration databases. To the extent that states have difficulties implementing this requirement—and it currently appears that many states are experiencing such difficulties, including some

¹⁶ See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 Fordham L. Rev. 1711 (2005); see also Tokaji, *Voting Technology: Beyond HAVA, Beyond Paper*, <http://moritzlaw.osu.edu/electionlaw/comments/2006/060314.php>.

severely¹⁷—the public will need to understand the basics of how these databases work in order to trust them. It will not be enough that states, in maintaining and updating these databases, avoid erroneous purges that systemically discriminate against a particular class of citizens, although of course avoiding this kind of problem is also important. Instead, it is necessary that states adopt a means by which individual voters easily can interface with their own personal records in the database: voters need to be able to see the registration information that state has; they need to be able to challenge this information if they believe it to be inaccurate; they need also to see that the system responds expeditiously to their input, so that when they go to their polling place to vote the database contains up-to-date records; and voters need to know that the system is able to perform these functions in a way that imposes minimal costs on the voters themselves, in terms of time and other resources.¹⁸

In short, securing the symbolic suffrage requires that citizens who register to vote have a visible means for tracking and updating the status of their registration.

The Importance of Provisional Voting. One of the most essential elements of any set of measures designed to protect the symbolism of equal voting rights is the guarantee of a provisional ballot for anyone who goes to the polls and, whose eligibility having been questioned by the poll workers, asks for one.¹⁹

No registration database, no matter how well designed and maintained, can be expected to operate without glitches. There always will be some citizens who show up at

¹⁷ See electionline.org, *What's Changed, What Hasn't*, at 19-21; see also Brennan Center for Justice, *Making the List: Database Matching and Verification Processes for Voter Registration*, <http://www.brennancenter.org/programs/downloads/HAVA/svrd/SVRD%20matching%20report.pdf>.

¹⁸ Foley, *Verifying Voter Registration Lists* (3/22/05), <http://moritzlaw.osu.edu/electionlaw/comments/2005/050322.php>; Association for Computing Machinery, *Statewide Databases of Registered Voters: Study of Accuracy, Privacy, Usability, Security, and Reliability Issues* (Feb. 2006), http://www.acm.org/usacm/PDF/VRD_report.pdf.

¹⁹ See Foley, *The Promise and Problems of Provisional Voting*, 73 Geo. L. Rev. 1193 (2005).

the polls entirely confident that they are properly registered, only to be told that the poll workers are unable to find their names. Indeed, the names of these citizens may be properly included on the list of registered voters that the poll workers are looking at, but in the heat of the moment as the workers are attempting to process hundreds of voters standing in line, the poll workers may get flustered and be unable to locate the names alphabetically on these accurate lists. In any event, it is enough that there is a risk of this sort of error, and the availability of a provisional ballot prevents the possibility that this error will cause this voter's disenfranchisement.

The authors of HAVA understood the symbolic importance of provisional voting. They described it as a kind of insurance policy that will protect registered voters from disenfranchisement caused by administrative errors. Knowing that a provisional ballot awaits any would-be voter who, because of some snafu, isn't on the list gives all voters the peace of mind that they won't be turned away erroneously, without having a chance to cast their preference.

Thus, simply implementing a system of provisional voting as HAVA intended would go a long way to protecting the symbolic suffrage. The election in 2004, however, revealed that the states were not entirely ready to do that yet. Some polling locations reported shortages of provisional ballots, or excessively long lines for those needing to use the single machine devoted to provisional voting.²⁰ Other jurisdictions failed to train their poll workers adequately, so that those needing to vote provisionally were prevented from doing so by the imposition of erroneous ID requirements or other improper procedures. But as the nation becomes more familiar with the idea of "fail-safe voting" that underlies the requirement that provisional ballots be available to all who ask for one,

²⁰ Cite to news sources; other data.

it is to be hoped that future elections are able to operate trouble-free at least in this regard. If so, then the essential symbolism of every would-be voter being able to cast a ballot would be preserved.

The Value of Protecting the Symbolic Suffrage. It would be no small accomplishment to secure the symbolic suffrage, with the consequence that voters believe that the electoral system guarantees equal voting rights to all. A level of public confidence in the electoral process would be restored, with the further benefit of increased participation in the process by more citizens. The ability of the government to make more difficult policy choices in the pursuit of the public interest would likely follow as well, since the government could invoke a more legitimate democratic pedigree as a result of the increased citizen involvement.

A transparently fair electoral system that publicly appeared to operate smoothly would have no difficulty with the kind of competitive election that occurred in the presidential race in 2004. None of the confidence-shaking problems that actually occurred in October and November 2004—from the bogus registration-form ruling concerning 80-pound cardstock to the unprecedented preelection challenges to 35,000 newly registered voters, to the inordinately long lines at some polling places (but not others), to the variability in availability and treatment of provisional ballots, and on and on—would have taken place. With the margin of victory in the pivotal state of Ohio in excess of 100,000 votes, an electoral system that effectively secured the symbolic suffrage would have breezed through 2004 without a hitch.²¹

²¹ As it was, had the presidential election in Ohio been close, it would have been a true disaster. See Foley, *The Promise and Problems of Provisional Voting*, 1200-1202; Rick Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937 (2005).

The problems that plagued the 2004 presidential election and the extreme consternation they caused show the value of securing the symbolic suffrage. If in 2008 the outcome of the presidential race is as close as it was in 2004, and if the electoral system operates smoothly—the databases and voting machines work as expected, no one is denied a provisional ballot, and no other form of discriminatory treatment bars voters from casting a ballot—then election administrators will be inclined to declare victory. They will have shown to the world that the United States is a democracy capable of guaranteeing equal voting rights to all its citizens.

This administrative victory, albeit worthwhile as far as it goes, would nonetheless be purely symbolic. It would not assure the actuality of equal voting rights. To know that every citizen's vote counts actually, and not just symbolically, the true test would be another razor-thin election, like the one that occurred in 2000 rather than 2004. When the margin of victory in a statewide race is 500 votes, or perhaps 50 or even 5, the professed guarantee of equal voting rights is made real only if the system is able to assure the validity of every vote and the absolute accuracy of the count. A system that manages successfully to achieve the symbolism of equal voting rights is not necessarily able to fulfill this additional promise of democracy.

The Gap Between Symbolism and Reality: Provisional Voting

Nothing better illustrates the difference between the symbolism and the actuality of equal voting rights than the implementation of provisional voting. It may be no small thing to make sure that every citizen who requests a provisional ballot is able to receive

one. But it is quite another matter to make sure that every provisional ballot that does get cast is properly verified, so that it is included in the count if the voter indeed turns out to be eligible. And it is an even greater accomplishment to make sure that there is an effective procedure for contesting these eligibility determinations if voters believe that their provisional ballots have wrongly been ruled ineligible—or, just as important for the protection of equal voting rights, other voters believe that some ineligible provisional ballots have been improperly included as valid votes.

The signs from 2004 are not promising: indications, instead, are that states are unable to convert the casting of a provisional ballot into a meaningfully accurate vote.

The Evaluating and Counting of Provisional Ballots. Take, first of all, the relatively simple task of processing provisional ballots to see if they match up with a state's voter registration records. The primary purpose of provisional voting, after all, is to protect a registered voter from being dropped from the rolls due to administrative error. In 2004, however, provisional voting failed to achieve this purpose in some locations, as election officials merely checked provisional ballots against the available list, without taking the extra step to see if the list might have erroneously omitted the name of the provisional voter. For example, in some states, including Washington where the margin of victory in the gubernatorial race was 42 after an initial automatic recount of the ballots, it turned out that administrative error had caused hundreds of timely new registration forms to remain unprocessed, so these eligible new registrants were never entered on the voter rolls. The provisional ballots cast by these new registrants were rejected because their names did not appear on the official list of registered voters. No one bothered to check the provisional ballots against the pile of timely but as-yet

unprocessed registration forms. It took litigation to get the election officials to undertake this additional, and very necessary, inquiry.²²

In a close election, as Washington's gubernatorial race was, the availability of a judicial procedure to rectify this administrative mistreatment of provisional ballots may make the difference between who wins and who loses.

The Ability to Contest an Ineligibility Determination. If, however, this same kind of administrative mistreatment of provisional ballots occurs this year in Ohio's election for U.S. Senator, there will be no judicial recourse under state law to protect the voting rights of these provisional voters. Ohio's Senate race is expected to be close: Republican incumbent Mike DeWine is thought to be vulnerable because, although he has not personally been linked to the scandals presently plaguing the Republican Party in Ohio, the current unpopularity in the state of both Governor Taft and President Bush, as well as Republicans generally, has created a potential opening for the Democratic challenger, Representative Sherrod Brown.²³ Let's assume for the moment that the result on Election Night is a razor-thin reelection victory for Senator DeWine, say only 150 votes among conventional ballots. Let's assume, moreover, that statewide over 2,000 provisional ballots are rejected because these provisional voters do not appear in the state's new centralized voter registration database, the reason being that their registration cards inadvertently were never entered into the database. Unlike in Washington, in Ohio

²² The Democrats in Washington initially brought suit to identify which provisional ballots had been improperly disqualified. *Washington State Democratic Central Committee v. King County Records* (Nov. 16, 2004), <http://moritzlaw.osu.edu/electionlaw/docs/WSDCC/WSDCCOrder2.pdf>. Having prevailed on this point, local election officials went back and discovered their errors, and the Washington Supreme Court ultimately confirmed the need for them to rectify their mistakes. *Washington State Republican Party v. King County Division of Records*, 103 P.3d 725 (Wash. 2004).

²³ Balz & Cillizza, *Handful of Races May Tip Control of Congress*, Washington Post (2/6/06), at A01.

these provisional voters are precluded from going to state court to challenge the results on the ground that their provisional ballots were improperly excluded.

The reason is that, earlier this year, Ohio's legislature passed a new law that provides that the judicial procedure available in the state to contest the results of an election is, from now on, unavailable to contest the results of an election for a federal office: President, U.S. Senator, or U.S. Representative.²⁴ Yet it is also well-settled by the Ohio Supreme Court that under Ohio law the results of an election in the state cannot be challenged except by the exclusive means of this "contest" procedure.²⁵ The combination of these two provisions results in the consequence that provisional voters are precluded from going to state court in the scenario described above, where the outcome of a U.S. Senate race in the state turns on the improper exclusion of provisional ballots because of administrative error in the processing of timely registration forms.

In this situation, it might be possible for the improperly disenfranchised provisional voters to go to federal court to get a remedy that would require the state to count these provisional ballots. Even so, the state itself would have failed to provide the

²⁴ Ohio's massive overhaul of its elections laws, enacted in January 2006, contains this little-noticed provision:

"The nomination or election of any person to any federal office, including the office of elector for president and vice president and the office of member of congress, shall not be subject to a contest of election conducted under this chapter. Contests of the nomination or election of any person to any federal office shall be conducted in accordance with the applicable provisions of federal law." Ohio Rev. Code § 3515.08(A), as amended by Am. Sub. H. B. No. 3, at 200-201, http://www.legislature.state.oh.us/BillText126/126_HB_3_EN_N.pdf. Contrary to the implication of new restriction, there is no provision in federal law for contesting elections to federal office, as those elections are conducted under the authority of state law.

²⁵ *State ex rel. Mackey v. Blackwell*, 106 Ohio St.3d 261, 264, 834 N.E.2d 346, 351 (2005). *Mackey* specifically involved a challenge to the procedures used to determine the eligibility of provisional ballots, but the plaintiffs had sought to invoke a different judicial procedure to make this challenge. They said that they were only seeking to have valid provisional votes included in the final certified election returns and were not necessarily contending that any election results would be changed. The Ohio Supreme Court, however, ruled that insofar as some election results in close races might be changed as a result of including additional provisional votes, it is necessary to seek this remedy by the "exclusive" means of the contest procedure. See also Christopher Fairman, *Ohio Election Contest Procedure* (10/12/04), http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_recount05.html#_edn6.

actuality of equal voting rights for all its citizens. As far as state law is concerned, the ability to cast a provisional ballot in this circumstance would have been entirely symbolic, with the provisional voters ending up wrongly disenfranchised and the outcome of the election dependent upon this improper disenfranchisement.

Contesting the Inclusion of Ineligible Provisional Ballots. The reverse situation could also happen, where provisional ballots are improperly included in the count of valid votes and yet there is no judicial procedure available to contest their inclusion even though they outnumber the winning candidate's margin of victory.

In fact, this situation occurred in the disputed gubernatorial election in Washington, which seemed to involve just about every misstep imaginable. In addition to excluding provisional ballots that should have been counted, election officials there also counted provisional ballots that should have been excluded. A total of 252 provisional ballots were improperly included in the final certified election results, which gave the Democratic candidate the victory by a margin of only 129 votes.²⁶

The problem, however, was that once these provisional ballots had been wrongly included, they had become commingled with all the other ballots and no longer could be extricated from the rest. Therefore, even though it was conceivable that the Democratic candidate had received 191 of these ineligible provisional votes—and thus enough to deprive her Republican opponent of his rightful victory—there was no way to know whether or not this was indeed the case. The circumstance was arguably even worse: 1,401 felons had been improperly permitted to cast conventional ballots. Combining these ineligible votes with the 252 invalid provisional ballots, if the Democrat had

²⁶ Foley, *Refusing to Unseat a Governor Despite a Flawed Election* (06/07/05), <http://moritzlaw.osu.edu/electionlaw/comments/2005/050607.php>

garnered 882 of this total, or just 54%, which was hardly a preposterous surmise, then the improper inclusion of all these ineligible votes was outcome-determinative, and the wrong candidate had been declared the winner.

But the state judge who was confronted with these facts felt he could do nothing to remedy the situation, neither voiding the election as irretrievably tainted by the inclusion of these invalid votes, nor reversing the result if a precinct-by-precinct analysis showed it more likely than not that their inclusion made the difference in the outcome. One can sympathize with the judge's plight in this situation: no available option seems especially attractive. Requiring a new election is an expensive and burdensome proposition, and the expectation would be another very close vote, with the possibility that administrative errors might prove outcome-determination, resulting in the exact same situation all over again. Conversely, reversing the result based on nothing more than a probabilistic analysis of the improperly included ballots would make the legitimacy of the judicially declared winner just as tenuous as that of the officially certified victor.

Even so, doing nothing, which is the course of action the state judge chose, has the consequence that the reality of equal voting rights remains unfulfilled. More eligible voters may have cast their ballots for the Republican rather than the Democratic candidate, and yet the true preferences of the majority of eligible voters may have been defeated by the improper inclusion of a relatively small number of ineligible ballots. That result, whatever else might be said about it, can hardly be considered a successful operation of democracy.

Yet this unfortunate circumstance is one that could occur again, not just in Washington but in other states as well. Next time, one can hope that election officials

will keep provisional ballots separate from the rest, so that if they are ultimately ruled ineligible after being judicially contested, these invalid votes can be removed from the count without having to speculate about whether they were cast for one candidate or the other. In Ohio, however, if these invalid votes are included in the certified results of a federal election, then even this straightforward judicial remedy would be unavailable. Thus, the results of the next presidential election, if Ohio again is the pivotal state and the outcome is close enough, may turn on the erroneous inclusion of a few hundred ineligible provisional ballots. For everyone else's valid vote to be nullified by this easily correctable mistake should be considered an intolerable denial of equal voting rights.

The Timetable for Resolving Disputes over Provisional Ballots. Even if state law were to provide a judicial procedure to rectify this error, in a presidential election there may be insufficient time to take advantage of this procedure. As all will remember from *Bush v. Gore*, an Act of Congress provides a "safe harbor" for states that conclusively resolve their election disputes within five weeks after Election Day. The necessity of complying with this safe-harbor deadline is what caused the Supreme Court to cut off any further recounts in that case.²⁷ In any future dispute over the eligibility of provisional ballots, it would seem that the Supreme Court, to be consistent, would be equally insistent that the dispute be resolved by this safe-harbor date.

Five weeks, however, is not a lot of time for, first, election officials to determine the eligibility of the hundreds of thousands of provisional ballots that may be cast statewide in a presidential election and, then, voters to challenge any such eligibility

²⁷ 531 U.S. at 9-10: "Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5," which "requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12," and [b]ecause it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed."

determinations they believe erroneous. The litigation over the Washington's gubernatorial election did not end until seven months after the safe-harbor deadline (had it been applicable to that election), and that litigation did not include an appeal from the trial judge's refusal to provide a remedy. Even had the litigation proceeded much more expeditiously, there was nothing to litigate until after a final count had been certified, and that did not occur in Washington until December 30, which was already more than three weeks after safe-harbor day.

Even assuming that election officials could complete their initial eligibility determinations within the first three weeks after election day, that schedule would leave only two weeks for any subsequent litigation, not enough time in a fiercely disputed presidential race involving hundreds or perhaps thousands of contested ballots. The upshot is that, as long as the safe-harbor date remains sacrosanct, the process of reviewing the eligibility of provisional ballots will remain incomplete. As a result, in a close presidential election, there will always be the very real possibility that some provisional ballots that should have been counted are not and others that should have been ruled ineligible are counted. In this way, *Bush v. Gore* makes the casting of provisional ballots primarily symbolic. Unless there is a change in the timetable, provisional ballots will be unable to serve the function of guaranteeing that the election is actually decided by the equal counting of all ballots cast by eligible voters.²⁸

²⁸ Steve Huefner further explores this problem, and potential solutions, in *Reforming the Timetable for the Electoral College Process* (11/30/04), <http://moritzlaw.osu.edu/electionlaw/comments/2004/041130.php>.

The Gap Between Symbolism and Reality: the Entire Electoral System

The processing of provisional ballots, moreover, is only one area in which achieving the symbolism of equal voting rights would not mean that the electoral system is actually capable of, in the words of this conference, “making every vote count.” In order to make the fulfillment of this ideal a reality, it would be necessary to guarantee that the vote counting machinery is error-free (or at least error-detecting and error-correcting, which in the end amounts to the same thing as being error-free). It would require also that the mechanisms for registering voters and maintaining the registration lists be similarly error-free, meaning that no one eligible is denied registration and no one registered is ineligible.

Fulfilling the ideal of electoral equality would also necessitate eliminating polling place mistakes, where someone not registered is accidentally permitted to cast a regular rather than provisional ballot, or (as often occurs) the number of regular ballots cast in the precinct exceeds the number of registered voters who signed in to vote at that precinct. Nor would this need for error-free perfection be confined to polling place operations. The separate subsystem of absentee voting, or what is sometimes called “mail-in voting” as it becomes increasingly common, must also be completely error-free, both in its counting of these mailed-in ballots and in assuring that none were cast by anyone ineligible to vote in the election.

Perfection, however, is an impossible standard. It is common knowledge that there is no such thing as a perfect electoral system. If fulfilling the idea of electoral

equality really requires a perfectly error-free system, then we might as well give up right away and remain satisfied with achievement of the symbolic suffrage.

And yet we are still pulled toward the ideal of “making every vote count,” which serves as the title of this conference precisely because it is such a compelling goal. We know, too, that elections are capable of being so close that they are decided by just one vote, or even a tie. Although extraordinarily unlikely on the scale of a statewide race, this occasionally occur in local elections. And when they do, there is the pressing sense that democracy demands that the count be completely accurate and that each vote cast be valid. If the wrong candidate is installed into office because of even a single mistake by the electoral machinery, then democracy has malfunctioned and the true will of the electorate has been denied. Because a democratic election in principle ought to be able to choose a candidate correctly, when the voters are evenly split and the winner receives a bare majority of one more vote than the other candidate, democracy seemingly requires the capability of a perfectly error-free result, even if this ideal remains unattainable.

From Symbolism Towards Realism

Because the ideal of “making every vote count” has this inevitable pull, given the basic concept of democracy, it is worth speculating about how our electoral system might move closer towards this ideal, even as we recognize the impossibility of achieving it completely. Moreover, a better understanding of why some elements of an error-free system will always remain elusive, including an appreciation of the fact that the cost to

other human values—like personal privacy—would be too great, will give us deeper insight into democracy itself, including its limits and its relation to other human values.

Vote-Counting Machinery. As difficult as it has been since 2000 to develop and implement vote-tabulating equipment that is accurate and secure, it would seem that this component of the electoral system would actually be the easiest to achieve. Computers generally are accurate in their arithmetical computations, which is what vote counting requires. It is often observed that computers used for banking and other financial transactions are reliable, as are those used for gambling in Las Vegas, and there is no reason in principle why computers used for voting could not be similarly reliable as well.

To be sure, there is a difference between designing a computer that is operational constantly, as the banking system is, compared to designing vote-counting machines, which are operational only a few times each year (and are used at close to full capacity only once every four years). Even so, there are engineering solutions to such operational requirements. One need only examine an iPod to know that it is possible to engineer a computer with an easy human interface.

As indicated earlier, a key feature of a well-designed vote-counting system will be to separate the symbolism of the VVPT (voter verified paper trail) from the reality of the digital counting and verification mechanism. The paper must exist to satisfy the voter's need for a visible sign that the ballot was cast, but the paper should play no role in the actual tallying of votes. Any attempt to count all the paper ballots will simply introduce an extra element of error.

This is not to say that there shouldn't be redundancy and verification mechanisms built into digital recording and computation processes. In a close election, computer

scientists hired by both candidates should be able to examine the digital records and verify the accuracy of the count. But in no event should digital votes be transferred to paper to be counted manually: there is absolutely no reason to suppose that a manual count of paper ballots would be more accurate than an examination of the hardware and software that digitally recorded the voter's preferences and then tabulated and verified the results.

Voter registration databases. A much greater challenge will be the successful design and implementation of voter registration databases, as evidenced by the many difficulties that states are currently having in this regard. The challenge, moreover, is not merely technical. Rather, it includes the conceptual question of what it would mean for the database to be sufficiently accurate.

In theory, a completely accurate database would correctly include the name and relevant information of every eligible citizen who attempted to register in a timely and appropriate manner, and it would not contain an entry for anyone ineligible to vote. But how to achieve this accuracy? Even if it were technically feasible, it would require the imposition of an identification requirement more severe than the photo ID regimes currently in dispute.

A policy of zero tolerance of ineligible registrants would mean that every citizen, to enter the database, would need to produce a birth certificate or naturalization papers as proof of citizenship. Moreover, there would need to be in place a mechanism incontrovertibly linking these proof-of-citizenship documents to the individuals who hold them, in order to avoid the possibility that they were fraudulently obtained or conveyed. Perhaps a blood test, both at birth (or naturalization) and at time of registration, to

establish that the DNA of the registrants match the DNA of the citizens they purport to be, would suffice to rule out fraud.

But would the country tolerate a system of universal DNA testing, so that the government can maintain a database of every citizen's DNA to make sure that no non-citizen registers to vote and no citizen registers more than once? Certainly not. Not even the ideal of "making every vote count" would be worth that risk to personal privacy.

Nor do Arizona's new registration rules attempt to go so far. While Arizona is seeking to impose the obligation to show proof-of-citizenship documents at the time of registration, a requirement that the U.S. Election Assistance Commission has determined to be inconsistent with the National Voter Registration Act (NVRA or "Motor Voter"),²⁹ Arizona makes no effort to biologically link these citizenship papers with the individuals who possess them. Therefore, even if Arizona enforces its new requirements, the state cannot be sure that its registration database actually will contain only eligible citizens.

Thus, the design of any registration database confronts the essential task of determining the acceptable level of risk that some of its entries are in fact ineligible, as well as the corresponding risk that some individuals excluded or removed from the database do in fact belong there. The importance of the symbolic suffrage, as described earlier, suggests that the latter risk should be minimized: it is a particularly grievous injury to a citizen's dignity to be denied the right to register to vote. Each citizen's entitlement to equal respect means that this affront, even if symbolic, is especially to be avoided.

²⁹ See Tokaji, *EAC on Arizona Registration Requirements* (03/07/06), http://moritzlaw.osu.edu/blogs/tokaji/2006/03/eac-on-arizona-registration_07.html.

By contrast, the general elusiveness of an error-free electoral system means that it is not as imperative to make sure that no ineligible individual enters the registration database undetected. To be sure, in a tight race the failure to remove ineligible registrants from the database may mean that the votes of eligible citizens are negated, with the wrong candidate attaining office and the will of the majority thereby defeated. Nonetheless, only an Orwellian police state, where the government constantly keeps track of everyone's DNA, could promise to prevent this occurrence. Once this indisputable truth is acknowledged, we are back to the task of identifying just how much we are willing to tolerate the possibility of ineligible individuals in the registration database in order to preserve other important values, like personal privacy. Moreover, to the extent that minimizing infringement of the symbolic suffrage inevitably conflicts with excluding ineligible individuals from the database, the priority of the former objective will require the latter to yield.

In any event, however the registration system sets the acceptable level of risk of erroneous inclusions and exclusions, it is important both that the system contain a process for attempting to rectify errors brought to its attention *and* that the system have a mechanism for finally and conclusively resolving any disputes concerning entries in the database. The need for a process whereby would-be voters can challenge any denial of their efforts to register is part of securing the symbolic suffrage, as explained above. The need for a mechanism whereby any disputes concerning the registration database are finally and conclusively resolved is part of any meaningful attempt to approach the ideal of "making every vote count," as well as providing a sensible understanding of that ideal.

Once the content of the registration database is finally and conclusively determined, that list of registered voters becomes the set of individuals to whom the principle of “making every vote count” applies. No one on that list who shows up to vote should be disenfranchised, meaning not just that they get to cast a ballot (whether conventional or provisional) but that, being on this list, their ballot must get counted. Likewise, no one off the list because they already have been ruled ineligible in final and conclusive determination of their status should be able to cast a vote that gets counted. To be sure, they should receive a provisional ballot if they go to the polls and ask for one, but this provisional ballot should be rejected based on the previous final and conclusive ruling of ineligibility.³⁰ This situation differs from the one, considered earlier, where election officials reject a provisional ballot without undertaking an effort to verify the accuracy of their registration lists. Obviously, if a provisional voter has not been afforded a fair opportunity to challenge the accuracy of the list, it is necessary for officials to double-check the list against other available records, including the voter’s original registration form. But where, conversely, there already has been a full and fair adjudication of the would-be voter’s eligibility, and that determination has been made against the voter, then to count that provisional ballot subsequently would be to undermine the integrity of the entire registration system.

In short, at some point it becomes necessary to cut off further challenges to the registration database and to say that henceforth, for purposes of counting votes, being registered is both necessary and sufficient for one’s vote to count. Otherwise, the results of an election remain open to challenge on the ground that some registered voters who

³⁰ Foley, *The Provisional Ballots of Unregistered Voters* (04/05/05), <http://moritzlaw.osu.edu/electionlaw/comments/2005/050405.php> .

cast ballots should have been excluded. In that scenario, the quest to “make every vote count,” rather than a worthy aspiration, becomes a nightmare. No one’s registration status, and therefore no one’s right to vote, is secure. The goal of an error-free registration database, far from advancing the principle of equal voting rights, would have subverted that principle entirely.

Polling Place Operations. It will also be impossible to make the voting process at polling places completely error-free. The human element of poll workers interacting with voters makes sure of that. But polling place mistakes surely could be reduced without excessive costs to other important social values.

Beyond the obvious need for improved poll worker training, increased automation of polling place operations has the potential for reducing the risk of errors. For one thing, the unfortunate gap that often exists between the number of votes cast at a precinct and the number of registered voters who were checked in to vote there could be eliminated by a technological integration of the registration database and the vote-tabulation machinery. Each individual would check in at a machine linked to the registration database and then that same machine would produce the ballot for the individual to cast. There would be no extra, unaccounted-for ballots that do not correspond to checked-in registered voters. (Obviously, this system would need to be designed in such a way as to preserve ballot secrecy, so that once a ballot is cast, it no longer can be specifically traced to the voter who cast it.)

A technological integration of the registration database and the voting equipment could have the further potential benefit of streamlining the provisional voting process. An individual’s initial interaction with the voting machine would, by checking the

registration database, automatically determine whether the individual should receive a conventional or provisional ballot and, then, automatically provide the appropriate ballot to the individual. Gone would be the situations in which poll workers mistakenly give someone a regular ballot who should have received a provisional one instead. Similarly, a well-designed machine would digitally keep track of the provisional ballots separately, thereby avoiding the problem of being commingled with regular ballots prematurely, before their eligibility is adequately verified.

Indeed, streamlining the provisional voting process as a result of integrating the registration database and the voting machinery might even make it possible to complete the evaluation of provisional ballots by the safe-harbor deadline, especially if the preelection process for verifying the accuracy of the registration database affords all those whose registration is disputed a fair opportunity to prove their eligibility. But even if further verification of registration records is necessary after election day, an integrated system that checks electronic provisional ballots against all available digital records will greatly expedite this process, reducing the number of provisional ballots over which there would be serious disputes about eligibility. If these can be identified and examined in the first week after election day, and their number is relatively small, then any litigation over them could be resolved in the four remaining weeks before safe-harbor day, and the fewer the elections in which these disputed ballots would make a difference to the outcome (the margin of victory needing to be even closer to come within the margin of litigation).

But integration of the registration database and the voting machinery could never be a complete panacea. There would still need to be human election officials to supervise

and inspect the operation of the electoral technology, both at the polling place during the times of voting and later during the count-verification process. Even if it were someday feasible to replace election officials with robots, it would be undesirable to do so. After all, it would be still be necessary to have human representatives of the candidates and voters to supervise and check the robots, to make sure that they did not malfunction. And with humans inevitably involved in the vote-recording and vote-counting process, the system is inevitably subject to the risk of human error.

Absentee or “mail-in” voting. The biggest obstacle to an error-free electoral system remains to be considered. As is widely known among election officials, absentee ballots present the greatest threat to the accuracy and integrity of an election’s results. This is true because absentee ballots present all the problems associated with polling-place ballots—they must be counted, the individuals who cast them must be eligible voters, there must be a match between the ballots cast and the registered voters who received them—and then some.

Control over the chain-of-custody of absentee ballots is obviously much harder than with polling-place ballots. With polling-place voting as it is commonly practiced, it is necessary to observe that the individual who has checked in and signed the poll book is the same person who casts the corresponding ballot, and after the ballot is cast it is necessary only to keep track of the voting machine. If registration databases and voting machines are technologically integrated in the way described above, then the chain-of-custody issue for polling-place ballots becomes even easier. (Again, there is no more gap between the check-in process of examining and signing the now-electronic pollbook and receiving a ballot to cast on the voting machine.)

By contrast, with absentee voting, there is the “outbound” fact that the ballot is mailed to an individual who requested one and, then, the “return-trip” fact that the ballot, after being cast, is mailed backed to the board of elections for counting. Who knows for sure what happened to that ballot while en route in either direction? It might have been intercepted before reaching the individual who requested it, and filled out fraudulently on that person’s behalf, or perhaps it might have been caught in transit on its way back and either altered, destroyed, or replaced with a fraudulent substitute. Imagining these possibilities is not to say that they are likely to occur, although history shows that such shenanigans have happened.³¹ Rather, the point is that, because they are conceivable, in a close election one side or the other may be able to raise a plausible question about the integrity of some absentee ballots, thereby casting doubt on the ability of the electoral system to make sure that every valid vote counts, and counts equally, in this particular race.

Even if the absentee ballot without incident gets to and from the person who requested the ballot, it is also harder to verify that this person is an eligible voter than it is if the same person must show up at a polling place to cast the ballot. The reason, of course, is that at the polling place the flesh-and-blood person can be examined in comparison with whatever documentary evidence of eligibility might be required: the individual can be asked to produce a signature to checked against one on file, the individual’s visage may be compared against a photo either on record or in hand, or a fingerprint of the individual can be taken on the spot to be checked against a fingerprint collected at time of registration. But none of these methods work as well in the context

³¹ See, e.g., *Pabey v. Pastrick*, 816 N.E.2d 1138 (2004) (recounting egregious facts of partisan abuses of absentee ballots).

of absentee voting: even if the absentee voter is asked to supply a signature, photo, or fingerprint, these forms of identification could have been forged; unlike with polling place voting, there is no way to check for sure that the individual filling out the absentee ballot is the same one whose signature, photo, or fingerprint is supplied along with the ballot. (And even if it is, there is a greater likelihood that the individual submitting the absentee ballot is not an eligible voter: a person who can both register and vote by mail is more likely to do so even if not qualified than if the same person must go in person to either register or vote; the prospect of having to break the law while directly engaged in a face-to-face encounter with government officials tends to deter the unlawful conduct.)

There is yet another problem with absentee voting that does not affect polling-place voting. Absentee ballots are not necessarily secret. Anyone might watch an individual fill one out: a spouse, a friend, a partisan operative. Therefore, even if there is no doubt about the eligibility to vote of the individual who casts an absentee ballot, the integrity of that ballot is compromised if the individual, while being watched, casts that ballot for a particular candidate because of coercion or pressure to do so. The influence of the observer may be subtle (“Everyone at our church is voting for Smith.”) or blatant (“We’ll break your kneecaps if you don’t vote for Jones.”). Or the observer may even pay the individual \$20 to vote as instructed. In any of these situations, the absentee ballot is hardly a reflection of the individual’s own free will, as the vote would have been had it been cast in secrecy behind the curtain at a polling place.

To the extent that absentee ballot laws are rapidly being liberalized, with many states adopting so-called “no-excuse absentee voting,” meaning that individuals can choose to mail in their votes from home for no other reason than it is more convenient to

do so, the consequence is that the risk of problems increases significantly. If one-quarter of all ballots (or even more) are mailed in from home, rather than less than ten percent, there is much more chance that the outcome of a close election will depend upon the resolution of a dispute over questionable mailed-in votes. Indeed, it is not too much to say that the more the public presses for the convenience of mail-in voting, even though it eliminates the secrecy of the ballot, the more the public reveals that it values the symbolic suffrage over the reality of equal voting rights.

In a regime of on-demand mail-in voting, the mantra of “making every vote count” must be scaled back. In an election where the margin of victory is 100 votes, what happens if there is evidence that 1000 mail-in voters were each paid \$20 to vote a certain way? Should a court void the election result and declare the true winner to be the apparent losing candidate? How strong does the evidence of the vote-buying scheme need to be, and what if there is testimony that the persons who received payment would have voted for the same candidate anyway, that \$20 was merely a way to solidify their inclinations? Suppose, further, that the vote-buying scheme comes to light only after the absentee ballots, for purpose of counting, have been commingled with regular ballots, or otherwise de-linked from the individuals who submitted them, thereby negating any ability to prove with certainty which absentee ballots were compromised by the payment scheme. Should a court still void the election and order a new one, in the hope that it will not be similarly tainted?

Alternatively, what if the evidence is not of vote-purchasing, but instead of more subtle manipulation of mail-in votes? Suppose, for instance, that a church-affiliated group holds an end-of-campaign-season supper party and quietly suggests that attendees

can bring their absentee ballots with them, so that they can ask each other any questions they might have about how to fill them out. Church volunteers, of course, will be ready to help in this regard. Should these ballots be voided, and perhaps with them the entire election, if this form of assistance comes to light?³²

To make sense of the principle of “making every vote count” in the context of widespread mail-in voting, it may be necessary to rule off-limits challenges to the validity of a vote, as long as that vote was cast by a qualified voter. In other words, a mailed-in vote is properly included in the certified results of an election even if there is evidence that the registered voter who cast the ballot was manipulated into doing so in a particular way. This ballot may be a tie-breaking one. Even so, the system will not entertain the possibility of voiding the ballot just because there is evidence that the voter’s wife threatened to leave him if he didn’t cast his mail-in ballot for her preferred candidate. Or the voter’s priest told him that he could no longer receive communion at church if the priest saw that his mail-in ballot had been cast for such a sinful candidate. Or even if the voter’s neighbor and coworker told him that he would lose his job if he did not vote for the pro-labor candidate at the top of the ticket.

To consider such challenges to the validity of absentee ballots may expose the electoral system to too much uncertainty and instability. It may be better, on balance, to accept the results of an election as definitive than to permit the results to be questioned on the ground that absentee voters would have voted differently had they not been pressured

³² For a more general discussion of these remedial concerns, see *Voting and Democracy*, 119 Harv. L. Rev. 1127, 1188-1200 (2006) (describing and discussing the concept of “remedial deterrence” as applied to election administration); see also *id.* at 1155-1164 (discussing remedial difficulties when the number of illegal votes exceeds the margin of victory yet it is unknowable for which candidate the illegal votes were cast).

into voting the way that they did. This value judgment, however, may simply confirm that the public's commitment to equal voting rights is more symbolic than real.

The Sufficiency of the Symbolic Suffrage?

Given the impossibility of “making every vote count” in reality—indeed, given the *undesirability* of doing so in light of the inevitable conflict between this goal and other important social values (like privacy, finality, and stability)—perhaps as a nation we should be satisfied if we are able to achieve at least the symbolism of equal voting rights. Since we have not yet accomplished at least that much, as recounted above, we should redouble our collective efforts to do so.

And yet one has the nagging intuition that our nation will not be satisfied with symbolic electoral equality. As we have seen, a commitment to democracy leads us to demand the real thing. Each time a close election exposes a deficiency in the electoral system's ability to guarantee equal voting rights in actuality, the citizenry calls for improvements in the system to bring it closer to fulfilling that democratic ideal.

In fact, the effort to secure just the symbolism of equal voting rights tends to pull the system closer to its reality. After all, each exposure of an actual defect in the system, which has caused a denial of equal voting rights in reality, also undermines the symbolism. The system can look like it adheres to the principle of equal voting rights only to the extent that its latent defects do not become exposed by close elections. Thus, each breakdown that occurs when the system is really tested tends to increase

expectations, even if one considers purely an appearances-preserving, symbolism-promoting point of view.

At the same time, however, each new demand to perfect the electoral system, in response to its inability to handle another razor-thin result, only reconfirms the impossibility of doing so. Serious attention to the design and implementation of an optimal election system reminds the public that the optimal will never be perfect, and the ideal of “making every vote count” must be compromised. The reality is that it is necessary to ratchet down expectations and to be satisfied by some form of symbolic commitment to equal voting rights.

But a commitment to symbolism alone will never be completely satisfying, as we have just reviewed. And thus the electoral system will face an ever-present pull toward a greater achievement of electoral equality in actuality, only to confront the simultaneously constant need to ratchet back down this inflation of unrealistic expectations. One suspects that this dialectic will always be with us: the symbolic suffrage is never enough yet must suffice.