

REVISED DRAFT: July 22, 2006

**The Legitimacy of Imperfect Elections:
Optimality, not Perfection, Should Be
the Goal of Election Administration**

Edward B. Foley*

The title of this conference is “Making Every Vote Count,” and I have been asked specifically to address the topic of “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.

My thesis is that we have not yet come to grips with this gap, although it is imperative that we do so. We must figure out a way to modulate our idealism. 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 say that it is entitled to public acceptance and appreciation as satisfying the highest possible

* Director, *Election Law @ Moritz*, & Robert M. Duncan/Jones Day Designated Professor of Law, Ohio State University. This paper was presented at “Making Every Vote Count: a Colloquium on Election Reform Legislation,” held at Princeton University on April 7, 2006. I am very grateful to Tom O’Neill, Tova Wang, Michael McDonald, Rick Pildes, and other conference participants for their helpful suggestions. Likewise, I received extremely valuable feedback on an earlier draft from Dan Tokaji, Steve, Huefner, Terri Enns, and the students in my Election Law seminar during the spring 2006 semester. (The earlier draft is available at <http://moritzlaw.osu.edu/electionlaw/freefair/060502.php>.) Thanks also to Sara Sampson and Kathy Hall of the Moritz Law Library for their research assistance in connection with this paper, as well as all members of the *Election Law @ Moritz* team whose ongoing work in this field informs my understanding of this topic. All errors in this inevitably imperfect paper are, of course, solely my own, although I hope that they do not detract from the legitimacy of my basis thesis.

standard of demographic legitimacy, rather than being condemned as inadequate in failing to live up to our professed ideals of equal voting rights.

Our nation by no means yet has achieved an optimal electoral system. There is still much, much work to be done, as avoidable errors abound. In a recent primary election in Cleveland, for example, local election officials lost 70 computer memory cards containing vote totals from 14 percent of precincts, and even a full week after the election these officials did not know how many of these lost cards had been recovered and, conversely, how many remained missing.¹

But even if we ever get to optimality, 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 started to tackle this essential task.

I will begin by describing the problem in some more detail, illustrating 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 of Perfectionist Expectations

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

¹ See Edward B. Foley, *Electoral Laments in Major and Minor Keys*, FREE & FAIR (May 9, 2006), available at <http://moritzlaw.osu.edu/electionlaw/comments/2006/060509.php>; Joan Mazzolini, *Election Board Opens Probe Into Voting Fiasco*, THE PLAIN DEALER (May 9, 2006).

commitments to those other human values, and yet we are not yet willing to admit to the existence of 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, but we know that two ballots cast for the losing candidate that 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 the State of Washington during its 2004 gubernatorial election.² 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 demonstrates 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 true rightful winner be declared victor and installed in office.

Consider, as an illustration of this point, an editorial in the *Boston Globe* concerning the wrongly rejected provisional ballots in the Washington gubernatorial election. Entitled “One Person, One Vote,” thus invoking the most fundamental mantra of perfectionist rhetoric, the editorial observes that the voters themselves “had done nothing wrong” and, therefore, it was proper for the judiciary to insist that these erroneously excluded votes be added to the final official tally, even as the consequence

² 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>. 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). If one wishes to get a full picture of the administrative errors that beset the Washington governor’s race in 2004, one can review the daily news coverage of the post-election turmoil during November and December in the *Seattle Times* and the *Seattle Post-Intelligencer*.

would be to flip the positions of the winning and losing candidates. Then, fully embracing the standard of perfection in the counting of votes, the editorial concludes: “[M]istakes that allow losers to win because legitimate votes are not counted must be squeezed out of the system. The cause of *each* mistake should be tracked down and eliminated.”³ The message of this editorial is crystal-clear: not a single outcome-determinative mistake is tolerable.

The same demand for perfection exists if two votes cast for the winning candidate were ineligible ballots, when the margin of victory is 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.⁴ 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. Or, as a recent comprehensive GAO report on the 2004 election summarized, “[t]he administration of election systems will never be error free or perfect.”⁵

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

³ Editorial, *One Person, One Vote*, BOSTON GLOBE, December 24, 2004, p.A18.

⁴ Holly Zachariah, *Couples’ 4 Ballots Stirs Chaos in London*, COLUMBUS DISPATCH, November 17, 2004, p.1A.

⁵ GAO, THE NATION’S EVOLVING ELECTION SYSTEM AS REFLECTED IN THE NOVEMBER 2004 GENERAL ELECTION 31 (June 6, 2006).

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 in 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 for perfection to be a reasonably attainable ideal. Not so in the context of a modern mass democracy, where millions cast votes for Governor or President.

II. Accuracy and Equality Conflict with Other Essential Values

Perfection is not just unattainable in practice; it is unattainable in principle. Thus, the task is not merely to build better vote-counting machines, ones with fewer error rates than the infamous punch-card ballots used in Florida during the 2000 presidential election. Nor would it suffice to improve the hiring and training of poll workers and other election officials, so that these individuals made fewer mistakes in the handling of ballots and the counting of votes. To be sure, vast improvements still could be made in both these respects, especially in terms of increasing the skill and performance of election personnel, and one can only speculate about how much healthier our democracy would be if the nation's electoral systems were to operate in accordance with the "Six Sigma" standard adopted by many businesses and other sectors of public administration.⁶

Six Sigma is a management protocol that seeks to reduce the rate of error in a system's operation to 3.4 incidences per million. Pioneered by Motorola and championed by General Electric, among other major corporations, Six Sigma derives its name from

⁶ For background on Six Sigma, see Mahesh S. Raisinghani, *Six Sigma: concepts, tools, and applications*, 105 *INDUSTRIAL MANAGEMENT & DATA SYSTEMS* 491 (2005); Navin Shamji Dedhia, *Six Sigma Basics*, 16 *TOTAL QUALITY MANAGEMENT* 567 (2005). Thad Hall and Mike Alvarez, among others, has suggested applying Six Sigma to elections. See *More on Lean Six Sigma* and "*Lean*" Voting, ELECTION UPDATES (November 1-2, 2005), available at http://electionupdates.caltech.edu/2005_10_30_archive.html.

the mathematical symbol for the statistical concept of six standard deviations from the mean. If applied in the context of elections, Six Sigma would require fewer than four vote-counting errors (ballots either erroneously included or excluded from the certified total) for each million voters who attempt to cast a ballot. In the 2000 presidential election, where approximately 6 million ballots were cast in Florida (5,963,070 according to official results⁷), compliance with Six Sigma would have produced a margin of error of 20 votes, well below the 537-vote margin in favor of then-Governor Bush according to the state's certified results. Even the 129-vote victory for Christine Gregoire in the 2004 Washington governor's race, out of total of 2,808,341 ballots in the state's certified results,⁸ would have been well beyond the 10-vote margin of error called for by Six Sigma. Consequently, even though Six Sigma could not guarantee absolute perfection—the proverbial one-vote margin of victory where just two ballots were wrongly included or excluded would escape Six Sigma's strictures in an election with more than one million voters—it would be an extraordinarily rare statewide race that would fail the Six Sigma standard. As a nation, we might have to wait another several centuries for such an event to occur.

But the Six Sigma standard is likely to be unattainable for elections not simply because we are unwilling to devote the financial resources that would be necessary to achieve it, or because we lack the political will to implement effective management practices in the sphere of electoral resources. Instead, important social values that we are unwilling to sacrifice require us in the context of elections to tolerate the risk of error

⁷ National Archives (http://www.archives.gov/federal-register/electoral-college/2000/popular_vote.html).

⁸ Official results of second recount in 2004 election for Governor, Washington Secretary of State (<http://vote.wa.gov/Elections/Results/Results.aspx?e=fe7e6b45-e39d-4959-95c7-9e27cf6e0b59&j=a1c5db0b-5cf2-4016-abe9-b5dfdb0f4fec&o=a8327ef7-2f99-40a3-85c9-ef641023cc0f>).

rates that are significantly higher than what Six Sigma would call for. To understand this inevitable values conflict, it is useful to consider some examples from different areas of election administration.

A. Registration

1. Deadlines

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 changes residence after 30 days is shut out of the election.

The consequence of the cut-off date is most vivid if we imagine someone who moved to the state 25 days before election day and then goes to the polls in the patriotic hope of participating in the election of the nation's president. (Turnout, after all, is to be encouraged.) Assuming that this new resident receives and casts a provisional ballot, this provisional ballot would not count because the resident was not properly registered within the deadline for doing so. Perhaps we would not consider the exclusion of this provisional ballot erroneous, but a more lenient deadline (say 15 days, instead of 30) would have enabled this citizen to participate in the franchise, as he or she wished to do.

To avoid this denial of the right to vote, six states permit same-day registration, whereby a new voter can both register and vote on election day.⁹ The elimination of any pre-election registration deadline, however, increases the risk that a person appearing at the polls is ineligible to vote but that this ineligibility will be undetected. The person might be under-age or a non-citizen or might even have voted previously in another

⁹ Idaho, Maine, Minnesota, New Hampshire, Wisconsin, Wyoming.

polling place. The risk of erroneously included ballots as a result of same-day registration might be relatively small—perhaps not much more than 100 per million¹⁰—but a state might wish to avoid even this amount of risk by imposing some form of pre-election registration deadline.

The same kind of timing trade-off exists with respect to the purging of voter registration lists. If the purging occurs too close to election day, the purged voters do not have enough time to contest the inaccuracy of the purge. Conversely, if the purging occurs too far in advance of election day, the purging will fail to remove the names of individuals who have died, moved out of state, or (where applicable) been convicted of a felony after the purge has occurred. Either way, there is some inevitable risk of inaccuracy in the content of the voter registration database. Even as a state endeavors to minimize that risk, it must balance the extent to which it prefers the risk of erroneously retained or erroneously purged names. Arguments can be made that it is better to permit an ineligible individual to vote than it is to deny an eligible individual the right to vote—just as it is better to let the guilty go free than it is to convict the innocent—but ultimately this value choice must be made by the democratic process itself, as reflected in legislation adopted by Congress or the states (unless it is possible for the judiciary to tease out this value choice from the bare text of the U.S. Constitution’s Equal Protection Clause).

2. Identification

An early registration deadline and a late purging deadline will reduce the risk of ineligible individuals being registered to vote. But these deadlines will not reduce this

¹⁰ Reports from Wisconsin, a state with same-day registration, indicate that in the 2004 election over 300 ineligible ballots were cast, out of a total of approximately 3 million (2,997,007). Greg Borkowski, *Inquiry Finds Evidence of Fraud in Election*, MILWAUKEE JOURNAL-SENTINEL, May 11, 2005, p. A1; National Archive (http://www.archives.gov/federal-register/electoral-college/2004/popular_vote.html).

risk to zero. Instead, if a state really wished to eliminate this risk entirely, or at least to come as close as possible in accordance with the Six Sigma objective of approximating perfection, the state would have to adopt a voter identification requirement much more stringent than anything either previously adopted or even currently contemplated.

A policy of zero tolerance of ineligible registrants would mean that every citizen, to enter the state's database of registered voters, 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 genetic test, both at birth (or naturalization) and at time of registration, to establish that the DNA of the registrants matches the DNA of the citizens they purport to be, would suffice to rule out fraud. Assuming that the error rate of the DNA-testing laboratories as well as the error rate of the election officials who reviewed the lab reports would be less than one in a million, then in theory the risk of an erroneous election caused by ineligible registrants could be reduced to within Six Sigma standards.

But would any state 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 invasion of personal privacy and affront to personal dignity.

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”),¹¹ Arizona makes no effort to use biological evidence to 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.

Consequently, we can imagine a situation in which as few as 20 individuals, out of the more than 2 million who vote in Arizona elections, fraudulently register to vote based on forged or borrowed citizenship papers. Yet we can also imagine a closely contested statewide race in Arizona being decided by fewer than 20 votes. In this hypothetical situation, the accuracy of the election would have been compromised by the inability of the state to eliminate entirely the risk of ineligible registrants.

But the lesson to be learned from this thought experiment is *not* to increase the stringency of Arizona’s identification requirements even further, by mandating a DNA match between time of birth (or naturalization) and time of registration. Instead, the lesson is to accept the inevitable imperfectability of the electoral system, recognizing that the harm to privacy and dignity from such DNA matching trumps the importance of electoral accuracy. Simply put, it is better to risk an erroneous election, even with the wrong candidate being installed into office, than it is to impose a draconian system of DNA testing in an effort to eliminate this risk.

Indeed, it is far from clear that one would want a court to overturn the results of this hypothetically erroneous election, even if evidence came to light that 20 individuals

¹¹ See Daniel P. Tokaji, *EAC on Arizona Registration Requirements* (03/07/06), EQUAL VOTE, available at http://moritzlaw.osu.edu/blogs/tokaji/2006/03/eac-on-arizona-registration_07.html.

voted fraudulently. Although it is hardly desirable to let stand the results of an election tainted by fraud, it might be even less palatable to permit elections to be challenged afterwards based on claims that some voters should not have been permitted to register in the first place. Arguably, one might say that the time to challenge the eligibility of a registered voter is in advance of the election and, therefore, if the election occurs without a challenge of this kind, then a vote cast by a registered voter cannot subsequently be nullified.¹²

B. Provisional Voting

Perfectly accurate voter registration lists would reduce, although not entirely eliminate, the need for provisional voting. (For example, there would still be the need for provisional ballots in the not-infrequent situation in which a harried poll worker cannot find an individual's name on the voter registration list even though it is there—like failing to find a name in a phone book because of a mental error concerning alphabetical order.) And, of course, registration lists will never be perfectly accurate: there will always be some names improperly excluded because of erroneous purging or an erroneous failure to add the names of new registrants to the list.

Provisional voting, therefore, is a welcome addition to the electoral process. But it, too, cannot function as a perfect “fail-safe,” despite the promises that are sometimes made on its behalf. One reason is that the time available for verifying the eligibility of provisional voters is necessarily limited in the aftermath of the election, and the verification process may be shut down before there is enough time to check all the

¹² For further thoughts on whether the accuracy of a state's voter registration database should be subject to challenge in the aftermath of an election, see Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193, 1203-04 & n.69 (2005).

available records to see if some provisional voters who superficially appear ineligible are in fact eligible.

As common sense would indicate, available evidence shows that a higher percentage of provisional ballots are verified in states that spend more time verifying provisional ballots. In 2004, according to research conducted by the Eagleton Institute of Politics at Rutgers University, 61% of provisional ballots were verified in states that spent over two weeks at this task, whereas only 47% of provisional ballots were verified in states spending between one and two weeks. Furthermore, the percentage of verified provisional ballots decreased to 35% in states spending less than one week at this effort.¹³

Recalling the problems that occurred in the 2004 Washington gubernatorial election, we can easily understand why this relationship between verification rates and time spent at verification would exist. Some provisional ballots were initially ruled ineligible based on an incomplete review of the election board's records; only after litigation required these officials to take another look did they discover the documentation that demonstrated the voters' eligibility. Somewhat more surprising, perhaps, it was not until after completion of the manual recount of Washington's ballots that officials unearthed several provisional ballots that had never been processed previously—because they had been erroneously placed in a pile of empty envelopes or erroneously left sitting at the bottom of a box.¹⁴

¹³ David Andersen, *Relationship Between Time Allotted to Verify Provisional Ballots and the Level of Ballots that are Verified*, The Eagleton Institute of Politics (on file with author).

¹⁴ David Postman, *Reed says county has right to fix error, tally 735 ballots*, THE SEATTLE TIMES, December 21, 2004, p. A1 (describing how seven provisional ballots “had been mistakenly put in a pile of empty envelopes and not discovered until after the first recount”); see also David Postman, *It's Gregoire by 130; is it over?*, THE SEATTLE TIMES, December 24, 2004, p.A1 (describing two provisional ballots “that had been left in locked compartments of voting equipment after the election”).

The manual recount of Washington’s gubernatorial election, however, was not complete until eight weeks after the election: Gregoire was certified the winner on December 30. Moreover, litigation over her 129-vote victory, which included a dispute over 252 provisional ballots that were counted but concededly should not have been, did not end until June 6, 2005, over seven months after election day, and the litigation stopped then only because Gregoire’s opponent decided not to appeal the trial court’s decision that refused to nullify the election notwithstanding the inclusion of more invalid ballots than her margin of victory. After all, Gregoire had already been serving as Governor for six months by the time of the trial court’s ruling, and it was impossible, once the improperly included provisional ballots had been commingled with other votes, to determine whether these ballots had been cast for Gregoire or her opponent.

Thus, even if not entirely accurate, the process of verifying provisional ballots must—as a practical matter—come to an end before inauguration day. Indeed, in a presidential election, this process must finish within five weeks of election day, because the fifth Tuesday after election day is the “safe harbor” deadline set by Congress, meaning that any state wishing its Electoral College votes to be immune from subsequent challenge in Congress must resolve any disputes over those votes by this deadline. As one will recall, in *Bush v. Gore*, the U.S. Supreme Court halted any recounting of votes in Florida because of this deadline.¹⁵ Presumably, then, in any future presidential election involving a dispute over the verification of provisional ballots, the Supreme Court will terminate the verification process on the fifth Tuesday after election day, so that the state

¹⁵ 531 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.”

whose provisional ballots are in dispute can take advantage of the congressional safe-harbor deadline. Yet if the process of verifying provisional ballots in Washington had shut down after only five weeks in 2004 (three weeks before the certification of Gregoire's victory), not only would there have been a lot of errors left uncorrected, thereby disenfranchising over 500 eligible voters, but a different Governor would have been installed into office.¹⁶

Even with improvements to the process of verifying provisional ballots that have been adopted in Washington and elsewhere in the wake of the 2004 elections, five weeks may be an insufficient amount of time for the verification process to satisfy the Six Sigma standard. If a state averages 100,000 provisional ballots per election, Six Sigma would find acceptable only one erroneous eligibility determination for every three elections (which is mathematically equivalent to a 0.34 error rate for each election involving 100,000 ballots).¹⁷ The task of processing 20,000 ballots per week is daunting enough, especially once one recognizes that the initial administrative review of these ballots needs to be finished even earlier if there is to be any time within this five-week period for litigating in court the validity of these administrative determinations. The idea that a combined administrative and judicial review of 100,000 provisional ballots within a frenzied five-week period could occur without a single error in two out of every three elections seems fanciful.

¹⁶ Gregoire's opponent led after both the initial count of ballots and the first machine count, and she did not overtake him until December 22, at the end of the manual recount. See David Postman, *Gregoire leads by 10*, SEATTLE TIMES (December 23, 2004), p.A1.

¹⁷ Washington had almost 93,781 provisional ballots cast in 2004; Ohio had over 157,7140. See U.S. Election Assistance Commission, *Election Day Survey*, Chapter 6 Data Tables, available at http://www.eac.gov/election_survey_2004/toc.htm.

But this conclusion does not imply that Congress should extend the safe-harbor deadline beyond the five-week period.¹⁸ Even if Congress and the states were to rethink the time between election day (or the end of a multi-day voting period) and inauguration day, it would seem unlikely that this period would be extended beyond eight to ten weeks. After all, it is often said that a defeated incumbent sits too long in office before the elected successor takes over. Thus, the implication instead is that it is necessary to accept an increased risk of error in order to serve the important societal interest in “electoral finality”—meaning that the results of the election are final soon after voting ends.

In sum, we could guarantee more accurate election results if we took longer to evaluate the eligibility of provisional ballots after they have been cast. If we stop the process after five weeks, we may leave hundreds of provisional ballots uncounted that should have been included, and we may also count hundreds of provisional ballots that should have been excluded. As a result, in a close election, the “wrong” candidate may be declared governor—or even president. Even so, it would be worse to let the process for fighting over disputed provisional ballots to drag on indefinitely, after the time has come for the winner to take office. Thus, the counting and re-counting must stop, within a few short weeks after the voting is over, even if the count remains inaccurate. The Six Sigma standard must yield to the need for finality.

C. Absentee ballots

The biggest obstacle to an error-free electoral system, or at least one that satisfies the Six Sigma standard, remains to be considered. As is widely known among election

¹⁸ My colleague Steve Huefner explores this possibility in *Reforming the Timetable for the Electoral College Process* (11/30/04), <http://moritzlaw.osu.edu/electionlaw/comments/2004/041130.php>.

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 machines and accompanying paper or electronic records. If registration databases and voting machines were to become technologically integrated, so that an electronic pollbook that each voter signed (using an electronic pen similar to ones now in many retail stores) also functioned as an electronic ballot, then the chain-of-custody issue for polling-place voting would become even easier. (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.) As there would be no more custodial gap between the check-in process and receiving a ballot, there also would be no more risk of a discrepancy between the number of ballots cast and the number of signed pollbook entries (a discrepancy which, regrettably, occurs with considerable frequency today).

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 back to the board of elections for counting. Who can know for

sure what happens 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 in that person's name, 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, although history shows that such illegalities have occurred.¹⁹ Rather, the point is that, because they are conceivable, in a close election the losing candidate 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 a particular race.

Even if the absentee ballot gets without incident 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 be 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 works as well in the context 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

¹⁹ See, e.g., *Pabey v. Pastrick*, 816 N.E.2d 1138 (2004) (recounting egregious facts of partisan abuses of absentee ballots).

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 major 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.

Despite the potential for these kinds of abuses, 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. Consequently, the risk that the outcome of a close election will be tainted by improperly cast absentee ballots is increasing, not decreasing. If one-quarter of all ballots are mailed in from home, rather than less than ten percent,

there is a significantly greater chance that the outcome of a close election will depend upon the resolution of a dispute over questionable mailed-in votes.²⁰

This observation does not necessarily mean that the liberalization of absentee ballot laws should be opposed. On the contrary, the convenience of on-demand at-home voting may be a societal value that outweighs the increased risk of erroneous election results. The point simply is that society must recognize the inevitable trade-off between liberalized absentee voting and the goal of reducing error-dependent election results.

In an election where the margin of victory is 100 votes, what happens if there is evidence that 1000 at-home voters were each paid \$20 to vote for the apparently winning candidate? Should a court void the election result, tossing out all the ballots that had been bought, and declare the other candidate to be the rightful winner? 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

²⁰ In states with “no excuse absentee voting” in 2004, 20% of registered voters requested absentee ballots (making these ballots an even larger percentage of ballots cast, since not all registered voters cast ballots). By contrast, in states without “no excuse absentee voting in 2004, only 5% of registered voters requested absentee ballots. See U.S. EAC, *Election Day Survey*, Chapter 5, p. 5-10, available at http://www.eac.gov/election_survey_2004/doc/EDS-chap%205%20absentee%20ballots.doc.

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?²¹

To salvage the ideal of “making every vote count” in the context of widespread at-home 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, an at-home 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 at-home 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 absentee 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 conclusive and unimpeachable than to permit the results to be questioned on the ground that absentee voters would have voted differently

²¹ 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).

had they not been pressured into voting the way that they did. This value judgment, however, may bring about a reduction in erroneous election results, but only because the concept of an electoral error has been redefined more narrowly.

No matter what the value judgment, there is little likelihood that a system of absentee voting could be administered in accordance with the Six Sigma standard. Even if the trend toward on-demand at-home voting were abandoned in favor of returning to a regime of absentee ballots being available for a strictly limited list of legitimate causes, and even if the integrity of an absentee ballot could not be challenged on the ground of improper influence but solely on the ground that it was cast by an ineligible individual, the extra chain-of-custody problems associated the absentee voting would seem to put its administration out of Six Sigma range. As we have seen with provisional ballots, if a state has an average of 100,000 absentee ballots cast each election, then Six Sigma would permit a single erroneous determination concerning an absentee ballot's eligibility only once every three elections. In other words, in two out of every three elections, the state must be absolutely perfect in counting every absentee ballot cast by an eligible voter and excluding every absentee ballot cast by an ineligible voter. In these elections, not a single fraudulently cast absentee ballot could escape undetected. It seems an impossible standard to meet.

Yet obviously we cannot abandon absentee voting entirely. The need for absentee ballots, even when they are strictly limited to the circumstances in which they have historically been provided, is too great: voters away from home on business, voters serving overseas in the armed forces, voters hospitalized or otherwise unable to go to the polls because of illness or infirmity, and so forth. Simply put, we would not permit the

disenfranchisement of these citizens just because of their unavoidable inability to get to a polling place on election day. As a result, whether or not states choose to liberalize absentee voting, they must accept some irreducibly significant risk of electoral error caused by the necessity of even strictly limited absentee voting.

III. Toward a Resolution of Our Values Conflict

In sum, three essential elements of our electoral system—registration, provisional voting, and absentee voting—all point to the same problem: in even the best designed and implemented electoral system, there is a real risk that some eligible citizens will be denied the opportunity to cast a ballot that counts (and thus will be disenfranchised in the election), while at the same time some of the ballots that are actually counted will have been cast by individuals who are ineligible to vote. This risk exists even if voting technology works perfectly and there is no human error by poll workers in the distribution and collection of conventional ballots at the polling places. Even more discouragingly, the unavoidable risks of errors with respect to each of these three essential elements of the electoral system cannot be considered in isolation, but instead must be taken together, thereby compounding the likelihood that the outcome of a close election will be tainted by cumulative errors affecting the electoral process as whole.

We can easily imagine, in other words, fifty fraudulent registrations, seventy misplaced or otherwise mistreated provisional ballots, and ninety improper absentee ballots combining to cloud the outcome of an election with a 100-vote margin of victory. We want every vote in this close election to count—and to count equally. We want every provisional ballot cast by an eligible voter to be included in the total, because each one might make a difference to this razor-thin result. We want every ballot cast by someone

who registered fraudulently to be excluded, even though there are just a few of them, because they, too, could make a difference in the outcome, depriving each valid vote of its equal right to determine the winner. Likewise, we want to exclude any absentee ballots that were illegally intercepted and fraudulently filled out by a partisan imposter, for any election in which these improper absentee ballots determined the winner would be considered a stolen election.

We want all this, but we cannot guarantee it, because we have no way to reduce the risk of these problems to the point that they approach the perfectionist aspiration of the Six Sigma standard. We cannot reduce this risk to a Six Sigma level because of countervailing considerations built into these three essential features of our electoral system. Our process of registering voters cannot demand a DNA-matching identification requirement that would violate privacy and dignity even though that would be the only way for a state's registration database to satisfy a perfectionist standard of accuracy. Our process of verifying provisional ballots must come to an end before there is sufficient time to achieve a perfectionist count of these provisional ballots. And because our electoral system cannot negate the need for at least some absentee voting, it cannot eliminate the distinctive risks of fraud that are inherently associated with absentee ballots.

What, then, are we to do about this inevitable conflict between our professed ideal of electoral perfection and these other values that we are unwilling to sacrifice? Simply put, we need to abandon electoral perfection as our standard of democratic legitimacy, and develop instead a standard of electoral optimality, a standard that 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.²² It is actually better for electoral results to be clear-cut and decisive. It would be far from ideal if each election were decided by just one vote. Although that situation would mean that the competing candidates were always expert in appealing to the proverbial “median voter,” the clouds of uncertainty that would hang over each election as both sides went to court to fight over who really won each race would be destabilizing. Democracy in this society would soon disappear. Therefore, we should hope instead that the process of campaigning causes in each election a sufficient swath of undecided middle-of-the-road voters to develop a distinct preference, with the result that the winner prevails by at least one percentage point (which in an election with one million votes would amount to a 10,000 vote victory).
- 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 an extremely close election. Much of the value of voting is the symbolism of equal citizenship that results from casting a ballot that is expected to be counted along with all other valid votes. When African-Americans, women, and other previously disenfranchised groups can go to the polls and proudly cast their ballots shoulder to shoulder with every other U.S. citizen, the victory for democracy is clear. To be sure, if some of these ballots inadvertently fail to get counted, that disenfranchisement is a clear harm to democracy, but when that inadvertent failure goes undetected it cannot undercut the democratic value that

²² Of course, the intentional stifling of electoral competition to serve the interests of incumbents is an evil in need of a remedy. See, e.g., Richard H. Pildes, *The Constitution and Political Competition*, 20 NOVA L. REV. 269 (2006).

resulted from the equal casting of the ballots in the first place. Symbolism is not the same as reality. Nonetheless, the equal entitlement of all citizens to cast a countable ballot is symbolically important and not to be underappreciated despite the inevitable inability to make sure that every ballot is properly counted.

- 3) 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—118,599 votes separated Bush and Kerry in the end²³—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, we should start by hoping for an electoral system that at least is capable of working well in a race that is not so close. For now, and perhaps forever, it will be too much to expect that our electoral system will operate with sufficient accuracy to produce an unimpeachable result when one million votes are cast and the margin of victory is less than 1000 (or 0.1% of the total).
- 4) 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 an acceptable margin of error for an electoral system and then hold the system accountable to that standard. For the reasons I have elaborated, the acceptable error

²³ National Archives, 2004 Presidential Election, Popular Vote Totals, available at http://www.archives.gov/federal-register/electoral-college/2004/popular_vote.html.

rate cannot be the Six Sigma standard that is suitable for some industrial or other administrative processes. The more interesting question, in my judgment, is whether it would be appropriate for an electoral system to hold itself to an error rate of 0.01%, or only 100 errors out of 1 million voters, rather than the less ambitious standard of 0.1% (1000 errors per million voters).

- 5) 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 is unable to guarantee that all eligible ballots were properly counted and no ineligible ballots taint the result. Conversely, if errors are non-random and fall predictably on one segment of society (African-Americans below the poverty line, for example), then even the symbolic value of casting a ballot would disappear. An electoral system with a built-in bias against counting the votes from one particular demographic group cannot pretend to honor the democratic ideal of equal citizenship, not even in the breach.
- 6) 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 is sometimes expected, and the system still works as intended even if we are understandably disappointed when it produces its expected error. In this way, an erroneous result may still have a legitimate democratic pedigree and be acceptable to the public as such.

7) 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 implement this optimal system, then when it produces 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.

In the end, we must acknowledge this simple truth: 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.