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978-1-107-04863-8 - Election Administration in the United States: The State of Reform
After Bush v. Gore

Edited by R. Michael Alvarez and Bernard Grofman

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Election Administration in the United States

This book tells the story of how the way we conduct elections has changed after the Florida recount litigation of 2000. Some of the nation's leading experts look at various aspects of election administration, including issues of ballot format, changes in registration procedures, the growth in the availability of absentee ballot rules and other forms of "convenience voting," and changes in the technology used to record our votes. They also look at how the *Bush v. Gore* decision has been used by courts that monitor the election process and at the consequences of changes in practice for levels of invalid ballots, magnitude of racial disparities in voting, voter turnout, and access to the ballot by those living outside the United States. The editors, in their introduction, also consider the normative question of exactly what we want a voting system to do. An epilogue by two leading election law specialists looks at how election administration and election contest issues played out in the 2012 presidential election.

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The State of Reform after Bush v. Gore

Edited by

R. MICHAEL ALVAREZ

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Foreword

Judge Danny Boggs, U.S. Court of Appeals, Sixth Circuit

Professors R. Michael Alvarez and Bernard Grofman and the authors of the individual chapters in this book have given a finely detailed study of many of the crucial aspects of election vote casting, administration, counting, and litigation. In particular, they have developed the granularity of the stories of individual American elections that lead to discussions over these issues. That is, each close or mismanaged election is like Tolstoy's statement: every unhappy family is unhappy in its own way. The broad issues only come to life in individual disputed races and practices. Each contested election, or controverted election practice, depends mightily on the individual circumstances and the positions of the contesting parties. If you win on a machine count, you disparage hand counts; if you are behind, you want hand counts.

A second key point is that these issues are endemic to elections, but rise to the surface only in very close elections. In assessing Florida 2000, it needs to be noted that Florida was unique in being the closest state presidential result (in percentage terms) in American history, rivaled only by Henry Clay's four-vote margin in Maryland in 1832, out of 38,000 votes cast. Florida was equivalent to counting 10,000 votes and having the count come out 5,001 to 5,000 – 500+ consecutive times! By contrast, the somewhat controverted result in Ohio in 2004 was exceeded in closeness hundreds of times in past state presidential elections – eleven times in 1960 alone.

A message that should be taken from this solid academic work, and taken to heart by all political participants and administrators, is that forethought on issues of ballot design, election administration, and voter education can be just as crucial as other campaign elements and ballot design deserves the same degree of forethought at a time when action can be taken in the interests of all voters and of the candidates and participants themselves.

Ballot design can be especially crucial, as the very interesting discussion of the Florida Thirteenth Congressional District race in 2006 sets out. Much less

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known is the fact that it is almost certainly the case that far more votes were lost to Gore by means of the “caterpillar ballot” in Duval County, Florida, than could possibly have been affected by the much more publicized butterfly ballot in Palm Beach County. Duval County attempted to solve the problem of the large number of candidates by placing the candidates on two facing pages. However, this design apparently resulted in tens of thousands of over-votes in Duval County, many perhaps by voters who had been advised to “vote every page,” and thus voted for one of the candidates on the first page and another candidate on the facing page. Regression analysis indicates that it was extremely likely that this ballot design cost Gore thousands of votes.

Both legislators and voters, as well as voting administrators, would do well to examine this volume carefully with an eye to understanding and fixing, or at least avoiding, the many potential traps that can arise in a process that involves fallible humans undertaking hundreds of millions of individual choices and physical actions, and yet whose smallest mistakes can, on rare occasions, affect the course of history.

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With one exception (an author whose schedule did not permit her to attend), earlier versions of the essays collected in this volume were given at a conference on “*Bush v. Gore* Ten Years Later: Election Administration in the U.S.” held at the Hotel Laguna in Laguna Beach, California, April 16–17, 2011, co-organized by R. Michael Alvarez and Bernard Grofman, and held under the auspices of the University of California, Irvine, Center for the Study of Democracy. Funding for the conference came from the Jack W. Peltason Chair at UCI, with supplemental funding from the UCI Center for the Study of Democracy (CSD). The conference reflects a combination of the interests of the Caltech/MIT Voting Technology Project and those of the Center for the Study of Democracy in electoral reform issues in the United States and worldwide.

The conference was long in the making. A decade ago Grofman and Henry Brady had planned a volume dealing directly with the panoply of issues in the 2000 *Bush v. Gore* recount controversy. But the proliferation of articles and books on that topic soon made it clear that yet another book on that topic was not really needed. Instead they decided that it made sense to wait until the dust had cleared and scholars could investigate how *Bush v. Gore*, the case and the controversy, had affected election administration in the United States in the longer term. Because of the press of other commitments, after his election as president of the American Political Science Association, Brady had to drop out of the project and was replaced by another leading expert on election administration issues, Mike Alvarez. We are deeply indebted to Shani Brasier, staff administrator of the Center for the Study of Democracy, for her remarkable organizational skills in putting the conference together, and to Ines Levin, currently an Assistant Professor at the University of Georgia, for her invaluable help in manuscript preparation. Alvarez wishes to thank his colleagues on the Caltech/MIT Voting Technology Project and Gloria Bain and Barbara Estrada for their support and assistance with this project.

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Editors' Introduction

R. Michael Alvarez and Bernard Grofman

“*Bush v. Gore*” means different things to different people. To some it is a 2000 presidential contest during which the winner received fewer voters than the loser and during which the election outcome was not “decided” until more than a month after the election. Some at the time (and some today) saw the election as “stolen.”¹ To others it is a still highly controversial Supreme Court case, *Bush v. Gore*, 531 U.S. 98 (2000) that stopped an ongoing recount in Florida on the grounds that the different standards (or lack thereof) for ascertaining voter intent in different parts of the state violated the equal protection clause of the Fourteenth Amendment, and that a statewide recount could not be conducted fast enough to offer Florida the ability to take advantage of a federal “safe harbor” deadline for disputed presidential outcomes. And many see “*Bush v. Gore*” as a poster child for problematic U.S. election administration practices, including partisan and localized control of the voting process, inexperienced election officials and polling place workers; and an absence of validated information of who was eligible to vote, uniform ballot formats, uniform technology for recording the vote, and uniform standards for recount practices. In Mark Braden’s apt phrasing, the Florida litigation revealed the “soft underbelly of American elections” and cast doubt on their legitimacy.²

The chapters in this book come neither to bury *Bush v. Gore* (the case), nor to praise it; rather they seek to trace the consequences of “*Bush v. Gore*” (and *Bush v. Gore*) for election law and election administration in the United States during the past decade. As the various chapters in this book demonstrate, in addition to sparking major changes in election practices in Florida, disputes about voting and vote counting in the 2000 election have served as a catalyst for a wide range of election reforms throughout the country that have been very similar to what happened in Florida.³ While the change is at a local level, it has been triggered by one of the most significant federal election reform efforts in recent decades, the Help America Vote Act (HAVA), passed in 2002,

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which mandated major changes in the election process and provided a carrot of substantial federal funds to motivate state compliance.

HAVA came about almost entirely because the deep flaws in how elections are conducted and in how votes are tallied that the 2000 election revealed provided a brief window of opportunity for electoral administration reform to be squarely on the national legislative agenda.

Moreover, while reforms like voting by mail are not directly linked to *Bush v. Gore*, issues related to absentee ballots, both those internal to the state and from overseas, arose in counting ballots in Florida in 2000, resulting in litigation in state or federal courts during the Florida recount controversy,⁴ and the election controversies in Florida stimulated the search for alternative voting technologies (see Stewart, Chapter 4, this volume, and Gronke, Chapter 6, this volume). In particular, we have seen the greatly increased use of DRE (computer-based modes of recording ballot information/images such as touch screens) and the replacement of punch card machines.

However, while great progress has been made on some fronts (e.g., in choosing technologies for recording votes that reduce voter errors leading to invalid ballots), there are still many areas (like ballot design) where little has changed; these topics are discussed in contributions to this volume by Charles Stewart III and Martha Kropf. Moreover, the virtual elimination of punch card machines and their replacement by computerized voting technology or optical scanning devices has not been without its problems, and the rise in absentee voting by mail has created problems of its own (see Alvarez and Hall, 2008). Furthermore, despite improvements in election processes, both preelection and postelection disputes have risen – in part, perhaps, because the revealed flaws in past election processes make challenging procedures in advance look like just being sensible while making election outcome challenges look less like merely being a sore loser.

STRUCTURE OF THIS VOLUME

The first section of this volume, placing *Bush v. Gore* in historical context, consists of three chapters. The first chapter, by Mark Braden and Robert Tucker, looks at how recount disputes have (or have not) changed after 2000. The second chapter, by Charles Anthony Smith, looks more broadly at the long-run legal impact of *Bush v. Gore* on election law, and potentially on other legal issues as well. The third chapter in this section, by Amy Semet, Nathaniel Persily, and Stephen Ansolabehere, traces the impact of *Bush v. Gore* on public opinion about the Supreme Court.

The next section has four chapters. The first of these, by Charles Stewart III, offers a broad overview of election administration reforms over the past decade. The second, by Lonna Rae Atkeson, examines the determinants of voter confidence, focusing attention especially on how the political and legal context shapes confidence. The third chapter in this section, by Paul Gronke,

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considers the extent to which the 2000 election controversy in Florida can be linked to the greatly increased proportion of voters who now cast their votes early (e.g., via ballots that are sent by mail). The last chapter in this section, by Jan E. Leighley and Jonathan Nagler, traces the changes in registration laws and in voter turnout since 2000 and compares the amount of change to what was observed in earlier time periods.

The final section of this book looks at a number of issues that remain highly troubling and, as discussed in the last two chapters, much more controversial. The first chapter, by Martha Kropf, looks at the potential for improvement of ballot format to minimize voter confusion and make it more likely that voters will complete a full ballot. The next chapter, by Thad E. Hall and Kathleen Moore, looks at the front line of election administration, poll workers, and at how what happens at the polls affects voter confidence in the election process. The chapter by R. Michael Alvarez and Thad E. Hall argues for improved voter registration procedures that allow some degree of “transferability” with change in residence and that shift the burden from the voter to the government to assure that voters who wish to vote can easily do so. The concluding chapter, by Khalilah L. Brown-Dean, identifies mechanisms to foster ex-felon re-enfranchisement and shows how ex-felon disenfranchisement has had especially pernicious consequences for minority communities.

We now turn to a more detailed discussion of the arguments and findings of each of the chapters.

CHAPTER-BY-CHAPTER OVERVIEW

We are very pleased to include in our volume a foreword by Judge Danny Boggs and an epilogue by Samuel Issacharoff and Richard H. Pildes. Judge Boggs is a longtime member of the U.S. Court of Appeals, Sixth Circuit, who is highly knowledgeable about constitutional law and about elections worldwide. Issacharoff and Pildes are two of the country’s leading election law specialists, and each played central roles in the preelection and election day litigation efforts of the Obama campaign in 2012, in areas such as voter lists, voter identification, and other issues of ballot access. Both are at New York University Law School (Bonnie and Richard Reiss Professor of Constitutional Law and Sudler Family Professor of Constitutional Law, respectively).

Judge Boggs’s foreword emphasizes the importance of election administration for democratic decision making. We agree fully with Judge Boggs that “issues of ballot design, election administration, and voter education can be just as crucial as other campaign elements and ballot design deserves the same degree of forethought at a time when action can be taken in the interests of all voters and of the candidates and participants themselves.” A central point made in the Issacharoff and Pildes postscript, which brings the U.S. election administration story through the 2012 elections and considers how close or potentially close elections raise legal issues, is about the legacy of *Bush v. Gore*

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vis-à-vis the spotlight it cast on “pervasive and structural dysfunctionalities of the American electoral system.” In their view, these include a winner-take-all electoral college system that created the cliff effect necessary for Florida 2000, the “control of federal elections left in the hands of the states and, ultimately, in those of local county administrators,” election day staff who are volunteers, “generally with inadequate training,” and “partisan control of the machinery of elections.”

In the opening chapter of this volume, Mark Braden and Robert Tucker look in detail at three of the most publicly visible recount disputes since *Bush v. Gore*: one gubernatorial (Washington, 2004), one for the U.S. Senate (Minnesota, 2008), and one for the U.S. House (Florida 13, 2006) and at one local-level recount dispute (a county-level juvenile court judge in Ohio) that would normally fly well below the radar were it not for the fact that, unlike these other cases, the trial court explicitly drew on the equal protection argument in *Bush v. Gore* to frame its ruling and that the Supreme Court may hear the case again after district court proceedings are completed. In their chapter, Braden and Tucker offer a template for classifying election law issues and alert us to the wide variety of election law controversies. They remind us that *Bush v. Gore* was only one of a number of presidential-election-related lawsuits in Florida, that Florida was only one of several states where presidential recount controversies were taking place (e.g., it is often forgotten that in New Mexico the presidential race in 2000 was even closer than in Florida), and that there were in 2000 (as there are today) many election challenges affecting all levels of public office and that these will primarily be litigated and decided on state law grounds, not in federal courts.

In addition to issues about who is eligible to run for office and procedures for getting candidates listed on the ballot (e.g., signature requirements), or about campaign funding legalities, or about election fraud in the narrow sense (e.g., ballot stuffing), among the many litigated election issues are polling place closing times; alleged discriminatory effects in purging the electoral rolls of dead and moved voters; voters turned away at the polls because of registration lists that wrongly omitted their names, or because of failure to present proper identification, or because of eligibility issues linked to supposed felony convictions or lack of citizenship – the flip side of which is voters wrongly allowed to vote; the handling of overseas military ballots and of other mail-in votes; issues of voter intimidation; ballot design problems (think of the “butterfly ballot” in Palm Beach), and so forth. In none of the three major recounts Braden and Tucker look at did the deciding court rely on *Bush v. Gore*. Braden and Tucker suggest that, even without the explicit disclaimer about the case’s precedential value in the *per curiam* opinion, because *Bush v. Gore* was primarily about standards for a statewide recount based on equal protection, it will simply not be relevant to most election law disputes, even recounts, although it might apply to other domains where statewide equal protection issues might arise, such as those involving differential standards and practices for offering/validating provisional ballots.

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Charles Anthony Smith looks at the precedential value of the *Bush v. Gore* opinion and tracks the degree to which courts, both federal and state, have subsequently cited the case. He identifies three different strands of the Supreme Court's views of the Florida recount. Some justices emphasized equal protection (with two believing that there should be statewide recounts held under uniform standards). Three justices asserted that the Florida Supreme Court had made "new law" when it ordered the recount and thus subverted the authority of the state legislature. But even more generally, as other commentators on the case have emphasized, there was also apparently great concern on the part of a number of justices that any further delay would obviate the state's "safe harbor" deadline and force a purely partisan political resolution of the dispute that would keep the dispute alive for even longer and cast doubts on the bona fides of the next president. Smith notes that only the first strand has struck a responsive chord with later courts. Despite the claim in the *per curiam* opinion about the decision only being applicable to the specific case facts at issue, substantial numbers of courts at all levels are citing *Bush v. Gore* in cases where equal protection issues can be said to apply. However, while Smith finds more than 100 federal cases in which *Bush v. Gore* has been cited, only a handful of these cases have actually treated the case as a relevant precedential authority. Moreover, with one key exception, a case still pending, the cases where judges made the greatest use of *Bush v. Gore* as precedent have been reversed on appeal. As Braden indicated in his comments at the conference, litigators of election law disputes continue to attempt to link some of their arguments to *Bush v. Gore* even though in almost all instances this proves unconvincing to the court before which they are arguing. Smith argues, however, that the claim that *Bush v. Gore* is without teeth is premature in that the idea of disparate impact as an equal protection violation (without a necessary showing of discriminatory intent) remains resonant with many attorneys, and may eventually gain more traction with judges, even in areas that are far removed from election law.

Amy Semet, Nathaniel Persily, and Stephen Ansolabehere look at public opinion regarding the *Bush v. Gore* decision, both in the immediate aftermath of the decision and more recently. While examining 2000 NAES data, their contribution also focuses extensively on recent survey data that they collected in 2010 on opinions about the fairness of this seminal decision by the Supreme Court. What is quite interesting and important about their contribution is that they find that among those survey respondents who have an opinion about the decision, the same factors – race, partisanship, political ideology, and Bush approval – that ten years ago polarized opinions about the decision continue to divide Americans about *Bush v. Gore*. They also find that *Bush v. Gore* has lingering effects on Americans' views about the Court. These findings, of course, open the door to many other questions that Semet and her coauthors pose; in particular, whether *Bush v. Gore* is unique in its effects on American public opinion or whether these attitudes about the case arise from more general opinions about the Court.

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In the opening chapter in the next section of this volume, on the voting process, Charles Stewart III provides a synthetic overview of changes in election procedures over the past decade. Changes he discusses include access to ballots by the disabled, changes in ballot technology, and use of provisional ballots. Stewart views HAVA as the direct result of the Florida election controversy because, without that controversy and the deep flaws in election processes it revealed, there would never have been the pressure to do something about election technology that tended to frustrate voter intent. But Stewart, in the process of tracing the links between the 2002 passage of HAVA and the 2000 presidential election controversy, shows how *Bush v. Gore* served as an icebreaker (our word, not his), which once having opened the way to putting reform of election administration on the congressional agenda, allowed issues that were not of great moment in Florida to be key elements of the new legislation. While some parts of HAVA were directly responsive to problems that came up in Florida (e.g., funding for new election machines to replace punch cards, requirements to guarantee that voters not found on electoral rolls would have the opportunity to cast a provisional ballot that would be sequestered until a postelection-day determination of the voter's eligibility could be reached), what went into HAVA was affected by the agendas of various interest groups (e.g., lobbying for special ballot access provisions for the disabled) and by the particular agenda of key political actors (e.g., raising concerns about fraud at the polls by voters who were not legally entitled to vote – leading to language in HAVA about voter identification requirements).

It is commonly asserted that citizens and voters must have confidence in the outcome of an election so that the government taking power after the election has legitimacy. The Court in *Bush v. Gore* noted this, faulting Florida's contest provision by saying it was "not well calculated to sustain *the confidence that all citizens must have in the outcome of elections*" (emphasis added). However, while such normative concerns have often been stated about elections, prior to *Bush v. Gore* little attention was paid to the question of how confident voters and citizens were with the outcomes of elections, or with the process that produced those outcomes. Discussions about whether voters were confident in the American electoral process continued during the debates about HAVA, and that was about the time that scholars began to devise means to study voter confidence.⁵ Hasen (2005) used what little survey data existed on voter confidence, and Alvarez, Hall, and Llewellyn (2008a) developed innovative survey questions to measure voter confidence in the 2004 presidential election.

More recently, a healthy and vibrant literature has arisen about voter confidence, as Lonna Rae Atkeson summarizes in her contribution to this volume. Instead of looking primarily at demographic divisions in voter confidence and at whether balloting technologies are associated with differing levels of confidence (as has been the primary focus of the literature on voter confidence), Atkeson uses voter confidence to study opinions about photo identification and fraud, as well as the changing context of elections. Her study is built on

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innovative surveys conducted in New Mexico, part of a longer-term project evaluating election administration reform in that state. Atkeson's study shows how sophisticated the state of research has become in the short period of time since *Bush v. Gore* and also provides important substantive results that will factor into current debates about voter confidence, photo identification, and fraud. One of the most interesting of these findings is that many voters who claim to be familiar with election fraud are using the term *fraud* in a very broad way to include virtually any form of elite activity that is seen as violating the spirit of free and open elections. And the fraud they are referencing is not something they have experienced firsthand.

Next, Paul Gronke tackles another important issue that has arisen since *Bush v. Gore*: early voting. Prior to the 2000 presidential election, few states allowed for widespread in-person early voting or voting by mail; the few academic studies that existed in the literature at the time looked mainly at how such procedures affected turnout and the composition of the electorate.⁶ But, as Gronke notes, while the *Bush v. Gore* decision did not really bear on the question about where Americans would cast their ballots, whether in person on election day, in person before the election, or by mail, the 2000 election seems to stand as a watershed in the deployment of "convenience" voting innovations (defined loosely as efforts to make voting easier beyond election day voting). In Gronke's argument, *Bush v. Gore* is a catalytic event in the recent history of election administration; after the decision and the public attention this election generated about flaws in election administration, election administrators were much more willing to turn to new ideas like early voting. And there has been a slow but, in the longer run, dramatic increase in the proportion of the electorate voting elsewhere than in a polling station on election day, although clear regional differences appear in the likelihood that early voting provisions will be adopted.

In close elections, the side that is more efficacious in getting its voters to the polls will be advantaged. Even in elections that, on election day, are not so close, turnout issues might well affect election outcomes, which is why parties (and candidates) are so concerned about mobilizing the vote. But we also need to understand how election procedures themselves may affect turnout. In their chapter, Jan Leighley and Jonathan Nagler look at how absentee voting procedures, in particular the exact procedures associated with getting a ballot prior to an election, affect voter participation. The logic of their chapter is straightforward; they argue that absentee voting reforms should work like other reforms that lower the cost of voting (like election day voter registration). While they show that allowing easy absentee voting does increase participation, they do not find evidence in their analysis that permanent absentee voter registration procedures increase participation above and beyond the allowance of absentee voting, *per se*. However, they note that the data they use may lack the statistical power to distinguish an additional effect of making absentee voting status permanent.

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In the last four chapters of this volume, authors discuss unresolved issues and proposals for reform. In her contribution, Martha Kropf discusses problems of ballot design. Oddly enough, despite the evidence of significant ballot design problems in the 2000 presidential election in Florida (for example, the Palm Beach “butterfly ballot”), questions about ballot design were not a factor in *Bush v. Gore*, nor were they much of a focus of HAVA. Instead, issues of ballot design have been left to states and counties, and, as Kropf discusses, this is an issue where very little progress has been made. It is the case that scholars like Kropf and her colleagues have studied ballot design issues, and that entities like the U.S. Election Assistance Commission have issued guidance to election officials about ballot design. But in her chapter Kropf notes that despite this attention, the empirical evidence she presents shows little sign that ballot design has improved dramatically. This stands as an area in need of more research and policy-making attention.

Thad E. Hall and Kathleen Moore look in detail at another largely overlooked topic, the human side of election administration, where the rubber meets the road, namely poll workers. Earlier research by Hall has noted that poll workers are “street-level bureaucrats,” and in that capacity, they have been delegated substantial authority over the local conduct of elections (Alvarez and Hall, 2006; Hall, Monson, and Patterson, 2009). For example, research has shown that poll workers apply this discretion with regards to the application of voter identification procedures (Atkeson et al., 2010a). Here, Hall and Moore show that voter experience at the polls has a direct impact on voter confidence in the electoral process, identifying demographic characteristics of voters and specific aspects of the voting experience that affect confidence in election procedures. Hall and Moore conclude with suggestions for improving the training and performance of poll workers. This is but one important example of how better election administration could substantially improve a voter’s experience at the polls (see also Gerken, 2009).

Another relatively unresolved issue at the state and local levels concerns voter registration. Like with ballot design, the *Bush v. Gore* decision was silent about voter registration issues. But as many of the studies and reports published in the aftermath of the 2000 presidential election note, a variety of voter registration problems cropped up in 2000, and by some estimates problems with voter registration might have accounted for more lost votes than bad ballots or faulty voting machines in that election.⁷ These concerns led to many proposals for reform, and HAVA mandated two significant voter registration reforms: states were required to allow some form of provisional or “fail-safe” voting for those individuals who were not on the rolls, and states were also required to develop statewide, computerized voter registration databases.

R. Michael Alvarez and Thad E. Hall discuss these reforms in their contribution and argue that much work still needs to be done. In particular, they contend that states should consider modernization of their voter registration systems, to move those systems away from the current standard where voters need to

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be proactive to get on the voter rolls and for their information to stay current; rather, Alvarez and Hall argue that states should adopt more automatic and portable procedures so that eligible citizens who move to or within the state, who turn eighteen years of age, or who otherwise become eligible to vote are automatically added to the voter rolls in a way that makes them potentially eligible to vote in future elections. They argue that such reforms could minimize errors in voter registries that prevent people from participating or that lead them to have to cast provisional ballots; these reforms might also lead to higher levels of voter participation if implemented well. In their view, the primary effort for registering to vote should be moved from the voter to the government.

Khalilah Brown-Dean looks at one of the consequences of the initial decision by the framers to leave suffrage issues in the hands of the states, namely the tremendous variation in suffrage eligibility across the different states linked to state provisions for felon (and even more important, ex-felon) disenfranchisement/re-enfranchisement and reviews the unsuccessful legal challenges to felon disenfranchisement practices. Brown-Dean points out how both felon and ex-felon disenfranchisement affect African Americans to a much greater degree than they do non-Hispanic whites. The rules in place in many states are tantamount to a barrier, in that those who served time as a felon face a daunting task of returning to eligibility. She also looks at how felon disenfranchisement affects those of Spanish heritage and considers how various states have changed their laws affecting ex-felon voting. She argues that: "The automatic restoration of civil rights for eligible current and former felons, particularly where application for restoration is intended to be mostly perfunctory, should be sought as a crucial advancement over existing laws."

The focus of the chapters in this volume is either descriptive (e.g., identifying changes in election law over the past decade) or explanatory (e.g., using process tracing to look at the impact of the 2000 election controversy on subsequent changes in election administration, attempting via multivariate regression to assess the impact of particular election law changes on voter turnout), but it is impossible to write about elections without at least touching on central normative issues in democratic theory. In the remainder of this introduction we draw on the discussion at the 2011 conference that led to this volume to consider some of the more normative aspects of election administration.

A number of conference participants highlighted three of the frequently identified goals for an election:

- 1) An election must provide a winner (or winners).
- 2) The winner (or winners) should be known in a timely fashion and with finality.
- 3) An election contest should produce an outcome that is seen as legitimate both by the voters and by the losing candidate(s).

The first two of these seem relatively straightforward, and some variant of them is found in virtually everything written about election administration. For

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example, the 2001 Report of the Collins Center on the 2000 election in Florida commissioned by Governor Jeb Bush asserted that “Elections must achieve two competing goals: certainty (making every vote count accurately) and finality (ending elections so that governing can begin).”⁸

The third might seem equally straightforward and noncontroversial. Similarly as with the first two criteria, concern for the perceived public legitimacy of outcomes is found widely in the literature on election administration. For example, the 2001 Report of the Collins Center on the 2000 election in Florida asserted that “procedures for counting and challenging votes should be open, transparent, and easily documented to ensure public confidence in the results.”⁹ Related, the Report argued that “Voting methods ... should meet uniform statewide and national standards for fairness, reliability and equal protection of voting opportunity.”

But while these assertions seem completely unobjectionable, in determining what constitutes a legitimate outcome, we must recognize that legitimacy (a) involves a multiplicity of factors; (b) is in part based on perceptions about fairness (and the competence of election officials), which are subject to manipulation by elites; (c) may generate issues of trade-offs between legitimacy and the timely and unambiguous resolution of outcomes; and (d) is not synonymous with having an outcome that is identical to the preferences of the voters in the jurisdiction, or even an outcome that corresponds to the preferences of the voters who were actually at the polls if there are “legitimate” reasons why some preferences were not registered or had to be disregarded.¹⁰ In particular, despite the many facts that problematize the 2000 election result, recognizing that there are virtues to finality, and having a greater degree of trust in the U.S. Supreme Court as the appropriate agency to resolve the conflict than they had in any other state or federal entity, after *Bush v. Gore*, most voters found it reasonable to accept the declared winner of the 2000 contest in Florida as our forty-first president, although partisan affiliations were strongly linked to how Americans evaluated the merits of the Supreme Court’s decision.¹¹

Five additional and more specific criteria for judging election administration were also discussed at the conference:

- 4) Choose election procedures that minimize the number of invalid ballots.
- 5) Use methods that maximize the likelihood that voter intent will be reflected in the tally of votes cast.
- 6) Choose election procedures that will enhance the likelihood of full citizen participation.
- 7) Implement procedures that make voting easy and convenient.
- 8) Make citizens’ experience with elections one that reinforces confidence in the system and ensures that the process has a high degree of integrity.

The fourth criterion raised issues that were central to the Florida recounts because a number of votes were invalidated either because of over-vote (i.e.,

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voting for more candidates than were eligible to be elected) or because a vote was not recorded for reasons such as incompletely cleared punch card chads. The criterion of minimizing invalid ballots has been widely used to compare different election technologies and to argue for the superiority of one over another. It has most often been operationalized in terms of what is called the “residual vote,” that is, the difference between the number of voters who went to the polls on election day and the actual number of valid votes for a particular office, usually the highest office on the ballot, such as the presidency (see Stewart, Chapter 4, this volume).¹²

The fifth criterion is another one that became prominent in the Florida presidential contest in 2000. In the Collins Center 2001 Report on Florida elections, one normative goal asserted is that “Voting systems should be designed to determine voter intent, to the extent that is humanly possible.”¹³ Florida showed the potential difficulties in reading voter intent (the numerous varieties of hanging chad) and the mess that can be caused by confusing ballot formats such as the infamous “butterfly ballot” in Palm Beach that led to at least 3,000 ballots being recorded in ways that did not match the intent of the voter (Wand et al., 2001).

The sixth criterion, full citizen participation, is a staple of civic discourse and is used as a component of cross-national measures of a country’s degree of democratization (e.g., Vanhanen, 2004). Because the United States has very low turnout compared to most other established democracies (Franklin, 2004), it scores somewhat lower than most other established democracies on Vanhanen’s measure of functioning democracy. However, in a world where a book entitled *Don’t Vote, It Just Encourages the Bastards* (O’Rourke, 2010) can become a best-seller, citizen duty, on the one hand, and concerns about electorates being unrepresentative of the overall population, on the other, run up against voluntaristic notions of political participation. For example, when the Collins Center 2001 Report asserts in seemingly the strongest possible terms: “The goal is perfection: every registered voter should have the opportunity to vote and every vote should count,”¹⁴ the language of full participation and full ballot efficacy is couched in terms of those voters who are already registered, not in terms of eligible voters (much less potentially eligible voters, such as ex-felons).

The seventh criterion, ease of voting, is also widely supported. For example, the Collins Center 2001 Report claimed that “Voting should be a simple, convenient and friendly process that encourages each responsible citizen to express his or her choices.”¹⁵ While this goal, too, is admirable, it runs up against two realities: the blanket-sized ballot that characterizes many U.S. elections and the frequency of U.S. elections of diverse types – both features of elections rooted in a republican model of government that requires there be elected officials from a multiplicity of jurisdictions at all levels of government. Taking into account these two features of the United States in conjunction with our low turnout, A Wuffle once quipped about U.S. elections that “Nowhere else in the world do so few vote so often for so many” (personal communication, April 1, 1984).

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Finally, one cannot have a discussion about elections and election administration without mention of voter confidence and the integrity of elections (or the inverse, which is a discussion of election fraud). One of the chapters in this volume, by Lonna Rae Atkeson, focuses attention on voter confidence and the integrity of elections, and there has been some discussion in the research literature about voter confidence (see Alvarez, Hall, and Llewellyn, 2008a, for more discussion). This connection between concerns about fraud and voter confidence has been made recently in litigation (*Crawford v. Marion County*),¹⁶ and scholars have carried out significant research in recent years – spawned in part by questions arising from the *Bush v. Gore* controversy – about how to conceptualize and measure efforts to illegally manipulate election outcomes (Alvarez, Hall, and Hyde, 2008).

In looking at reforms of the voting process, once we moved beyond ballot technology, the recent public debate has largely been about fraud, for example, on issues such as the potential for computer hacking of electronic forms of ballots and even greater fears about the potential for manipulation of ballot tallies were there to be Internet voting, as well as the debate for the need for voter ID requirements at the polls as a means to combat alleged election fraud. Pursuing these issues is beyond the scope of the present volume because we wanted to focus on what has actually happened in the decade plus since *Bush v. Gore*, thus allowing our chapter authors to be primarily factual rather than speculative.

In particular, the volume editors opted against commissioning a chapter on photo ID (and similar) laws because issues connected to voter ID are very much in a state of flux, both legally and politically. Laws requiring voters to show identification are nothing new, but “they are becoming more numerous and more stringent” (Eversley, 2012). In 2011, for example, eight states (Alabama, Kansas, Mississippi, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin) either enacted new laws about proof of identification (usually photo ID) needed at the polling station or toughened existing laws (Eversley, 2012). At the time of writing (March 2012), although the new Wisconsin law mandating government-issued photo ID was implemented during the 2012 primary elections, its further use was enjoined by a state court (Smolka, 2012), while in South Carolina a new photo ID law was denied preclearance under Section 5 of the Voting Rights Act – a decision that is being appealed to a federal court. The U.S. Department of Justice is apparently considering preclearance denials for the new voter identification requirements in states such as Texas that fall under Section 5 coverage, with other legal challenges, for example, to the Kansas law requiring voters to provide proof of citizenship, which went into effect January 1, 2013, also likely (Eversley, 2012).

In Kansas, the secretary of state asserted that his office discovered thirty-two noncitizens on its voter rolls, out of 1.7 million registered voters. How many other voters who are not U.S. citizens are illegally registered in Kansas but remain undiscovered remains in dispute, as does the more general question

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about the magnitude of the illegal voting problem in the nation as a whole for which voter ID is the supposed remedy.¹⁷ Other questions, for example, about the magnitude of the burden on voters in obtaining an appropriate form of identification and remembering to bring it with them to the polls and about appropriate trade-offs between Type I and Type II errors (although provisional ballots are intended to deal with voters who are legally registered but were unable to prove that fact on election day), as well as about the claim that racial and ethnic minorities are discriminatorily burdened by the requirement to have government-issued photo ID, are all in dispute.

While we do not wish to directly address any of these questions about the potential for fraud, what we can say is that we believe that the much greater potential for fraud associated with mail-in ballots as opposed to voting at the polls has gone virtually unaddressed.¹⁸ Also, issues of other types of manipulation, for example, improper purging of eligible voters prior to an election, has not generally been a matter of public discussion, nor have allegations of voter intimidation.¹⁹ Thus, while dramatic progress has been made in some respects, for example, improved ballot recording technology, many issues in election administration remain unresolved ten years after *Bush v. Gore*.

GLOSSARY

For readers who may be new to the area of election administration and reform, in the pages that follow we provide a glossary of terminology.

absentee ballot – see **absentee voting**.

absentee voting – most commonly used as synonymous with any form of voting that does not require the voter to be physically present at a polling station in order to cast a ballot. In some jurisdictions, voters who wish to vote absentee must attest that they will not be physically present in the jurisdiction on the day of election or are incapacitated from coming to the polls. When voters are not required to give specific reasons why they wish to vote absentee this is sometimes referred to as *no-excuse absentee voting* or as *no-fault absentee voting*.

active voter registration system – the compilation of a “permanent” statewide database that places more of the onus on the state to seek out and register new entrants to the state and to adjust registration enrollment when information is provided about relocations within the state of previously registered voters (for a more detailed treatment, see Alvarez and Hall, Chapter 10, this volume). Also see **EDR**.

advance voting – see **early voting**.

ballot – used (rather confusingly) to refer either to the way choices are presented to the voters in a given election (see **ballot format**, **ballot design**), or as synonymous with *vote* (e.g., I cast my ballot for Boss Tweed).

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ballot design – the art and science of structuring ballot format so as to minimize voter confusion and to reduce the number of invalid or wrongly entered votes.

ballot format – the way ballot choices are displayed on the ballot, for example, by office, starting from the top of the ticket, with vertical columns indicating candidate names, and instructions for voting at the top of the ballot page. This term is also sometimes used to refer to the medium in which the ballot is presented to the voter, for example, paper, punch card, or electronic screen display, although the term *ballot technology* is more commonly used for this purpose.

ballot stuffing – adding fraudulently filled-in ballots so as to affect the election outcome. (NOTE: Ballot stuffing is but one of a bevy of fraudulent devices, including misreporting of ballot returns, destruction of ballots thought likely to be going to the “wrong” candidate or candidates, and failure to provide ballots to some of those eligible to vote, for example, by selectively removing subsets of the population from the registration lists.)

ballot technology – the medium in which the ballot is presented to the voter, for example, paper, punch card, electronic screen display, sometimes also called *election technology*, though the latter term has a broader connotation.

convenience voting – forms of voting that do not require the voter to go to the polls on one single election day, for example, absentee mail voting, **Internet voting**/absentee Internet voting, **early voting**.

covered jurisdiction – see Section 5.

disenfranchisement (also written as **disfranchisement**) – the removal of the right to vote, most commonly applied to those in prison or those who have been convicted of a felony, but also applied to someone convicted of treason. Re-enfranchisement rules vary widely by state in terms of how easy it is for those convicted of a felony offense who have completed their sentence to regain the right to vote after leaving prison or parole.

DRE – a direct recording electronic device, that is, a computer-based mode of recording ballot information/images, such as via a touch screen.

EAC – the Election Assistance Commission created by HAVA (q.v.) to serve as a clearinghouse for election research, but with no rule-making authority. (Under the Obama administration this agency has been impotent because Republicans wish to eliminate it.)

early voting – voting rules that allow a voter to cast a ballot at designated locations at times in advance of a single scheduled election day (often, however, used as synonymous with **convenience voting**, q.v.).

EDR – election day registration, that is, allowing voters to come to the polling place and to register the day of the election rather than having to preregister days or weeks in advance. Also see **active voter registration system**.

election administration – the art and science of conducting elections.

election contest – a challenge to the legality of procedures/outcomes in a given election. The contest phase of an election dispute normally comes after the

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- recount phase and is distinct from it. Typically, a contested election is a formal challenge to the outcome of an election – a charge that the declared winner is, for any number of possible reasons, not the true winner. A *recount* is a retabulation of the vote, simply another count (see Braden and Tucker, Chapter 1, this volume, for further clarification of the legal issues involved).
- election fraud** – a general term for any deliberately fraudulent attempt to corrupt the outcome or process of an election, with **ballot stuffing** (q.v.) one of the most blatant techniques used. (As noted in the Atkeson chapter in this volume, the public sometimes uses this term in a much more inclusive fashion to include “virtually any form of elite activity that is seen as violating the spirit of free and open elections.”)
- election law** – the body of state and federal law that regulates the conduct of campaigning, campaign finance, election technology, vote counting, recounts, registration procedures, suffrage eligibility, and so forth.
- election technology** – a general term used variously for the mode in which the ballot is presented to the voter, for example, paper, punch card, electronic screen display; the way ballots are tabulated, for example, by hand, electronically from computer input, electronically after scanning of ballots; and the mechanism(s) for validation of the vote count.
- ex-felon disenfranchisement** – see **disenfranchisement**.
- felon disenfranchisement** – see **disenfranchisement**.
- HAVA** – the Help America Vote Act, passed in 2002. It mandated major changes in election technology so as to minimize the likelihood that votes would not be recorded or would be recorded wrongly, required that procedures be put into place for **provisional ballots** (q.v.), and required the creation of statewide computerized registration data lists. Accompanying the passage of HAVA, Congress provided a substantial carrot of federal funds to motivate state compliance with its provisions.
- Internet voting** – voting involving ballots that are provided to voters electronically and returned to election officials electronically. (This form of voting may be done in such a fashion so as to eliminate the need for polling stations entirely, by handling the entire election electronically.)
- lever machine** – a machine, usually a bulky one, where a set of candidate names were visible at the same time on the front of the machine, and voters indicated their vote by moving a lever below (or to the side of) the candidate (s) they chose from an off position to an on position. In many of these machines a single larger lever allowed voters to cast a partisan ballot, returning a vote for all candidates of a given party for all partisan offices, that is, a **straight ticket vote**.
- mail ballot** – a form of **absentee voting** (q.v.) that involves ballots that are sent to voters and returned to election officials via the U.S. mail. (This form of voting may be done in such a fashion so as to eliminate the need for polling stations entirely, by handling the entire election via the mails.)
- minority vote dilution** – see **vote dilution**.

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no-excuse absentee voting (also known as **no fault absentee voting**) – see **absentee voting**.

NVRA – the National Voter Registration Act, passed by Congress in 1993, sought to ease the registration process for eligible voters by providing incentives for states to adopt **election day registration (EDR)** or to make registration forms available in state agencies.

optical scanning device – a device that scans paper or punch ballots to transfer the information on them to computer readable form.

overseas military ballots – **absentee ballots** (q.v.) cast by military personnel who were not resident in the United States on election day.

over-vote – a ballot that records a vote for more candidates than there are seats to be filled. Normally this results in an invalid ballot.

partisan polarization – at the voter level, a pattern in which Republican and Democratic identifiers differ substantially on candidate or ballot proposition choices, or on issue preferences, or on beliefs about ostensibly factual matters.

polarization – see **racial polarization**, **partisan polarization**.

polling place – the location in which voting takes place if voting is done in person (also known as *polling station* or *precinct*). When referring to the tabulation of votes from a given polling station these are often referred to as the *precinct-level results*.

polling station – see **polling place**.

precinct – see **polling place**.

preclearance review – see **Section 5**.

provisional ballot – a ballot given to a voter who is not shown as registered to vote in that polling station but who claims eligibility. Such ballots are segregated from those of voters known to be eligible, allowing time for the eligibility of the voter to be further investigated and, if the voter is found eligible, allowing his or her ballot to be counted.

punch card machine – a machine that records votes by having voters mechanically or physically punch through a paper ballot so as to leave a hole (punch) by the name of the candidate for whom the voter is casting a vote.

purging – the practice of removing from the voting rolls those individuals who are dead or who have not voted in recent elections and thus may have moved from the jurisdiction. This term is also used for the practice of removing from the voting rolls those individuals who are supposedly illegally on the rolls, for example, because they are ex-felons not entitled to vote or because they are noncitizens not entitled to vote.

racial polarization – at the voter level, a pattern in which non-Hispanic white and African American or Hispanic voters differ substantially on candidate or ballot proposition choices, or on issue preferences, or on beliefs about ostensibly factual matters.

Re-enfranchisement – see **disenfranchisement**.

residual vote – the difference between the number of voters who went to the polls on election day and the actual number of valid votes for a particular office, usually the highest office on the ballot. Also see **roll-off**, **under-vote**.

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recount – the legally mandated recount of ballots when the discrepancy between the first place candidate and the runner-up is below some predetermined threshold. A recount is distinct from an election controversy (q.v.).

roll-on – see roll-off.

roll-off – the drop off in the number of votes that are cast for offices below the top of the ticket. (Normally the highest number of votes is recorded for the most important office on the ballot, though there can be exceptions if that office is not highly contested.) Also see **residual vote**, **under-vote**.

rolls – see **voting rolls**.

Section 2 – this section of the VRA (q.v.) applies to all jurisdictions. Its most important provision sets standards for what constitutes “minority vote dilution” and allows individual plaintiffs in a protected class to challenge in federal courts election law provisions claimed to violate Section 2.

Section 5 – this section of the VRA (q.v.) applies only to jurisdictions found to have a history of practices that had a discriminatory purpose or effect. It had applied to sixteen states in whole or in part. “Covered jurisdictions,” that is, jurisdictions that come under Section 5 review by the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice (DOJ) must submit any changes in election procedures, from changes in legislative district boundaries down to the level of moving the location of a polling station, to the DOJ for what is called *preclearance*. Only if the change is agreed to (i.e., precleared) by the DOJ or by the Federal District Court for the District of Columbia can the jurisdiction implement the change in election practice. A recent Supreme Court decision has placed the preclearance provisions in limbo until Congress creates a new set of requirements for which states will be covered under Section 5 of the Act.

Section 5 preclearance review – see **Section 5**.

signature requirement – the requirement that, for a candidate to appear on a ballot, the candidate must demonstrate a minimum potential level of support, as signaled by the willingness of legal voters in the jurisdiction to sign a nominating petition on the candidate’s behalf. (Sometimes signature requirements are also distributional, for example, for statewide office, requiring a certain number of signatures in a certain number of counties.) In those states that allow popular initiatives, signature requirements also commonly apply before voters can place an initiative on the ballot.

straight ticket vote – a vote cast for all and only candidates of a given party.

top of the ticket – the highest office on the ballot. Normally ballots are formatted so that the first office on which voters are asked to cast their vote is the top of the ticket office. By convention, in the United States, federal offices are regarded as more important than state offices, and state offices more important than local offices.

under-vote – a ballot that fails to record a vote for the (or a) top of the ticket office even though it contains votes for offices lower on the ballot. (Sometimes this term is used even more generally to refer to any ballot that does not contain votes for all offices and ballot propositions for which the voter might

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have voted, but the first definition we give is the preferred one.) Also see **residual vote**, **roll-off**.

vote dilution – a term of art in election law referring to election practices that operate to minimize or cancel out the voting strength of minority groups designated by Congress as protected by the VRA (or protected directly under the “equal protection” clause of the Fourteenth Amendment).

voter confidence – in the Atkeson chapter (this volume) voter confidence is measured by a series of questions at different levels of government asking “How confident are you that your vote and all the votes at the XXXX level of government were counted as the voter(s) intended?”

voter identification requirement – a requirement that a voter at the polling station provide one of several specified forms of identification before being allowed to vote. States vary widely in their voter ID rules, and in 2012 some of the most stringent of these that had recently been adopted, often involving the requirement that voters present a picture ID from a state authority, were struck down in federal courts or their implementation delayed until voters have been given more time to familiarize themselves with the requirement and to take steps to satisfy it if they do not already possess a valid driver’s license or other official state ID.

voting rolls – the list of voters eligible to vote.

VRA – Voting Rights Act of 1965: the most important federal statute dealing with issues of racial and ethnic/linguistic representation. It has been subsequently amended several times and was reauthorized (with further changes) by Congress in 2006, to be in force for the next twenty-five years. Two of the most important provisions of the VRA are Section 5 (q.v.) and Section 2 (q.v.).

Notes

- 1 As shown in the National Opinion Research Center (partial) recount, <http://www.norc.org/projects/ByClient/Tribune+Publishing/>, sponsored by a number of leading news organizations (*New York Times*, *Wall Street Journal*, *Washington Post*, *Tribune Publishing*, *CNN*, *Associated Press*, *St. Petersburg Times*, and *Palm Beach Post*), just as, prior to election day, the Florida presidential result was regarded as “too close to call,” and the initial tallied results had the candidates only a hair’s breadth apart, so, even with time to count some 180,000 ballots that were not registered as valid – an admittedly incomplete sample of all the votes that might have been recounted – a good case can be made that the election remained “too close to call.” Had there been a complete statewide hand recount, some ballots that were not previously counted would have been awarded to one candidate or the other. But given the problem of ascertaining the intent of the voter, seemingly minor variations in what standards were used might have determined the winner of the recount. However, regardless of the controversy over how to count problematic ballots, one conclusion about the 2000 Florida presidential contest is clear, namely that a different result would also have been reached had any of the following counterfactuals