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TROUBLE COUNTING VOTES? COMPARING VOTING MECHANISMS IN THE UNITED STATES AND SELECTED OTHER COUNTRIES

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“The health of democracies, of whatever type and range, depends on a wretched technical detail: electoral procedure. All the rest is secondary.”¹

(Jose Ortega y Gasset, Spanish Philosopher)

INTRODUCTION

The primary functions of elections are to produce winners, decide who forms governments, and make the determination of winners and governments legitimate.² Legitimacy requires that governments conduct elections in a way that is objectively fair and widely perceived as fair. Therefore, a central motivation for non-partisan and uniform system of election administration is “that every citizen, every voter, be treated equally and have an equal opportunity to participate.”³

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1. JOSE ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 158 (1932). See also TOM STOPPARD, *JUMPERS* (1972) (“It’s not the voting that’s democracy; it’s the counting.”).

2. LOUIS MASSICOTTE, ANDRÉ BLAIS & ANTOINE YOSHINAKA, *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES* 9 (2004) (citing Richard Nadeau & André Blais, *Accepting the Election Outcome: The Effect of Participation on Losers’ Consent*, 23 *BRIT. J. POL. SCI.* 553 (1993)).

3. Jean-Pierre Kingsley, *The Administration of Canada’s Independent, Non-Partisan Approach*, 3 *ELECTION L.J.* 406, 411 n.3 (2004). The National Commission on Federal Election Reform described the election process this way:

[T]he American people should expect all levels of government to provide a democratic process that:

- Maintains an accurate list of citizens who are qualified to vote;
 - Encourages every eligible voter to participate effectively;
 - Uses equipment that reliably clarifies and registers the voter’s choices;
 - Handles close elections in a foreseeable and fair way;
 - Operates with equal effectiveness for every citizen and every community;
- and

The United States frequently appears to fall short of these goals.⁴ The highest profile example of this failure is the Florida vote in the 2000 presidential election.⁵ Michigan Representative John Conyers stated, “[o]ur broken electoral system was an accomplice to a magic trick that would make David Copperfield proud: millions of Americans went to vote on November 7, 2000, only to have their voice in our democracy disappear.”⁶

Problems in Florida spurred the passage of the Help America Vote Act (“HAVA”) in 2002.⁷ HAVA’s purpose was “to establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, [as well as] to establish minimum election administration

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- Reflects limited but responsible federal participation.

The National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* (2001), reprinted in 1 ELECTION L.J. 111, 114 (2002) [hereinafter National Commission].

4. See VotersUnite.org, Election Problem Log: 2004 Plus, <http://www.votersunite.org/electionproblems2004plus.asp> (last visited Oct. 16, 2007) (providing a comprehensive overview of problems reported in the media about U.S. elections beginning in 2004); see also Michael J. Pitts, *Heads or Tails? A Modest Proposal For Deciding Close Elections*, 39 CONN. L. REV. 739, 742-45 (2006) (listing numerous U.S. voting problems, including “New Mexico: 678 votes lost due to a programming error involving electronic voting machines in Rio Arriba County. Ohio: the use of punch-card voting systems resulted in the loss of thousands of votes. Pennsylvania: touch-screen voting machines in Mercer County malfunctioned. Iowa: one hundred voters in Ames were turned away from a polling place. Wisconsin: 200 felons voted illegally.”) (citations omitted); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1220-39 (2005) (enumerating problems in the 2004 presidential election); Lillie Coney, *A Call for Election Reform*, 7 J.L. & SOC. CHALLENGES 183, 183-84 (2005) (arguing that the failures of the U.S. election system necessitate reform). U.S. voting problems are hardly a recent phenomenon. See JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES vii (1934) (describing the administration of elections as “backward and generally unsatisfactory”) (available for download at http://vote.nist.gov/election_admin.htm).

5. For some of the voluminous materials produced on the issues in Florida, see ALAN M. DERSHOWITZ, SUPREME INJUSTICE (2001); BUSH V. GORE: THE COURT CASES AND THE COMMENTARY (E.J. Dionne, Jr. & William Kristol eds., 2001); ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY (2001); and RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001). See also Allan J. Lichtman, *What Really Happened in Florida’s 2000 Presidential Election*, 32 J. LEGAL STUD. 221, 221 (2003) (providing a statistical analysis that concluded there were “wide racial disparities in ballot rejection rates” in Florida’s 2000 presidential election).

6. Press Release, Rep. John Conyers Jr., Conyers Releases First Fifty-State Survey of Election Irregularities (Aug. 20, 2001), available at <http://www.house.gov/conyers/pr082001.htm>.

7. Help America Vote Act (HAVA) of 2002, Pub. L. No. 107-252, 116 Stat. 1666, available at http://www.usdoj.gov/crt/voting/hava/HAVA_2002.html (codified at 42 U.S.C. §§ 15301-15545 (Supp. II 2002)). Before HAVA, the federal government did not underwrite states’ expenses for elections to federal offices.

standards for States and units of local government with responsibility for the administration of Federal elections”⁸

Notwithstanding the improvements HAVA promised, there were many voting controversies in the 2004 election.⁹ From disenfranchisement in Florida, to eight-hour poll lineups in Ohio, problems marred the elections.¹⁰ As Richard L. Hasen observed, “[i]n the 2004 presidential election, the United States came much closer to electoral meltdown, violence in the streets, and constitutional crisis than most people realize.”¹¹ The 2006 midterm elections also had “plenty of problems” including lost votes, malfunctioning machines and absent poll workers.¹²

8. HAVA (Preamble), Pub. L. No. 107-252, 116 Stat. 1666. *See also* HAVA § 301(a)(5), 42 U.S.C. § 15481(a)(5) (providing general voting requirements, including equipment error guidelines); HAVA § 301(a)(6); 42 U.S.C. § 15481(a)(6) (requiring that each state define in advance what qualifies as a vote). Congress’ motives underlying the passage of HAVA are discussed in Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act’s Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 133, 159-66 (2006).

9. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 941 (2005) (arguing that “[t]he very basis of our democratic system of government—the use of free and fair elections for the peaceful transfer of power from one administration to the next—was called into question by concerns over the rules for the casting and counting of votes and frequent, if often unwarranted, allegations of fraud”); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 697 (2006) (“The 2004 election showed that the work of election reform is far from complete, and studies conducted since then reveal that substantial problems remain.”). *See* RON BAIMAN, KATHY DOPP, STEVEN F. FREEMAN, BRIAN JOINER, VICTORIA LOVEGREN, JOSH MITTELDORF, CAMPBELL B. READ, RICHARD G. SHEEHAN, JOHNATHAN SIMON, FRANK STENGER, PAUL F. VELLEMAN & BRUCE O’DELL, ANALYSIS OF THE 2004 PRESIDENTIAL ELECTION EXIT POLL DISCREPANCIES (2005), http://electionarchive.org/ucvAnalysis/US/Exit_Polls_2004_Mitofsky-Edison.pdf (providing a scientific analysis); *see also* MICHAEL KEEFER, EVIDENCE OF ELECTORAL FRAUD IN THE 2004 U.S. PRESIDENTIAL ELECTION: A READING LIST (2004), http://opednews.com/keefe_111504_readings.htm (listing a “wide range of readings on the subject of the integrity—or the lack of integrity—of the [2004] U.S. presidential election”).

10. Hasen, *supra* note 9, at 944 (arguing that many of the responses to the problems in Florida in 2000 have “made things worse”). It is also noteworthy that the rate of election litigation “increased dramatically in the 2004 election.” Charles Anthony Smith & Christopher Shortell, *The Suits that Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251, 251 (2007). *See also* Tova Andrea Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 SEATTLE U. L. REV. 353, 358 (2006) (noting many “troubling developments, ranging from simple human errors to prosecutable felony violations of federal law”).

11. Hasen, *supra* note 9, at 938.

12. ELECTIONLINE.ORG, BRIEFING: THE 2006 ELECTION 1 (2006), <http://www.electionline.org/Portals/1/Publications/EB15.briefing.pdf>. Electionline, a non-partisan organization, concluded that the 2006 elections had been successful with respect to identifying winners but had failed in terms of “the individual interest of having each voter’s voice heard.” *Id.* at 4.

Obviously, however, the United States is not the only developed Western democracy. Most of these other countries do not seem to experience the kind of problems seen in recent years with U.S. elections. This raises the question whether these countries have not only different, but perhaps better approaches to critical election issues.¹³ Unfortunately, the “comparative study of the conduct of elections . . . has been largely neglected.”¹⁴

This Article provides a brief overview of some of the major election problems experienced in the United States and analyzes varying approaches taken by other countries facing similar challenges (notably Canada, Germany, and several other European Union (“EU”) Member States). Additionally this article will discuss international best practice standards.¹⁵ Overall, the United States could benefit from the consideration and adoption of some of these approaches.

13. Of course, there are many differences even between developed Western democracies, and processes that work well in one country will not necessarily travel well to other countries. Michael Maley, for example, has focused on problems in transplanting the regulatory framework of elections from one country to another. See Michael Maley, *Transplanting Election Regulation*, 2 ELECTION L.J. 479 (2003) (focusing on problems with the transfer of election law to developing countries). Although some of Michael Maley’s points are inapplicable here—by contrast to at least some developing countries, the United States does have a strong commitment to democracy; stable, established political parties; well developed institutions; and a predominantly educated electorate—others are relevant. *Id.* at 486-91. For example, sources of election regulation and “unenforceable but well-understood conventions” vary between the United States and other industrialized democracies. *Id.* at 481-84. See also Andrew C. Geddis, *It’s a Game that Anyone Can Play: Election Laws Around the World*, 4 ELECTION L.J. 57, 58 (2005) (“It may be that attempts to draw lessons from the divergent answers given by two or more countries to a common problem of (say) electoral regulation will founder on the fact that the background social conditions in each nation are just too different to allow for any meaningful evaluation.”); DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* (1st ed. 1967) (supporting the idea of seeking inspiration in other systems; providing critical comments); Arend Lijphart, *The Political Consequences of Electoral Laws, 1945-85*, 84 AM. POL. SCI. REV. 481 (1990) (providing critical comments on RAE, *supra*); see generally, EDGARDO BUSCAGLIA & WILLIAM RATCLIFF, *LEGAL AND ECONOMIC INTEGRATION: THE CASES FOR AND AGAINST LEGAL TRANSPLANTS* (2000); Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. OF COMP. L. 163 (2003).

14. MASSICOTTE ET AL., *supra* note 2, at 13. A notable exception is Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECTION L.J. 584 (2004) (identifying possible electoral system reforms). See also Global Initiative to Enfranchise People with Disabilities: Laws and Regulations, http://www.electionaccess.org/subpages/Laws_Regulations.htm (last visited Oct. 17, 2007) (listing “election laws, constitutions and regulations of almost every country and territory in the world” aimed at achieving the participation of disabled citizens in elections).

15. This article does not examine some of the problems that appear relatively specific to the United States. Campaign finance, for example, is fundamentally important to the fairness of elections. However, other countries do not face the restrictions imposed by the First Amendment. See MASSICOTTE ET AL., *supra* note 2 (giving a thorough descriptive account of the electoral processes in sixty-three democracies); see also AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN*

Clearly, countries can improve their electoral systems. Canada's electoral system provides a good case study. In the nineteenth century, Canada's electoral system violated basic principles of fairness. An authoritative study observed that "an election during the first decades after 1867 was a rough game whose rules allowed ample scope for cheating."¹⁶ Yet since that time, Canada has slowly improved its electoral system to the point where it can make very strong claims to satisfy the primary election functions.¹⁷ Important developments included the introduction of the secret ballot in 1874, which reduced the corruption associated with oral voting, and the establishment of the Chief Electoral Officer position in 1920.¹⁸

Of course, we recognize that there are important differences between the United States and Canada. The legal framework governing elections in Canada consists of the written constitution, unwritten conventions (non-legal rules unenforceable in courts), statutes, and common law.¹⁹ The right to vote in Canada is more firmly established than in the United States. Indeed, the United States Supreme Court's majority opinion in *Bush v. Gore* affirmed that Article II of the U.S. Constitution does not ensure a right to vote.²⁰ In contrast, Canada's *Charter of Rights and Freedoms* ("Charter") guarantees that "[e]very citizen has the right to vote in an election of members of the House of Commons or of a [provincial] legislative assembly . . ." ²¹ This right, like all the rights guaranteed in the *Charter*, is subject only to "rea-

TWENTY-ONE COUNTRIES (1984) (discussing the strengths and weaknesses of majoritarian versus proportionate voting systems).

16. NORMAN WARD, *THE CANADIAN HOUSE OF COMMONS: REPRESENTATION* 248 (2nd ed. 1963); Worth Robert Miller, *Harrison County Methods: Election Fraud in Late Nineteenth Century Texas*, 7 *LOCUS: REGIONAL AND LOCAL HISTORY* 111 (1995), available at http://clio.missouristate.edu/wrmiller/Populism/texts/harrison_county_methods.htm (stating the United States also had problems in the 19th Century, and estimated that nearly 30% of votes were fraudulent in some United States jurisdictions). Miller further noted that "[f]raud also played a prominent role in innumerable Democratic victories in Congressional and local races, as well." Miller, *supra* (citations omitted).

17. The following discussion deals with Canadian federal elections, which are administered by the federal government. In general, similar claims about fairness can be made of provincial elections.

18. JOHN C. COURTNEY, *ELECTIONS* 114 (2004).

19. J. PATRICK BOYER, *POLITICAL RIGHTS: THE LEGAL FRAMEWORK OF ELECTIONS IN CANADA* 1-2 (1981). See generally, Maley, *supra* note 13, at 481-83 (describing sources of election regulation).

20. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. U.S. CONST. art. II, § 1."); see also John Anderson, *What's Right and Wrong With Democracy in the United States*, 3 *ELECTION L.J.* 404, 404 (2004) (suggesting a 28th Amendment to the U.S. Constitution guaranteeing the right to vote may now be appropriate).

21. Constitution Act, 1982, pt. I, § 1, as reprinted in R.S.C., No. 1 (providing that the rights set forth later in the document, including the right to vote, are "subject only

sonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” as indicated in section 1 of the *Charter*.²² Consequently, the right to vote among adult citizens is now virtually universal.²³

ADMINISTRATION OF ELECTIONS

The United States, in effect, places authority in the hands of roughly “13,000 sovereign counties and municipalities,” each responsible for election administration.²⁴ The separate counties and municipalities make separate decisions about ballot design, the choice of voting technology, and the methods for counting votes, interpreting disputed ballots, and then reporting the results to state offices.²⁵ Thus demonstrating why “[t]here is probably no other phase of public administration in the United States which is so badly managed as the conduct of elections.”²⁶ In Canada, uniformity is assured because

to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”). See COURTNEY, *supra* note 18, at 36-38.

22. See Jennifer Smith, *The Franchise and Theories of Representative Government*, in *DEMOCRATIC RIGHTS AND ELECTORAL REFORM IN CANADA* 5 (Michael Cassidy ed., 1991).

23. For a very accessible history of the franchise in Canada, see CBC Archives, *Voting in Canada: How a Privilege Became a Right*, http://archives.cbc.ca/IDD-1-73-1450/politics_economy/voting_rights/ (last visited Jan. 31, 2008) (describing how women, Asian-Canadians, the mentally disabled, prisoners, and the homeless obtained the right to vote).

24. See Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 *ELECTION L.J.* 584 (2004) (discussing problems with the 2000 elections and observing that the “U.S. system was ‘dysfunctionally decentralized’”).

25. See Robert A. Pastor, *Introduction: The State of Democracy in North America*, 3 *ELECTION L.J.* 396 (2004); see also KAREN O’CONNOR & LARRY J. SABATO, *AMERICAN GOVERNMENT: CONTINUITY AND CHANGE* 505 (2006 ed., Pearson Longman, 2006) (indicating that there are “over 41,000 voting localities”); LOUIS MASSICOTTE, ANDRÉ BLAIS & ANTOINE YOSHINAKA, *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES* 11 (2004) (stating that a broad survey of “democratic” systems notes that only the United States and Switzerland have sub-national administration of national elections); 3 U.S.C. § 1 (2000). One of the few aspects of voting (in presidential elections) in the United States that is uniform is the date, i.e. the first Tuesday after the first Monday in November. Many have argued that having only one day—and a regular work day for that matter—disenfranchises many eligible voters who cite “scheduling conflicts” and/or “being too busy” as the main reasons for not making use of their right to vote. This places the United States among the countries in the world with the lowest voter turnout. See also *Why Tuesday? Fixing Our Voting System, One Question at a Time*, www.whytuesday.org (last visited Jan. 2, 2008); *The National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process* (2001), reprinted in 1 *ELECTION L.J.* 111, 116 (2002) [hereinafter National Commission] (recommending that congressional elections should be held on a national holiday).

26. Ray Martinez III, *Greater Impartiality in Election Administration: Prudent Steps Toward Improving Voter Confidence*, 5 *ELECTION L.J.* 235, 240 (2006) (concluding “the truth of the matter is that the whole administration—organization, laws, methods and procedures, and records—are, for most states, quite obsolete. The whole system, including the election laws, requires a thorough revision and improvement”).

Elections Canada, an agency the Chief Electoral Officer oversees, centrally manages these functions.

Moreover, unlike the secretaries of state who oversee U.S. elections, the Chief Electoral Officer and Elections Canada staff are public servants independent from partisan politicians and are given the task of ensuring that elections are administered fairly.²⁷ Elections Canada's functions include implementing and enforcing the relevant laws, monitoring election spending, maintaining voters lists, training returning officers who oversee elections in specific constituencies, and assisting commissioners responsible for drawing electoral boundaries. In order to maintain a non-partisan agency, the Chief Electoral Officer and the chief's assistant are not permitted to vote in federal elections.²⁸ The appointments have, in practice, been approved by all parties in Parliament. The procedures for dismissing the Chief Electoral Officer are as difficult as those for a judge; thus assuring their independence.²⁹

However, the fact that Canada has a uniform nationwide system for the mechanics of elections goes only part way to explaining the problems in the United States: it facilitates fairer elections but is not sufficient. In Germany, another federal state, we find the co-existence of a multitude of regulatory and administrative regimes. Each of the sixteen states that comprise the Federal Republic of Germany maintains its own election laws for state-wide, regional, and municipal elections. Differences in the state election laws can be substantial, including whether or not elections are entirely paper-based, entirely by voting machines, or a mix of both methods. However, the national elections—federal elections and the elections to the European Parliament which are also held nationwide—are governed by uniform laws and procedures.³⁰ Moreover, similar to Canada, the nationwide elec-

27. Jean-Pierre Kingsley, *The Administration of Canada's Independent, Non-Partisan Approach*, 3 ELECTION L.J. 406, 406 (2004).

28. See Jennifer Smith, *The Franchise and Theories of Representative Government*, in DEMOCRATIC RIGHTS AND ELECTORAL REFORM IN CANADA 6 (Michael Cassidy ed., 1991); Cecile Boucher, *Administration and Enforcement of Electoral Legislation in Canada*, in DEMOCRATIC RIGHTS AND ELECTORAL REFORM IN CANADA (Michael Cassidy ed., 1991).

29. MASSICOTTE ET AL., *supra* note 25, at 97; Kingsley, *supra* note 27, at 406.

30. See generally GRUNDGESETZ [GG] [Constitution], available at <http://www.bundeswahlleiter.de/bundestagswahl2005/downloads/ggauszug.pdf> (specifically, see Article 9 (freedom of association), Article 21 (political parties), Article 38 (principles of free and democratic elections), Article 39 (foundations of the Federal Parliament), and Article 41 (procedure in case of challenges of election results)). See also Bundeswahlgesetz [BWG] [Federal Election Law], July 23, 1993, BGBl. I at 1594, 1288, last amended by Gesetz, Mar. 11, 2005, BGBl. I at 674 (F.R.G.), available at http://www.bundeswahlleiter.de/bundestagswahl2005/downloads/bwg_standmaerz05.pdf (covering the electoral system); Bundeswahlordnung [BWO] [Federal Election Regulation], Apr. 19, 2002, BGBl. I at 1376, last amended by Verordnung, June 30, 2005, BGBl. I at 1951 (F.R.G.),

tions to the Federal Parliament (Bundestag) and to the European Parliament are overseen and organized by one independent officer (Bundeswahlleiter) and the independent officer's staff of non-partisan public servants. Similar administrative structures exist within the several states with the offices of the Landeswahlleiter.³¹

THE RIGHT TO VOTE

Democracy was a concern to few in pre-confederation Canada.³² For many decades after confederation, Canada saw many limits on the right to vote in various ways that would be unacceptable, and indeed unimaginable, from a contemporary perspective. When Canada became independent in 1867, the franchise was restricted to men at least twenty-one years of age who owned property. In addition to qualifications based on gender and property ownership, there have been various restrictions on the voting rights of aboriginals and Canadians of Asian origin. Voting rights were also somewhat uneven, as eligibility rules varied from province to province and property qualifications varied within provinces from 1867 to 1885 and again after 1898. Canada's 1885 reforms emphasized property qualifications and allowed some owners to vote more than once in different constituencies.³³ Inconsistencies between provinces remained along with dubious restrictions.

available at <http://www.bundeswahlleiter.de/bundestagswahl2005/downloads/bundeswo.pdf> (dealing with voter lists, absentee ballots, etc.); Parteiengesetz [PartG] [Federal Law on Political Parties], Jan. 31, 1994, BGBl. I at 149, last amended by Gesetzes, Dec. 22, 2004, BGBl. at 3673, art. 2 (F.R.G.), *available at* <http://www.bundeswahlleiter.de/bundestagswahl2005/downloads/parteieng.pdf> (addressing political party functioning, internal organization, public financing, etc.); Wahlprüfungsgesetz [WPG] [Federal Law on Scrutiny of Elections], Apr. 28, 1995, BGBl. III at 582, art. 1, § 111-2 (F.R.G.), *available at* <http://www.bundeswahlleiter.de/bundestagswahl2005/downloads/wahlpruefg.pdf> (describing procedures for determining the validity of an election); Bundeswahlgeräteverordnung [BWahlGV] [Federal Regulation on Voting Machines], Sept. 3, 1975, BGBl. I at 2459, last amended by Verordnung, Apr. 20, 1999, BGBl. I at 749, art. 1 (F.R.G.), *available at* http://www.bundeswahlleiter.de/bundestagswahl2005/downloads/BWahlGV_Stand20041999_GESAMT.pdf (regulating electronic voting machines and software). Unofficial translations into English of Germany's Federal Constitution and Federal Election Law can be found at German Law Archive, <http://www.iuscomp.org/gla/> (last visited Dec. 30, 2007).

31. *See, e.g.* Deutsche Wahlgesetze, <http://www.wahlrecht.de/gesetze.htm> (last visited Nov. 28, 2007) (providing links to the legislative provisions on the state, regional, and municipal level and the offices of the "Landeswahlleiter" in the sixteen states).

32. J. PATRICK BOYER, *POLITICAL RIGHTS: THE LEGAL FRAMEWORK OF ELECTIONS IN CANADA* 3 (1981) (citation omitted).

33. J. PATRICK BOYER, *1 ELECTION LAW IN CANADA: THE LAW AND PROCEDURE OF FEDERAL, PROVINCIAL AND TERRITORIAL ELECTIONS* 385-86 (1987); NORMAN WARD, *THE CANADIAN HOUSE OF COMMONS: REPRESENTATION* 216-17, 220 (2nd ed. 1963); CANADIAN GOVERNMENT, *A HISTORY OF THE VOTE IN CANADA* 45 (1997).

Full federal control of voting rights in federal elections was not established until the Dominion Elections Act of 1920.³⁴ Likewise, in Germany, the constitution did not guarantee the right to vote in federal elections until 1949, and currently the Federal Electoral Law specifies under what circumstances a person loses the right to vote.³⁵

An unusually partisan treatment of voting rights in Canada occurred when the Canadian government altered eligibility rules in order to bolster the wartime government's prospects of re-election in 1917. The government enfranchised women who were related to men fighting in World War I, and servicemen's votes were taken by appointees of the government; at the same time, the government stripped conscientious objectors of their voting rights, along with British subjects born in, or who spoke the language of, a hostile country.³⁶ A more recent instance of the franchise growing more restrictive occurred in 1975 when the right to vote was taken from non-citizens who were British subjects.³⁷

In other respects, Canada has gradually moved toward a wider franchise, granting voting rights to women in 1918, and eliminating restrictions based on property, religion (*e.g.* restrictions affecting Doukhobors' voting rights until 1960) and race (*e.g.* the right to vote has been denied at certain times to Japanese Canadians and aboriginal people).³⁸ In addition, Canada lowered the voting age from twenty-one to eighteen in 1970. More recently, following court rulings based on section 3 of the *Charter*, voting rights have expanded to include people with mental disabilities and, in several stages, to prisoners.³⁹ Unlike Canada, most U.S. states deny voting rights to

34. TERENCE H. QUALTER, *THE ELECTION PROCESS IN CANADA* 3 (1970). See also WARD, *supra* note 33, at 214.

35. See GRUNDGESETZ [GG] [Constitution] art. 38, §2 ("Anyone who has attained the age of eighteen years is entitled to vote; anyone who has attained majority is eligible for election."); Grundgesetz [GG] [Constitution] art. 13 [Federal Electoral Law] ("A person shall be disqualified from voting if (1) he or she is not eligible to vote owing to a judicial decision, (2) a custodian has been appointed not only through a restraining order to attend to all his or her affairs; this also applies when the custodian's sphere of duties does not include the affairs set forth in Article 1896(4) and Article 1905 of the Civil Code, (3) he or she is accommodated in a psychiatric hospital under an order pursuant to Article 63 of the Penal Code.")

36. BOYER, *supra* note 32, at 132-33; WARD, *supra* note 33, at 179-81, 226-27; JOHN C. COURTNEY, *ELECTIONS* 115 (2004).

37. Munroe Eagles, *The Franchise and Political Participation in Canada*, in *CANADIAN PARTIES IN TRANSITION* 307, 311 (A. Brian Tanguay and Alain-G. Gagnon eds., 2nd ed., Scarborough: Nelson, 1996); BOYER, *supra* note 32, at 314-15.

38. COURTNEY, *supra* note 36, at 34 (women); BOYER, *supra* note 32, at 134 (religion); WARD, *supra* note 33, at 230 (race).

39. See *Charter of Rights and Freedoms* § 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (stating that "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."); Canadian

prisoners, and seven states do not automatically restore prisoner voting rights after a sentence is served.⁴⁰ In Canada, the only remaining significant restriction applies to people who have not yet turned eighteen, and there have even been proposals to reduce the voting age to sixteen.⁴¹ The nationwide uniformity in modern Canada and Germany contrasts with the United States, where the right to vote in U.S. national elections has always been determined by states, which are modestly constrained by only a few national requirements in the Bill of Rights such as Amendments XIX, XXIV, and XXVI.⁴²

VOTER LISTS AND REGISTRATION

According to a 2001 report by The CalTech/MIT Voting Technology Project, the “Census Bureau estimated that in the 2000 election

Disability Rights Council v. Can., [1988] 3 F.C. 622; *Sauvé v. Canada*, [2002] 3 S.C.R. 519. Canada is one of four countries which allows mentally challenged people to vote. See LOUIS MASSICOTTE, ANDRÉ BLAIS & ANTOINE YOSHINAKA, *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES* 27 (2004) (surveying sixty-three countries).

40. ANDREW GUMBEL, *STEAL THIS VOTE: DIRTY ELECTIONS AND THE ROTTEN HISTORY OF DEMOCRACY IN AMERICA* 47 (2005); COURTNEY, *supra* note 36, at 38 (citing Christian R. Grose & Antoine Yoshinaka, *Electoral Institutions and Voter Participation: The Effect of Felon Disenfranchisement Laws on Voter Turnout in the U.S. Southern States* (2002) (paper presented at the Annual Meeting of the Canadian Political Science Association)). See Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 *ELECTION L.J.* 584, n.3 (2004) (estimating that if America allowed felons to vote as Canada does, four million people would be affected); *Making Votes Count: Felons and the Right to Vote*, *N.Y. TIMES*, July 11, 2004, at A12 (reporting that nearly five million Americans are ineligible to vote due to prior felony convictions); see also The National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* (2001), reprinted in 1 *ELECTION L.J.* 111, 117 (2002) [hereinafter National Commission] (recommending that felons should be permitted to vote after serving their sentence).

41. The only other restrictions on the right to vote in Canada affect the Chief Electoral Officer and the Assistant Chief Electoral Officer. ALAIN PELLETIER (WITH THE ASSISTANCE OF MARIE-EVE POULIN, NATHALIE NYE, TIM MOWNEY, MARC TASCHEREAU, JAIME ALIAGA, GALLO, CHRISTINE MOREAU-TREMBLAY, JEAN-SEBASTIEN BARGIEL & MARTIN LAVOIE), *COMPENDIUM OF ELECTION ADMINISTRATION IN CANADA: A COMPARATIVE OVERVIEW*, tbl. Part.D.3 (2002), http://www.elections.ca/loi/com2002/comp2002_e.pdf. The United States has also seen a discussion of a lowering of the voting age to sixteen. See Pam Belluck, *Sixteen Candles, but Few Blazing a Trail to the Ballot Box*, *N.Y. TIMES*, Aug. 26, 2007 at 3 (reporting that countries such as Austria allow voting at age sixteen).

42. Under the Constitution, Congress may regulate federal elections. See U.S. CONST. art. I, § 4, cl. 1 (stating that although each State’s legislature shall prescribe the “Times, Places, and Manner of Holding Elections for Senators and Representatives . . . the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.”); see also U.S. CONST. art II, § 1, cl. 3 (declaring “the Congress may determine the Time of chusing the Electors and the Day on which they shall give their Votes”). The Fourteenth and Fifteenth Amendments are also used to permit Congress to regulate state or local elections on equal protection and due process grounds. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *S. C. v. Katzenback*, 383 U.S. 301 (1966).

three million *registered* voters did not vote because of problems with their registration.”⁴³ Given this problem and the related problem of eligible but unregistered voters, HAVA requires that

[e]ach state . . . shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State⁴⁴

HAVA’s success remains uncertain and does not inspire confidence.⁴⁵ In 2005, Hasen wrote, “[n]o rational election administrator would design the current hyperfederalized and non-intuitive system of voter registration.”⁴⁶ There are two prime risks if the voter registration system is not working: eligible voters may be denied the right to vote (vote denial) or may vote more than once (vote dilution). With respect to the first risk, electoral jurisdictions frequently have difficult, non-intuitive “rules for registration – from how to fill out the forms, to where the forms are available, to what information must be put on the forms, to the deadlines for registration.”⁴⁷ In addition, there may be technical requirements, such as the allowable weight of the paper or the need for voters to provide duplicate information.⁴⁸

43. CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS AND WHAT COULD BE 27 (2001), http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf.

44. Help America Vote Act (HAVA) of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1708 (codified at 42 U.S.C. §§ 15301-15545 (Supp. II 2002)). HAVA also attempts to solve some of the registration problems by giving potentially eligible voters the right to cast a provisional ballot. HAVA § 302, 42 U.S.C. §15482.

45. See, e.g., Lillie Coney, *A Call for Election Reform*, 7 J.L. & SOC. CHALLENGES 183, 185 (2005) (“Poor administration of the voter registration lists, inadequate training of election workers, poorly implemented third party registration efforts, abuse of public access to voter registration data, and bogus felony purge lists, all contributed to the disenfranchisement of millions of American citizens in 2004.”).

46. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 964 (2005). See also Gabrielle B. Ruda, *Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act*, 31 FORDHAM URB. L.J. 235 (2003).

47. Hasen, *supra* note 46, at 964. At one time these difficult requirements were justified on the basis of limiting those people who were eligible to vote. See *id.* Further, “[t]hose who overcome the annual hurdle of registering at a time remote to the fall elections will more likely be better informed and have greater capabilities of making an intelligent choice than those who do not care enough to register.” *Id.* (quoting the Texas Attorney General in *Beare v. Smith*, 321 F. Supp. 1100, 1106 (S.D. Tex. 1971)). See also Coney, *supra* note 45, at 190 (stating that “[a]mong the registration form problems faced by voters in 2004 who wished to register to vote included state applications that were cluttered with text, asked the same question multiple times, and challenged a voter’s right to privacy while the form was in transit to the registrar’s office”).

48. Hasen, *supra* note 46, at 964-65.

Lillie Coney goes so far as to suggest that “[t]he key to free and fair elections may lie in the design of voter registration forms.”⁴⁹

In addition, problems arise in the creation of voter lists. Private contractors are often involved in the creation of voter lists, and political parties may pay them by the name.⁵⁰ Eligible voters might effectively lose the ability to vote if political groups destroy the registration forms of those predicted to vote for the other party.⁵¹ Moreover, this “bounty hunter” system likely encourages voter fraud, as with the registration forms submitted with names of fictional characters, like Mary Poppins, Dick Tracy, or Jive Turkey Sr., or with eligible voters registering (and then voting) in multiple locations.⁵² There certainly were numerous examples in the 2004 election of people registered in multiple locations. In Indiana, for example, thousands of voters were registered incorrectly, including both deceased individuals and individuals registered in multiple counties.⁵³ There were also numerous instances of problems with voter lists. For example, voter registration lists in counties in Ohio and West Virginia had higher numbers of registered voters than the estimated population of voting age residents in the counties.⁵⁴

Even if voters have correctly registered to vote, states may still remove (“purge”) their names from the voter lists.⁵⁵ Many states “compile their purge lists without reference to any legislative standards whatsoever, while half the states surveyed do so using only an

49. Coney, *supra* note 45, at 190.

50. NATIONAL ASSOCIATION OF ELECTION OFFICIALS, ELECTION 2004: REVIEW AND RECOMMENDATIONS BY THE NATION'S ELECTION ADMINISTRATORS 12-13 (2005), <http://www.electioncenter.org/documents/Task%20Force%20Final%20PDF.pdf>. See also NATIONAL ASSOCIATION OF ELECTION OFFICIALS, INTRODUCTION & PURPOSE OF THE NATIONAL TASK FORCE (2001), <http://www.electioncenter.org/publications/electionrefortreport2001.pdf> (describing problems with the United States voter registration system and recommending solutions).

51. Hasen, *supra* note 46, at 967. See also Coney, *supra* note 45, at 195 (reporting examples of voter registration forms being discarded or not being sent to the government).

52. Hasen, *supra* note 46, at 967. See also Coney, *supra* note 45, at 195, 197 (discussing third party and invalid voter registrations). Multiple registration, by itself, is not necessarily evidence of voter fraud. *Id.* at 187-88.

53. John Strauss & Mark Nichols, *11,214 on Rolls in 2 Counties*, THE INDIANAPOLIS STAR, Oct. 28, 2004, at A1 (reporting that a former Indiana governor, then deceased, was included among the registered voters). See also Coney, *supra* note 45, at 188 (reporting additional examples of newspaper reports of multiple registrations, including Florida, the Carolinas, Kansas, and Missouri).

54. Coney, *supra* note 45, at 189.

55. See generally AMERICAN CIVIL LIBERTIES UNION, PURGED! HOW A PATCHWORK OF FLAWED AND INCONSISTENT VOTING SYSTEMS COULD DEPRIVE MILLIONS OF AMERICANS OF THE RIGHT TO VOTE (2004), http://www.aclu.org/FilesPDFs/purged%20-voting_report.pdf (describing how states unevenly conduct purges, even when the underlying disenfranchisement policies are the same).

individual's name and address."⁵⁶ Moreover, states that deny convicted felons the right to vote frequently have failed to codify the criteria necessary to ensure that the voter being removed from the list is the same person as the one convicted of the felony.⁵⁷ Finally, many states do not require the notification of voters purged from voter lists, thereby reducing the likelihood of the voter challenging incorrect removal.⁵⁸

Composition of voter lists proved to be a problem in Florida, as before the 2000 election a private contractor helped purge the voter lists of felons, and mistakenly removed up to 8000 eligible voters.⁵⁹ In 2004, a different private contractor failed to notice the list of felons to be purged from the voter lists included 2100 people who had won clemency, and thus the right to vote, while very few Hispanic names were on the purge list.⁶⁰ Hispanics in Florida generally vote Republican, whereas many of the people wrongly included on the list were African Americans, who generally vote Democratic.⁶¹ Composition of voter lists was also a problem in the high-profile 2004 Washington gubernatorial election, with "allegations of ineligible voters, including felons and non-registrants, casting votes."⁶²

Canada had similar problems with voter registration. Until roughly 1900, opposing parties frequently battled more over voter lists than the actual elections. The franchise in Canada during the late nineteenth century was not so much what the law said it was, but rather the presence of one's name on an accepted voter list.⁶³ Not only did considerable partisan manipulation of voter lists occur, but Canada did not fully establish its process of enumeration until 1938.⁶⁴ Following the call of an election (election dates are not fixed as in the

56. *Id.* at 2-3.

57. *Id.*

58. *Id.* at 2-4 (identifying "myriad structural and procedural flaws" in states' structures and procedures).

59. Hasen, *supra* note 46, at 965-66.

60. Lesley Clark, *List Abandoned, but Doubts Linger*, MIAMI HERALD, July 11, 2004 at 21A; Joshua Kurlantzick, 2000, *The Sequel*, AM. PROSPECT, Sept. 19, 2004, at 22. Although both African Americans and Hispanics comprise roughly 10% of Florida's population, only 61 of nearly 48,000 named felons were Hispanic, and approximately 22,000 were African American. *Id.*

61. *See id.*

62. Hasen, *supra* note 46, at 968-69. Even leaving aside the question of eligibility, it remains astonishing that only two-thirds of eligible U.S. voters are actually registered to vote. Furthermore, the United States in a worldwide comparison of some 180 countries that conduct national elections ranks 139th in voter turnout over the last fifty-eight years. John Anderson, *What's Right and Wrong with Democracy in the United States*, 3 ELECTION L.J. 404, 404 (2004).

63. NORMAN WARD, *THE CANADIAN HOUSE OF COMMONS: REPRESENTATION* 189 (2nd ed. 1963).

64. *Id.* at 196.

United States), temporary state employees gathered names door to door in each riding.⁶⁵ The system was credited with registering 95 to 97.5% of voters.⁶⁶ Norman Ward confidently praised the system, observing that if individuals are primarily responsible for registering to vote, as in the United States, the likely result is a list with more omissions and in which younger citizens are disproportionately excluded.⁶⁷

After the 1997 election, a permanent voter list, perhaps more accurately called “a continuously maintained roll of electors,” replaced this system of enumeration.⁶⁸ Elections Canada assembles the list by using a range of sources including citizenship applications, provincial voter lists, tax returns, and driver’s licenses; voters can also register directly or on election day.⁶⁹ One academic study indicates that the system managed to include 93.1% of the eligible population in 2000, a slightly weaker performance than enumeration.⁷⁰ Another study indicates that it is premature to assess the new system, yet is hopeful that it will ultimately prove satisfactory.⁷¹ Neither study suggests any deliberate manipulation; instead, they believe the new machinery may be less efficient than enumeration and certain groups may be dis-

65. JOHN C. COURTNEY, ELECTIONS 79, 85 (2004).

66. *Id.* at 80.

67. WARD, *supra* note 63, at 204. See G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. (1986) (analyzing the low rates of registration in the United States); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON'T VOTE* (Pantheon 1988); see also TERENCE H. QUALTER, *THE ELECTION PROCESS IN CANADA* 22 (1970) (describing the enumeration system as “highly effective”); Hugh Segal, *The Costs of Partisan Disengagement: the Mounting Democratic Debt* (Sept. 16, 2004), <http://www.canadiandemocraticmovement.ca/Article443.html> (commenting that “[d]uring the 1960’s, many American civil rights workers would have been overwhelmed by this Canadian practice of going out to find voters and making sure that they were on the voters list in comparison to the very different American system of voter registration.”). The enumeration system, two political scientists indicated in 1991, appears to have operated “without major instance of public or private willful abuse.” John C. Courtney & David E. Smith, *Registering Voters: Canada in a Comparative Context*, in *DEMOCRATIC RIGHTS AND ELECTORAL REFORM IN CANADA* 433 (Michael Cassidy ed., 1991).

68. John Courtney, *Reforming Representational Building Blocks: Canada at the Beginning of the Twenty-first Century*, in *POLITICAL PARTIES, REPRESENTATION, AND ELECTORAL DEMOCRACY IN CANADA* 119 (William Cross ed., 2002).

69. Courtney, *supra* note 65, at 85. Enumeration is still done in certain areas, such as new neighborhoods and locations with large numbers of tenants. Beyond the question of eligibility, there is the question of whether an individual gets on a voters’ list. The right to get on the voters’ list on Election Day exists today, but this has only been recently established for all ridings—there was a period when the right only existed in rural ridings.

70. Jerome H. Black, *From Enumeration to the National Register of Electors: An Account and an Evaluation*, in *STRENGTHENING CANADIAN DEMOCRACY* (Paul Howe, Richard Johnston & Andre Blais eds., 2005), also in 9 CHOICES 21, available at <http://www.irpp.org/choices/archive/vol9no7.pdf>.

71. COURTNEY, *supra* note 65, at 161.

proportionally excluded.⁷² With no significant limits on the right to vote and non-partisan control of the voter lists there is little danger of selective disenfranchisement as has occurred in U.S. states.⁷³

The German system, based on mandatory residence lists, has also been successful at enabling fair elections. Every person spending 186 days or more per year in Germany—who is therefore subject to universal income taxation under German law—must maintain no more and no less than one primary residence in the country. The respective local authorities are charged with the maintenance of various records on that person, and he or she can only apply for a national identification card, a driver's license or a passport at the place of the primary residence. A new primary residence will only be registered in one place if the applicant presents a document from the authorities of the previous place of residence showing the de-listing of the person at that location. With various administrative controls and severe penalties for fraud, the system results in highly accurate population registers, which, together with information about citizenship, are then used, *inter alia*, to compile the voter lists. On election day, voters have to show up at their neighborhood voting station and identify themselves with either their passport or their national identification card. Germany's use of a national identification card is straightforward, but difficult for countries that lack such a system to emulate. In addition, German authorities had to find solutions for eligible voters who had their primary residence outside the country. German citizens living abroad can apply in the county of their last German residence to be included in the voter list. This is done by submission of a special form, together with a written affirmation of voter eligibility in lieu of an oath. Although the forms are widely available on the internet and from German embassies, their use by eligible citizens abroad has been limited. Nevertheless, no evidence suggests that significant problems with vote denial or vote dilution exist in Germany.

Hasen, among others, has supported the idea of a national, universal registration system in the United States.⁷⁴ Hasen notes that if other entities are required to provide appropriate information, the fed-

72. See Black, *supra* note 70, at 32-33.

73. See ANDREW GUMBEL, STEAL THIS VOTE: DIRTY ELECTIONS AND THE ROTTEN HISTORY OF DEMOCRACY IN AMERICA 211-13 (2005) (discussing disenfranchisement in Florida); see also LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, SHATTERING THE MYTH: AN INITIAL SNAPSHOT OF VOTER DISENFRANCHISEMENT IN THE 2004 ELECTIONS (2004), http://www.pfaw.org/pfaw/dfiles/file_477.pdf (enumerating numerous difficulties with minority voter registration in the last two presidential elections).

74. Hasen, *supra* note 46, at 970 (recommending that “[t]he federal government—perhaps the Department of the Census—should undertake the universal registration of eligible voters, and issue each voter a voter identification card that contains a name, signature, photograph, and biometric identification (such as a fingerprint)”).

eral government could maintain an up-to-date voter list. For example, the U.S. Postal Service could provide data from its change of address forms, and local organizations could provide data from death certificates.⁷⁵ The states' different voter eligibility rules would, however, remain an issue.

VOTING AND COUNTING

The de facto delegation of vote counting to the private companies supplying the voting machines, such as Election Systems & Software ("ES & S"), Premier Election Solutions (formerly Diebold Election Systems), and Sequoia remains an interesting specialty of the U.S. democratic system.⁷⁶ By and large these companies tabulate the votes behind closed doors without effective monitoring, and sometimes even without any monitoring by non-partisan officials and/or concerned citizens.⁷⁷ By contrast, Canada and European countries typically count their votes in public, under the critical eyes of representatives of the parties competing in the elections.

According to the U.S. Election Assistance Commission, the *average* age of U.S. poll workers is seventy-two.⁷⁸ Although the high average age could stand for many years of experience, and thus, be a good thing, it has more likely contributed to problems in recent elections because of complicated and non-uniform ballot design and widespread use of voting machines for which poll workers had received little training.⁷⁹ Dan Seligson, editor of an election monitoring group, notes that

75. Hasen, *supra* note 46, at 971.

76. See generally, Mark Crispin Miller, *Keynote Speech*, 30 SEATTLE U. L. REV. 1019, 1021 (2007) (observing that "for-profit private corporations—private vendors—literally run the electoral process in over eighty percent of the counties in the United States"). See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1717-24 (2005) (describing the types of voting equipment currently used in the United States); see also Susan M. Boland & Therese Clarke Arado, *O Brave New World? Electronic Voting Machines and Internet Voting: An Annotated Bibliography*, 27 N. ILL. U. L. REV. 313 (2007) (providing an annotated list of references to post-2000 materials).

77. In some cases, such as counting votes entered on paperless, touch-screen machines, monitoring may be "literally impossible." Miller, *supra* note 76, at 1021. As Miller observes, "There is nothing to count after votes are cast. We simply have to take the corporation's word that the numbers are what the corporation claims they are." *Id.* This is also troubling, given that the four largest companies also have links to the Republican Party. *Id.*

78. See Jim Drinkard, *Panel Cites Poll Workers' Age as Problem*, USA TODAY, Aug. 8, 2004, available at http://www.usatoday.com/news/politicselections/nation/2004-08-08-voting-workers_x.htm (reporting federal election officials believed "the potential for confusion and mistakes" by U.S. poll workers was the "biggest threat" to the 2004 election).

79. HAVA includes a section on poll worker training. See Help America Vote Act (HAVA) of 2002, Pub. L. No. 107-252, § 254(a), 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-15545 (Supp. II 2002)).

“[i]t’s almost become a specialized job.”⁸⁰ A survey of poll workers for the 2006 Ohio primary found that more than half of the respondents “did not feel that their training gave them sufficient information to do their job well,” and older poll workers expressed the least familiarity or comfort with computers.⁸¹

There is also a shortage of qualified poll workers.⁸² As Curtis Gans, director of the Center for the Study of the American Electorate at American University in Washington, observed “[m]ost of the poll workers are older people, and they’re dying off.”⁸³ New workers are less interested, in part because of very low wages.⁸⁴ At least one lawmaker has proposed requiring citizens to serve at the polls in the same way citizens are required to serve on a jury, and one county, Douglas County, Nebraska, already uses a conscript system.⁸⁵ The lawmaker’s proposal also provides for two days of training for election workers.

In 2000, another fundamental problem in Florida was the lack of a clear standard for what constituted a valid vote.⁸⁶ This was the root cause for subsequent debates about the status of overvotes and chads that were hanging, dimpled, or pregnant.⁸⁷ Different technologies for voting vary in their capacity to successfully translate voters’ intent into valid votes; the method used affects the rate of spoiled ballots. Five different voting methods were used in the 2000 presidential election, and it was not uncommon to have different systems used within the same state.⁸⁸ Moreover, in many cases, there was no paper trail

80. Bob Driehaus, *Official Proposes ‘Drafting’ Poll Workers to Ease Problems*, N.Y. TIMES, Jan. 27, 2007, available at http://www.nytimes.com/2007/01/27/us/27voting.html?_r=1&oref=slogin.

81. See DEMOS BRIEFING PAPER SERIES, CHALLENGES TO FAIR ELECTIONS: POLL WORKER TRAINING, (2006), http://www.demos.org/pubs/CFE_pollworker_102506.pdf (asserting that “[s]tates squeak by each year with a bare minimum of poll workers who receive inadequate training for an increasingly complex task”).

82. See, e.g., Rachel Konrad, *Poll Worker Shortage Has Voters Bracing for Long Lines, Confusion*, ASSOCIATED PRESS, Oct. 31, 2004 (reporting an expected shortage of 500,000 poll workers).

83. Driehaus, *supra* note 80.

84. Poll workers frequently receive less than fast food workers. See DEMOS BRIEFING PAPER SERIES, *supra* note 81 (comparing poll workers’ wages with those of fast food restaurant employees).

85. See Driehaus, *supra* note 80.

86. Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECTION L.J. 591 (2004).

87. In Florida, each county’s canvassing board had discretion to determine whether a ballot adequately indicated the voter’s intent. See FLA. STAT. § 102.166(5)(c) (2000) (stating that “if a counting team is unable to determine whether the ballot contains a clear indication that the voter has made a definite choice, the ballot shall be presented to the county canvassing board for a determination.”).

88. See, e.g., Stephen Ansolabehere, *Voting Machines, Race, and Equal Protection*, 1 ELECTION L.J. 61, 67 (2002) (providing the following figures: Direct Recording Electronic Machines (DRE) 11.7%; lever 18.1%; paper 1.4%; punch 38.1%; and scanner

and therefore manual recounts were impossible if the count was questioned.⁸⁹ Interestingly, African-American voters were disproportionately likely to live in the jurisdictions using “inferior technology.”⁹⁰ These problems are unsolved and undermine the legitimacy of elections in the United States.

Canada largely avoids these difficulties. Canada does not have computer failure problems because its elections use paper ballots.⁹¹ Paper ballots likely minimize opportunities for cheating.⁹² In the four American presidential elections preceding 2004, punch card systems failed to count 2.5% of the ballots cast, and electronic voting machines failed to count an average of 2.3% of ballots.⁹³ Paper ballots were more secure and lent themselves to fewer errors.⁹⁴ This is supported by Canadian experience. For example, in Canada’s 2004 and 2006 federal elections, just 0.9% and 0.6%, respectively, of ballots were re-

30.8%.); Voting Systems 2007, <http://www.pewcenteronthestates.org/uploadedFiles/voting%20Systems%202007.pdf> (last visited Jan. 23, 2008) (providing a complete list of voting systems used in the United States).

89. See ANDREW GUMBEL, *STEAL THIS VOTE: DIRTY ELECTIONS AND THE ROTTEN HISTORY OF DEMOCRACY IN AMERICA* 270, 280 (2005).

90. Ansolabehere, *supra* note 88, at 64, 65. See also DENNIS F. THOMPSON, *JUST ELECTIONS* 58 (2002) (citing SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 307-09 (2nd rev. ed. 2001)).

91. Robert A. Pastor, *America Observed: Why Foreign Election Observers Would Rate the United States Near the Bottom*, *THE AMERICAN PROSPECT*, Dec. 20, 2004. Only eight of sixty-two countries examined in a recent survey employ electronic voting or voting machines; the rest use paper ballots. LOUIS MASSICOTTE, ANDRÉ BLAIS & ANTOINE YOSHINAKA, *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES* 124-25 tbl. 5.3 (2004). Canadian provincial elections also use paper ballots. See, e.g., Elections Ontario, <http://www.elections.on.ca/en-CA/Voters/WhatHappensWhenIVote/> (last visited Jan. 31, 2008) (describing voting procedures). This is not to say that paper ballots are without risks. Election Canada, for example, lists on its website as a frequently asked question, “[i]s someone allowed to eat a ballot?” Elections Canada: Frequently Asked Questions, <http://www.elections.ca/content.asp?section=faq&document=faqvoting&lang=e&textonly=false#voting1> (last visited Jan. 15, 2008). (For the curious, the answer is no pursuant to section 167(2)(a) of the Canada Elections Act. *Id.*) Elections Canada claims, however, that its “system to control all ballots is recognized worldwide as being at the forefront of measures aimed at preventing electoral fraud.” *Id.*

92. J. PATRICK BOYER, *2 ELECTION LAW IN CANADA: THE LAW AND PROCEDURE OF FEDERAL, PROVINCIAL AND TERRITORIAL ELECTIONS* 750 (1987) [hereinafter BOYER, *THE LAW AND PROCEDURE*]. Miller likewise notes that paper ballots are preferable because “after an election, one can theoretically count the paper ballots and verify the results,” but observes that some U.S. jurisdictions, like Florida, have made illegal such hand counts after an election. Miller, *supra* note 76, at 1022.

93. See CALTECH/MIT VOTING TECHNOLOGY PROJECT, *VOTING: WHAT IS AND WHAT COULD BE* 21 (2001), http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf.

94. *Id.* (concluding that “[o]ptically scanned paper and hand-counted paper ballots have consistently shown the best average performance”).

jected.⁹⁵ Moreover, Canada uses uniform ballots. Simple and uniform ballots minimize voters' errors. Ballots are relatively easy to count and any contentious points that appeared in the past have already been litigated, leaving less room for ambiguity.

After the elections in 2000, Florida courts considered the legality of a manual recount.⁹⁶ The recount process was not adequately established before the election.⁹⁷ Rather, under Florida law each county had a county canvassing board, which in some circumstances had the discretion to order a recount.⁹⁸ In 1874, Canada established the practice that judges resolve disputed procedures.⁹⁹ In Canada, many important court cases resolving electoral disputes had been decided by 1920.¹⁰⁰ Compared with the United States, Canada's recount procedures and rules for disallowing controverted results are straightforward and unambiguous.¹⁰¹ Electoral disputes in Canada are now primarily technical exercises with relatively little judicial discretion. In this context, it is also relevant that Canadian and European courts are generally less partisan than American courts, which likely leads to the fairer resolution of election disputes.

ELECTRONIC VOTING MACHINES

In the United States there have been many reports of problems with electronic voting machines and numerous court challenges.¹⁰² Doug Chapin provides a long list of problems that occurred in the 2004

95. See Elections Canada, <http://www.elections.ca/scripts/OVR2004/default.html> (last visited Oct. 17, 2007) (providing Official Voting Results for the 2004 Election); Elections Canada, <http://www.elections.ca/scripts/OVR2006/default.html> (last visited Oct. 16, 2007) (providing Official Voting Results for the 2006 Election). A portion of these ballots presumably were deliberately spoiled in both Canada and the United States.

96. See, e.g., *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla. 2000) (per curiam), *vacated sub nom.*, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam); *Siegel v. LePore*, 120 F. Supp. 2d 1041 (S.D. Fla. 2000), *aff'd*, 234 F.3d 1163 (11th Cir. 2000); see Mitchell W. Berger & Candice D. Tobin, *Election 2000: The Law of Tied Presidential Elections*, 26 NOVA L. REV. 647 (2002) (providing a thorough analysis of the legal issues following the Florida 2000 election).

97. See also Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, ANNUAL REV. OF POL. SCI., June 2004, at 4-6, available at <http://ssrn.com/abstract=491326> (providing background information on *Bush v. Gore*).

98. FLA. STAT. § 102.166(4)(c) (2000) ("The county canvassing board may authorize a manual recount.")

99. NORMAN WARD, *THE CANADIAN HOUSE OF COMMONS: REPRESENTATION* 243 (2nd ed. 1963).

100. J. PATRICK BOYER, *POLITICAL RIGHTS: THE LEGAL FRAMEWORK OF ELECTIONS IN CANADA* 51 (1981).

101. BOYER, *THE LAW AND PROCEDURE*, *supra* note 92, at 893-96; 1067-80.

102. See Kristine Cordier Karnezis, Annotation, *Electronic Voting Systems*, 12 A.L.R. 6th 523 (2006) (listing court cases concerning electronic voting machines).

election.¹⁰³ For example, an electronic voting system's error gave President Bush 3893 extra votes outside Columbus, Ohio.¹⁰⁴ In North Carolina, more than 4400 votes were lost, necessitating a later special election.¹⁰⁵ In Indiana, a machine miscounted Democratic votes as Libertarian votes.¹⁰⁶ More recently, a California judge voided the results of a failed ballot initiative because information stored on the electronic voting machines had been lost.¹⁰⁷ The 2006 election also had problems with electronic voting systems. The Electronic Frontier Foundation reported problems "wide-ranging in both size and scope."¹⁰⁸ Aviel D. Rubin, a computer science professor at John Hopkins University and an expert on voting machines, told the United States Election Assistance Commission in May 2004, "[o]n a spectrum of terrible to very good, we are sitting at terrible."¹⁰⁹

Various European countries have also experienced problems with voting machines. In October 2006, weeks before national parliamentary elections, the Dutch interest group "Wij vertrouwen stemcomputers niet" ("We Don't Trust Voting Machines") succeeded in hacking into a voting machine in such a way that it misrepresented the voting results. It subsequently demonstrated the procedure, which took less than five minutes, in front of live television cameras.¹¹⁰ Since the German town of Cottbus used the same type of voting machines in local elections at about the same time, the infamous German Chaos Computer Club ("CCC") sent observers to a number of voting stations and then reported about widespread potential security risks such as voting machines standing around unsecured prior to the opening of the voting stations, and insufficiently trained staff unable to recognize

103. Doug Chapin, *The Machinery of Democracy: Voting Technology in November 2004*, 23 J. MARSHALL J. COMPUTER & INFO. L. 553, 554-59 (describing "widespread problems" with reference to voting technology). See also ARIEL J. FELDMAN, J. ALEX HALDERMAN & EDWARD W. FELTEN, SECURITY ANALYSIS OF THE DIEBOLD ACCUVOTE-TS VOTING MACHINE (2006), <http://itpolicy.princeton.edu/voting/ts-paper.pdf> (providing an independent study of various security risks and problems with these kinds of machines).

104. Chapin, *supra* note 103, at 557.

105. *Id.* at 557.

106. *Id.* at 556.

107. Henry K. Lee, *Judge Voids Results of Berkeley Measure on Medical Pot*, S.F. CHRON., Sept. 28, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/09/28/BA3MSFNNP.DTL>.

108. Electronic Frontier Foundation, *Electronic Voting Machine Headaches Shut Out Citizens* (Nov. 7, 2006), <http://www.eff.org/press/archives/2006/11/07-0>.

109. Associated Press, *Computer Expert: E-Voting Systems Flawed* (May 5, 2004), <http://www.kioskmarketplace.com/article.php?id=13571&na=1>.

110. ROP GONGGRIJP, WILLIAM-JAN HENGEVELD, ANDRES BOGK, DIRK ENGLING, HANNES MEHNERT, FRANK RIEGER, PASCAL SCHEFFERS & BARRY WELS, NEDAP/GROENENDAAL ES3B VOTING COMPUTER - A SECURITY ANALYSIS, <http://www.wijvertrouwenstemcomputersniet.nl/images/9/91/Es3b-en.pdf>.

manipulations of the seals.¹¹¹ The CCC subsequently initiated a petition to the German Parliament for the abolition of the Federal Regulation on Voting Machines, and thus the legal basis for the use of these machines.¹¹² The petition is still pending. Another type of voting machine, made by the Dutch company SDU, was excluded from the 2006 national elections in the Netherlands because its strong radiation allowed the detection of voter choices with simple technology from as far away as one hundred feet.¹¹³

An experiment allowing voters in municipal elections in the United Kingdom in 2003 to cast their votes via personal computers, internet, cell phone text message service, tone-dial telephones, interactive digital televisions, and voting machines in supermarkets, was generally considered a failure because of numerous technology breakdowns and many logistical problems. Although one goal of the campaign to bring the elections closer to the citizens was to reverse a slow decline in voter turnout, the percentage of voters making use of their right to vote in districts using the new technology ended up 1.5% lower than in the preceding municipal elections.¹¹⁴

There appear to be feasible alternatives to these problematic voting machines. In recent years several voting stations in Germany have tested a digital pen that registers, via a kind of camera, the voter's choice on the paper ballot and transmits it to a central computer. One advantage of this technology is the availability of paper ballots as a backup in the event of actual or alleged failure or manipulation of the digital technology.¹¹⁵ However, the hackers of the CCC

111. Heise online, CCC kritisiert schwere Mängel bei Wahl in Cottbus (Oct. 25, 2006), <http://www.heise.de/newsticker/meldung/80022> (providing a report about potential security risks).

112. *Id.*

113. Heise online, SDU-Wahlcomputer von niederländischen Parlamentswahlen ausgeschlossen (Oct. 30, 2006), <http://www.heise.de/newsticker/meldung/80256> (providing another example of problems with voting machines).

114. See Bryan Mercurio, *Democracy in Decline: Can Internet Voting Save the Electoral Process?*, 22 J. MARSHALL J. COMPUTER & INFO. L. 409 (2004) (discussing the potential of this technology in the United States); Electoral Reform Society, *Piloting Alternative Voting Methods in the 2003 Local Elections in England*, <http://www.electoral-reform.org.uk/oldsite20070123/publications/briefings/pilotingalternativevotingmethods.htm> (last visited Jan. 5, 2007) (providing alternative methods for voting); see also IAN LEIGH, *LAW, POLITICS, AND LOCAL DEMOCRACY* (2000) (providing a broader critique of British local democracy).

115. See *Digitaler Wahlstift*, http://de.wikipedia.org/wiki/Digitaler_Wahlstift (last visited Oct. 15, 2007); see also *Das Digitale Wahlstift-System*, http://fhh.hamburg.de/stadt/Aktuell/wahl/digitaler_20wahlstift/start.html (last visited Oct. 15, 2007) (exploring elections in Hamburg, Germany). In the United States, several states have conducted tests with voting machines that essentially scan a paper ballot, again preserving the paper record in addition to the electronic count. See also MELANIE VOLKAMER & ROLAND VOGT, *NEW GENERATION OF VOTING MACHINES IN GERMANY, THE HAMBURG WAY TO VERIFY CORRECTNESS* (2006), <http://fee.iavoss.org/2006/papers/fee-2006-iavoss-New->

even call this technology unsafe because the system is too complex to be understood by the average person working at the voting stations and is open, at least potentially, to manipulation by the hardware manufacturer and/or the software programmers.¹¹⁶ The CCC, therefore, keeps demanding that the electronic results should only be used as preliminary results, and that the final results should always be determined on the basis of a count of the actual paper ballots.¹¹⁷

PARTISAN OFFICIALS

Election officials in the United States are frequently affiliated with one of the major political parties.¹¹⁸ Sometimes, this can create glaring conflicts of interest, as in 2004 when Missouri's Secretary of State Matt Blunt competed in the gubernatorial race, or when Ohio's Secretary of State J. Kenneth Blackwell served as co-chair of the Ohio Bush Re-election Campaign.¹¹⁹ Since the 2000 and 2004 elections

Generation-of-Voting-Machines-in-Germany.pdf (discussing digital pens that scan paper ballots).

116. Von Florian Hanauer, *Chaos Computer Club mahnt: Digitaler Wahlstift ist nicht sicher*, WELT ONLINE, Sept. 25, 2007, http://www.welt.de/welt_print/article1211107/Chaos_Computer_Club_mahnt_Digitaler_Wahlstift_ist_nicht_sicher.html.

117. See also Ted Selker, *Fixing the Vote – Electronic Voting Machines Promise to Make Elections More Accurate than Ever Before, but Only if Certain Problems – With the Machines and the Wider Electoral Process – Are Rectified*, SCI. AM. MAG., Oct., 2004, <http://www.sciam.com/article.cfm?id=fixing-the-vote>; Martin L. Haines, *Questionable Machines and the Promise of Chaos, Expect Déjà vu this Election Day*, 117 NJLJ 199 (2004); Marjorie Cohn, *Paperless Voting in the Presidential Election: Be Very Afraid*, L.A. DAILY J., Aug. 10, 2004, at 6; ROY G. SALTMAN, NATIONAL BUREAU OF STANDARDS, ACCURACY, INTEGRITY, AND SECURITY IN COMPUTERIZED VOTE-TALLYING (1998); NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, ASKING THE RIGHT QUESTIONS ABOUT ELECTRONIC VOTING (Richard Celeste, Dick Thornburgh & Herbert Lin eds., 2005).

118. See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974 (2005) (noting that in thirty-three states the chief election officials “are elected through a partisan election process”).

119. Matthew Fox, *To be Blunt, Missouri's Election Reeks of Conflicts of Interest and Warrants a Recount*, Oped News, http://www.opednews.com/foxMatthew_missouri.htm (last visited Jan. 23, 2008); Paul Farhi & Jo Becker, *Some Fear Ohio will be Florida of 2004*, WASH. POST, Oct. 26, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A62645-2004Oct25.html>. Secretary Blackwell's potentially partisan decisions included:

- (1) forbidding individuals from even receiving a provisional ballot unless their eligibility to vote within the precinct could be confirmed;
- (2) the refusal to provide provisional ballots to voters who had requested but claimed not to have received absentee ballots;
- (3) declining to count provisional ballots by voters subject to HAVA's ID requirement, unless they provided their identifying number or acceptable documentation by the time the polls closed;
- (4) the initial decision to allow both pre-election challenges and election day challenges;
- (5) the requirement that voter registration forms be rejected if certain information was omitted; and
- (6) the rejection of registration forms on less than eighty-pound paper weight.

there has been a “widespread perception that party-affiliated election administrators may have indulged in partisan favoritism during those elections,” which has led to proposals for “the creation of politically insulated bodies to administer elections.”¹²⁰

While Canada and the United States have many similarities, a few institutional differences matter for this discussion of partisanship. Canada has a tradition of a non-partisan civil service dating back to 1918; reforms of the same era did not reach as far in removing partisanship from the United States’ public service.¹²¹ Moreover, Canada has more experience with partisan figures functioning in positions requiring a degree of non-partisanship (e.g. Ministers of Justice and Speakers in the federal and provincial legislatures). Even so, Canada has generally recognized that only non-partisan officials should make major decisions in the administration of elections. For example, independent commissioners have been responsible for drawing federal electoral boundaries since 1964; they provide greater fairness and avoidance of gerrymandering than decisions of state legislatures.¹²²

However, Canada’s system does contain some weaknesses. For example, returning officers are partisan appointments and, while they have less discretion than partisan officials in the United States, a handful of problems has occurred. In 2004, the Chief Electoral Officer cited thirteen cases of incompetent or unethical behavior by returning officers. The Chief Electoral Officer asked the government to give him the authority to hire and fire returning officers, a power he would have exercised on three occasions.¹²³ Bill C-312, which would grant such authority, was examined by a House of Commons committee and has the support of most Members of Parliament.¹²⁴

Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1249-50 (2005) (citations omitted).

120. Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425, 425 (2006). See also David C. Kimball, Martha Kropf & Lindsay Battles, *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447, 447 (2006) (finding in the 2004 presidential election “suggestive evidence of partisanship in the selection of state rules governing the counting of provisional ballots [and] . . . conditional partisan effects in the casting and counting of provisional ballots”).

121. See Kenneth Kernaghan, *The Political Rights of Canada’s Federal Public Servants*, in DEMOCRATIC RIGHTS AND ELECTORAL REFORM IN CANADA 216-21 (Michael Cassidy ed., 1991) (discussing reforms); GRUNDGESETZ [GG] [Constitution] (discussing non-partisan civil servants administering elections in Germany); *supra* notes 30 and accompanying text.

122. See WILLIAM E. LYONS, ONE MAN - ONE VOTE, Ch. 2 (1970) (analyzing redistricting by provincial electoral boundary commissions).

123. Tim Naumetz, *Let Me Fire Incompetent Returning Officers: Electoral Chief*, OTTAWA CITIZEN, Nov. 24, 2004, at A3.

124. The bill passed by a vote of 258 to 29 in a second reading on June 22, 2005. See Parliament of Canada, LEGISinfo, 38th Parliament, First Session, Bill C-312, <http://>

As others have noted, it may be difficult in the United States to reach this level of non-partisanship.¹²⁵ If even the Supreme Court is perceived as politicized, there may be little chance of a non-partisan election administration. In addition, even if election administrators act in good faith, there is the possibility of subconscious partisan bias.¹²⁶ Hasen notes, however, given a supermajority requirement for appointment and the position's high prestige, "there is good reason . . . to believe nonpartisanship can be achieved by election administrators," and in fact proposes that the United States adopts a non-partisan model of senior election administrators like that used in Canada.¹²⁷ For now, the American Bar Association has created a Standing Committee on Election Law to help ensure that "the voting process is as fair and democratic as possible."¹²⁸ Whether the standing committee is enough remains to be determined.

ENFORCEMENT

Enforcement of election law in the United States is provided in the Voting Rights Act of 1965, the Federal Election Campaign Act of 1971, and the National Voter Registration Act of 1993.¹²⁹ Although each state is generally responsible for electoral administration, typi-

www.parl.gc.ca/LEGISINFO/index.asp?Lang&Chamber=C&StartList=201&EndList=1000&Session=13&Type=0&Scope=I&query=4377&List=vote (last visited Oct. 17, 2007). It did not, however, go through the remaining stages necessary to become law. See Parliament of Canada, LEGISinfo, 38th Parliament—1st Session (Oct. 4, 2004–Nov. 29, 2005), <http://www.parl.gc.ca/LEGISINFO/index.asp?Language&Chamber=N&StartList=A&EndList=Z&Session=13&Type=0&Scope=I&query=4377&List=stat> (last visited Oct. 22, 2007).

125. Hasen, *supra* note 118, at 986-87. An alternative response to the problem of partisanship is the creation of "clear rules prescribed in advance" that limit a partisan official's discretion. Tokaji, *supra* note 122, at 1249-53.

126. Hasen, *supra* note 118, at 987.

127. *Id.* at 987-88. Hasen also evaluates the bipartisan alternative but finds it inferior to the non-partisan model due to an increased risk of deadlock and the potential unfairness in the selection process. *Id.* at 989. See also The National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* (2001), reprinted in 1 ELECTION L.J. 111, 122 (2002) [hereinafter National Commission] (proposing that states should "consider establishing nonpartisan election commissions"); Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J. 425 (2006) (examining the possible role of independent commissions in electoral reform).

128. Robert A. Stein, *Guarding the Ballot Box: The Standing Committee on Election Law Helps Ensure Fairness in Voting*, 90 A.B.A. J. 64 (May 2004).

129. Other acts include the Voting Accessibility for the Elderly and Handicapped Act of 1984, Pub. L. No. 90-435, 98 Stat. 1678 (codified at 42 U.S.C. § 1973ee-1 (2000)), Uniformed and Overseas Citizen Absentee Voting Act of 1986, Pub. L. No. 99-410, 100 Stat. 924 (codified in scattered sections of 18 U.S.C., 39 U.S.C., and 42 U.S.C.), and Help America Vote Act (HAVA) of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-15345 (Supp. II 2002)). See also Michael J. Pitts, *Defining "Partisan" Law Enforcement*, 18 STAN. L. & POL'Y. REV. 324, 330-35 (2007) (discussing different kinds of potentially partisan law enforcement decisions).

cally the federal Department of Justice prosecutes crimes against electoral processes.¹³⁰ In addition, the U.S. Attorney General has various powers, such as the right to have federal officials observe polling places and ballot tabulation, or to require the provision of non-English election materials.¹³¹ Moreover, the U.S. Attorney General is involved in the enforcement and implementation of other voting-related acts such as HAVA, and may perhaps administer them in a biased manner.¹³²

In Canada, much of the responsibility for enforcement of the Elections Act lies with the Commissioner of Canada Elections, who reports to the Chief Electoral Officer. This arrangement differs from other countries' practices because it provides for a single non-partisan official who is responsible for enforcing election rules. Most violations are minor, and compliance agreements have been used since 2000 as a mechanism for enforcement, particularly for minor violations; it is recognized that criminal proceedings are not suitable for punishing these offenses.¹³³ There were, however, thirty cases of people caught voting twice in the 2000 election.¹³⁴ Most complaints about violations of election laws relate to finance, sale of alcohol, and the rule allowing employees a period of time off work to vote. The four Canadian elections from 1979 to 1988 saw just nine cases of prosecutions for electoral fraud. Cecile Boucher concluded that "[f]raud and corruption are no longer common practice in the election of candidates and parties."¹³⁵ The system of having the power of enforcement in the hands of non-partisan officials compares favorably with bi-partisan bodies

130. See, e.g., Craig C. Donsanto, *Prosecution of Electoral Fraud Under United States Federal Law*, 1558 *PLI/CORP* 655, 659 (2006) (discussing federal authority over electoral matters).

131. See 42 U.S.C. § 1973f(d)(1) (2000) (granting federal officials the right to observe "whether persons who are entitled to vote are being permitted to vote"); 42 U.S.C. § 1973f(d)(2) (2000) (granting federal officials the right to observe "whether votes cast by persons entitled to vote are being properly tabulated"); 42 U.S.C. § 1973b(f)(4) (2000) (requiring states in some circumstances to provide election materials in the language of the minority group); 42 U.S.C. § 1973aa-1a (2000) (prohibiting states and political subdivisions of states from denying a citizen the right to vote "because of his failure to comply with any test or device").

132. Pitts, *supra* note 129, at 333 (describing how the DOJ may have been involved in "partisan 'mission creep'" when it offered "unsolicited advice to state officials on how to interpret HAVA's provisional ballot requirements").

133. See David M. Brock, *Compliance Agreements as an Alternative Enforcement Mechanism in Canada's Federal Election Law* (2005), available at <http://cpsa-acsp.ca/papers-2005/Brock,%20David.pdf> (paper for the Canadian Political Science Association Annual Meeting, London, Ontario).

134. *Id.* at 18. Many voters may have mistakenly believed they had the right to vote twice by virtue of owning property in two constituencies.

135. Cecile Boucher, *Administration and Enforcement of Electoral Legislation in Canada*, in *DEMOCRATIC RIGHTS AND ELECTORAL REFORM IN CANADA* 498 (Michael Cassidy ed., 1991).

such as the U.S. Federal Election Commission, established to enforce election finance legislation.¹³⁶

CANADIAN & EUROPEAN WEAKNESSES: PARTY-RUN PROCESSES

The Canadian and the German experience show that when the national government takes charge, general elections can be run cleanly. Party organizations, however, are responsible for the selection of candidates for legislative office and party leaders (the rough equivalent to U.S. primaries), and these processes are less fair. Access to the votes is restricted to party members in good standing—which in most cases requires a membership fee—who are often expected to sit through a two or three hour long meeting. The fee has been criticized as a poll tax.¹³⁷ On occasion there is no nomination vote at all, and the party leadership appoints a candidate.¹³⁸ Canadian and German parties select their leaders either in delegated conventions or through “direct” processes that allow all members in good standing to vote. Convention rules often reserve specific delegate positions for groups such as women or youth, and in some instances, certain individuals may be able to vote in more than one delegate selection meeting. This violates the principle of one person, one vote.¹³⁹ Non-citizens or minors are often permitted to vote.

Delegate selection meetings sometimes feature underhanded tactics. A particularly well-known case involved the recruitment of new party members from a mission where derelicts lived; they were bussed to a meeting to select convention delegates.¹⁴⁰ In direct votes of party members, failure of technology for telephone voting to select leaders has embarrassed provincial parties on at least two occasions.¹⁴¹ At

136. Robert Pastor, *America Observed: Why Foreign Election Observers Would Rate the United States Near the Bottom*, THE AMERICAN PROSPECT, Dec. 20, 2004. See also Boucher, *supra* note 135, at 476-77. The Federal Election Commission was created in 1975 to “[d]isclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections.” Federal Election Commission, <http://www.fec.gov/about.shtml> (last visited Oct. 22, 2007).

137. See J. PATRICK BOYER, POLITICAL RIGHTS: THE LEGAL FRAMEWORK OF ELECTIONS IN CANADA 30, 32 (1981); WILLIAM CROSS, POLITICAL PARTIES 73-74, 176 (2004).

138. CROSS, *supra* note 137, at 59-60.

139. Heather MacIvor, *The Leadership Convention: An Institution Under Stress*, in LEADERS AND LEADERSHIP IN CANADA 13, 21 (Maureen Mancuso, Richard G. Price & Ronald Wagenberg eds., 1994).

140. PATRICK MARTIN, ALLAN GREGG & GEORGE AERLIN, CONTENDERS: THE TORY QUEST FOR POWER 41 (1983).

141. See Ian Stewart, Agar Adamson & Bruce Beaton, *Pushing the Right Buttons: The Nova Scotia Liberals and Tele-Democracy*, in ROASTING CHESTNUTS: THE MYTHOLOGY OF MARITIME POLITICAL CULTURE 135-54 (Ian Stewart ed., 1994) (discussing the 1992 Nova Scotia Liberal leadership election); Heather MacIvor, *Some Reflections on*

other times, members were apparently signed up without their knowledge, with leadership campaign funds paying membership fees, and the possibility that personal identification numbers would be used by others.¹⁴² Supporters of one leadership candidate may acquire internal party positions with control of membership forms and thereby restrict the ability of opponents to recruit new party members.¹⁴³ With these types of considerations in mind, political scientist Kenneth Carty has criticized the process, including the reliance on party organizations and their volunteers to run leadership selection processes without involvement of the state. He suggests that a hypothetical team of foreign election observers would object that "Canadians elect a leader by a process that is uncontrolled by law, open to gross manipulation by the candidates and their teams, and, it seems, large sums of money are spent to buy and influence votes. We recommend withholding recognition."¹⁴⁴ The contrast with general elections is striking; despite the importance of these decisions to the public as a whole, parties are treated largely as private organizations with the authority to manage their own affairs.¹⁴⁵

Similar problems with the selection of candidates via internal and in-transparent party procedures are known to many European democracies.¹⁴⁶ However, arguably these problems are not as severe as the U.S. problems with counting votes on election day because it is still in the interest of the respective political parties to present the strongest candidates with the best chances of winning.

Technology and Politics, 19 CAN. PARL. REV. 14-16 (Winter 1997) (describing problems in provincial leadership selection); DAVID K. STEWART & KEITH ARCHER, QUASI-DEMOCRACY? PARTIES AND LEADERSHIP SELECTION IN ALBERTA 68-94 (2000) (discussing the 1994 Liberal leadership election in chapter four, "Electronic Fiasco: The 1994 Liberal Tele-Votex"). The case of the Alberta Liberal party in 1994 was particularly serious because, despite the failure to provide a fair process, the result of the vote was allowed to stand. STEWART ET AL., *supra*.

142. See, e.g., Dalton Camp, *First Came Caesar, Now Comes Long*, TORONTO STAR, Jun. 18, 2000, at A13; see also JUDY TYABJI, POLITICAL AFFAIRS (1994) (providing examples of claims about provincial cases in chapter 10); Vaughn Palmer, *Even in Political Terms NDP Blows Membership Issue: Recipe for Explosive Dissent with no Offsetting Benefit: One Riding in Surrey is Equal to 12 in the North and the Interior*, VANCOUVER SUN, Feb. 15, 2000, at A18.

143. CROSS, *supra* note 137, at 91-92.

144. Kenneth Carty, Remarks in Transparency, Disclosure and Democracy: Assessing the Chief Electoral Officer's Recommendations (Feb. 27, 2002), available at <http://www.irpp.org/miscpubs/archive/030206e.pdf> (citations omitted). Laws governing federal electoral finance have changed, but the remainder of Carty's criticisms continue to be valid today.

145. A recent exception to the treatment of parties as private organizations is new regulations concerning finance in constituency nominations and leadership contests. See CROSS, *supra* note 137, at 166.

146. For a classic critique of the German system see HANS HERBERT VON ARNIM, STAAT OHNE DIENER (1993), and REFORM DER PARTEIENDEMOKRATIE (Hans Herbert von Arnim ed., Berlin 2003).

In contrast, state-run candidate selection procedures are the norm in the United States.¹⁴⁷ Primaries, defined as “a state-run election for the purpose of nominating party candidates to run in the general election,”¹⁴⁸ are frequently seen as desirable in “achieving a representative and corruption-free election system.”¹⁴⁹ In addition, voters in primaries enjoy some constitutional protections.¹⁵⁰ Although U.S. candidate selection processes are not above criticism, they are arguably more democratic than the Canadian or German methods.

INTERNATIONAL BEST PRACTICE STANDARDS

To support interested developing countries in their efforts at setting up legislative and administrative structures to ensure free and fair elections, several non-governmental organizations have elaborated international guidelines and best practice standards. The United States could benefit from careful analysis of these proposals and from selective implementation of some of the best practice standards.

The International Institute for Democracy and Electoral Assistance (“IDEA”) is based in Sweden and has been active for decades in constitution-building and support for the development of electoral processes around the world.¹⁵¹ In a 2002 publication entitled *International Electoral Standards – Guidelines for Reviewing the Legal Framework of Elections*, IDEA compiled what it calls “internationally recognized electoral standards.”¹⁵² Different chapters in this volume

147. See, e.g., KEVIN J. COLEMAN, JOSEPH E. CANTOR, THOMAS H. NEALE & GOVERNMENT & FINANCE DIVISION, CRS REPORT FOR CONGRESS: PRESIDENTIAL ELECTIONS IN THE UNITED STATES: A PRIMER, 7 CONGRESSIONAL RESEARCH SERVICE (2000), <http://www.senate.gov/reference/resources/pdf/RL30527.pdf> (noting that in 2000 respectively 85.2% and 90.1% of the Democratic and Republican delegates to their national nominating conventions would be selected through primaries).

148. *Id.* at 10.

149. Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629, 644 (1991).

150. See, e.g., *United States v. Classic*, 313 U.S. 299, 313 (1941) (extending “constitutional protection of the integrity of ‘elections’” to primaries); *Terry v. Adams*, 345 U.S. 461 (1953) (applying the Fifteenth Amendment to pre-primary elections); see also *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (noting that primaries are not “wholly public affairs that States may regulate freely”).

151. See International IDEA: Supporting Democracy Worldwide, <http://www.idea.int/index.cfm> (last visited Nov. 4, 2007). Another important contribution in this context is made by the ACE Electoral Knowledge Network, a cooperation project supported by multiple organizations including Elections Canada, the Mexican Federal Electoral Institute, International IDEA, the United Nations Department for Economic and Social Affairs (UN-DESA), and the United Nations Development Programme (UNDP). See ACE Electoral Knowledge Network, <http://www.aceproject.org/> (last visited Nov. 4, 2007) (providing extensive links to election-related materials).

152. INTERNATIONAL INSTITUTE FOR DEMOCRACY & ELECTORAL ASSISTANCE (INTERNATIONAL IDEA), INTERNATIONAL ELECTORAL STANDARDS: GUIDELINES FOR REVIEWING THE

deal with the recommended constitutional and legislative framework, the choice of an electoral system, districting and defining boundaries of electoral units, the right to vote and to be elected, electoral management bodies, voter registration and voter registers, rules for electoral campaigns, media access and media freedom, more and less sensible rules for campaign finance and expenditure, the actual balloting, vote counting and tabulating, the role of party representatives during the balloting process, the possible role of independent election observers, as well as complaints and challenges.¹⁵³ Although these guidelines are intended primarily for developing countries trying to establish a framework for “good electoral practice,” the guidelines are equally suited for countries considering reforming electoral systems that have experienced problems.¹⁵⁴ Some short remarks shall suffice to persuade the reader of their relevance and usefulness in the U.S. context.

Chapter 6 of the guidelines promotes the establishment of “autonomous and impartial” electoral management bodies (“EMB”), in particular for countries where the “neutrality and fairness” of national and local government officials is not or may no longer be “generally accepted by the electorate.”¹⁵⁵ One of the principles advocated in this chapter is the importance of having national and uniform rules providing for “the size, composition and membership tenure of the EMB, as well as for the appointment and removal of members,” since “these factors directly affect the independence and impartiality of the EMB.”¹⁵⁶ At the same time, having “party representatives or judges, who are ultimately appointed by the incumbent party” on an EMB is strongly discouraged, because it “obviously will impact on an EMB’s independence and impartiality.”¹⁵⁷

Chapter 12 of the guidelines deals with balloting. It begins with the seemingly uncontroversial principle that “[t]he legal framework should ensure that polling stations are accessible, that there is accu-

LEGAL FRAMEWORK OF ELECTIONS (2002) [hereinafter INTERNATIONAL ELECTORAL STANDARDS], available at <http://aceproject.org/ero-en/topics/election-integrity/UNPAN016077.pdf/view>. International IDEA is a non-partisan NGO that promotes sustainable democracy rather than any particular model of an electoral system. Its basic premise is that there are various choices countries can make in designing their specific electoral system, but some choices are more conducive toward sustainable democracy than others. See also INTERNATIONAL INSTITUTE FOR DEMOCRACY & ELECTORAL ASSISTANCE (INTERNATIONAL IDEA), ELECTORAL MANAGEMENT DESIGN: THE INTERNATIONAL IDEA HANDBOOK (2006); INTERNATIONAL INSTITUTE FOR DEMOCRACY & ELECTORAL ASSISTANCE (INTERNATIONAL IDEA), ENGAGING THE ELECTORATE: INITIATIVES TO PROMOTE VOTER TURNOUT FROM AROUND THE WORLD (2006).

153. See INTERNATIONAL ELECTORAL STANDARDS, *supra* note 152.

154. *Id.* at vi.

155. *Id.* at 37.

156. *Id.* at 38.

157. *Id.* at 39.

rate recording of ballots and that the secrecy of the ballot is guaranteed.”¹⁵⁸ It is fair to blame at least some of the problems in recent U.S. federal elections on the absence of such a legal framework at the federal level providing uniform and transparent national rules.

Although IDEA does not come out for or against voting machines, it does proclaim the principle that “[a] fair, honest and transparent vote count is a cornerstone of democratic elections,” which in turn “requires that votes be counted, tabulated and consolidated in the presence of the representatives of parties and candidates and election observers, and that the entire process by which a winner is determined is fully and completely open to public scrutiny.”¹⁵⁹ While this sounds so obvious that we almost hesitate to spell it out, the system in the United States could hardly be further away from these principles. If and when voting machines are used, IDEA requires that “[t]he legal framework must make possible the independent verification of the accuracy and soundness of hardware and software used for counting ballots. Whether manual, mechanical or electronic counting is used, overview procedures must be in place to ensure accuracy and reliability.”¹⁶⁰ Again, this does not appear to be the present case in the United States.

When comparing the electoral system in the United States to internationally accepted best practice standards—which are 100% endorsed by the United States for adoption by developing countries—there is a very serious discrepancy. It is, therefore, hardly surprising, that the United States has been experiencing significant problems with its elections. If anything, it is surprising that these problems have arisen only recently and that there has not been more done to correct them already. Canadians and Europeans, it seems, have experienced similar difficulties and have found reasonable ways and means to fix at least the more serious problems—about fifty years ago! Ultimately, this leaves the question whether the United States is unable to create a better system of voting mechanisms or whether there

158. *Id.* at 71.

159. *Id.* at 77. See INTERNATIONAL INSTITUTE FOR DEMOCRACY & ELECTORAL ASSISTANCE (INTERNATIONAL IDEA), THE FUTURE OF INTERNATIONAL ELECTORAL OBSERVATION (1999) (examining the subject of independent—and possibly international—election observers).

160. See INTERNATIONAL ELECTORAL STANDARDS, *supra* note 152, at 78; see also SHARON J. LASKOWSKI, MARGUERITE AUTRY, JOHN CUGINI, WILLIAM KILLAM & JAMES YEN, NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, IMPROVING THE USABILITY AND ACCESSIBILITY OF VOTING SYSTEMS AND PRODUCTS (2004), <http://vote.nist.gov/Final%20Human%20Factors%20Report%20%205-04.pdf> (providing recommendations that “should measurably improve” voting systems for all voters, including those with disabilities).

are forces in the United States that are unwilling to accept, let alone promote, a better system.¹⁶¹

161. An unlikely proposition, of course; the international standards and various proposals in the United States demonstrate that this is not exactly rocket science. *See, e.g.,* The League of Women Voters of Ohio, A 10-Point Proposal for Election Administration Reform (Jan. 29, 2007), <http://www.lwvohio.org/10PPEARSsummary.htm>. The League of Women Voters of Ohio capture the main issues by providing:

1. Absentee voting: Ensure that all persons eligible to vote by absentee ballot can do so in a timely way.

Overseas voters, those in hospitals, assisted-living facilities and nursing homes, and non-felons in jail must be informed that they are entitled to vote and must receive absentee ballots upon request in a timely way. The timing of absentee ballot application, delivery and return must allow overseas voters to have their votes counted with all others. Finally, the Ohio Revised Code should mandate a system for tracking and reporting how all absentee and provisional ballots are handled.

2. Accessibility: Ensure that voting locations, equipment and instructions are fully accessible to all voters, including those with disabilities.

Voters with disabilities must be afforded all the information, assistance and accommodation necessary to comply with state and federal law and to cast their vote with the same privacy as their non-disabled peers. Elements of access include parking, physical access to polling places, adapted voting equipment, seating, restrooms, signage, assistance as legally allowed, and adapted ballots.

3. County boards of elections: Ensure increased support and assistance to the county boards of elections.

The office of the Secretary of State must address its responsibility to provide ongoing training and technical assistance to the county boards of elections. This includes ensuring that at both the state and county levels: all Freedom of Information and Sunshine laws are observed; that voter registration databases are properly maintained; and that election equipment vendors act independently of political campaigns.

For their part, county boards of elections must ensure citizen participation in election oversight and appoint ombudsmen to investigate and address the public's problems and concerns. In addition, county boards of elections must provide adequate training and rapid, accurate assistance to their poll workers. They must provide an effective, transparent voting experience for all. And on election night, they must verify the accuracy of the ballot tally by publicly hand-counting randomly selected ballots cast.

4. Impartial election administration: Create an impartial election administration system.

The LWVO endorses a nonpartisan system of election administration independent of the office of the Secretary of State. An impartial and independent system would eliminate the possibility for partisan advantage – and the possibility of the appearance of partisan advantage – in running Ohio's elections.

5. Poll workers: Improve poll workers' training and experience.

In every precinct across the state of Ohio, poll workers must be actively recruited, thoroughly trained, fully supported for Election Day questions and problems that arise, and formally appreciated for their service. Poll workers should be tested on their knowledge of our increasingly complex voting system prior to Election Day and graded on their Election Day performance.

6. Provisional ballots and voter identification requirements: Ensure that these two interrelated issues do not prevent eligible voters from having their ballots counted.

The Ohio Revised Code must be amended to ensure that provisional ballots are available to all voters who may need them, and that there is uniform treatment of—and full accountability for—provisional ballots across the state. Provisional ballots are meant to provide a fail-safe way for every voter to cast a counted vote. Voters must be able to cast a provisional ballot in any precinct in

CONCLUSION

As Professor Michael Pitts has noted, “[e]lections are fundamentally imperfect . . . no matter how many positive reforms we enact, there will always be a few incredibly close elections that lie ‘within the margin of litigation.’”¹⁶² Simply because perfection is an unattainable goal, however, is no reason for the United States not to attempt improvements. The electoral machineries in Canada and in the European Union have evolved enormously. By a combination of accident and design, these democratic countries have moved from systems full of unfair and undemocratic elements to ones which, while not perfect, assure largely fair general elections. Of the electoral machinery’s rel-

their county. Furthermore, eligible voters should be able to register on Election Day and use a provisional ballot.

Current requirements for voter identification are complex and ambiguous. These must be clarified or eliminated.

7. Recounts and challenges: Ensure that each recount is honest, accurate and accepted as so.

The Ohio Revised Code must ensure that recount and challenge procedures are governed by a uniform set of rules and procedures. There must also be adequate security measures for materials and equipment; a minimum 3% random hand recount provision; and an immediate, appropriate Ohio Supreme Court review of election challenges. Further, there must be clear procedures allowing witnesses to view documents and ballots during counts and recounts.

8. Voter education: Ensure that voters are provided with the information they need.

Registered voters should receive a full description of where and how to vote, including: a sample ballot, instructions for early/absentee/provisional voting; an introduction to their voting machinery; and where to find substantive information about candidates and issues. County boards of elections and the Secretary of State should have user-friendly websites offering basic election information. They should also prepare and distribute educational materials to special populations such as newly registered voters and students.

9. Voter registration: Ensure timely and accurate voter databases at both the county and state levels.

The requirements and intent of the national Voting Rights Act and the Help America Vote Act (HAVA) should be enforced so that the registration process is fair, accessible and user-friendly.

10. Voting systems and security: Ensure that each voting system provides an accurate, transparent and secure record of all ballots cast.

Voting systems need to be fiscally feasible, secure, accurate, recountable, accessible, and have the public’s trust. Ease of recounts and reliability is essential. At this time, the optical scan machines appear to be the most capable of meeting these goals and should be adopted statewide. Whichever type of voting system is in use, security measures are paramount in the development, testing, approval, implementation and oversight processes.

Id.

162. Michael J. Pitts, *Heads or Tails? A Modest Proposal For Deciding Close Elections*, 39 CONN. L. REV. 739, 739, 741, 748-51 (2006) (citations omitted) (arguing, apparently only in part tongue-in-cheek, that a coin toss would be a better method of resolving close elections because it would be less expensive, less partisan and more timely). See also Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL’Y REV. 350, 350 (2007) (“Errors will always plague the counting of votes and, periodically, errors will be big enough to undermine the outcome of a close election.”). Both authors accept, however, that improvements to the recount system are possible. See Pitts, *supra*, at 741, n.18; Foley, *supra*, at 350.

atively limited problems, few are attributable to partisan actions. Some possible improvements which could and should be made remain, such as refining the system for preparing the voter lists and altering the system of hiring and dismissing returning officers. However, unless these countries introduce electronic voting systems on a larger scale before the technology is sufficiently proven and/or without backup paper ballots, major problems are unlikely. In particular, it is virtually impossible that an experience like the Florida recount would occur in Canada or the European Union. Among the reasons for the difficulties in Florida were the failure to adequately provide for recounts, the time pressures created by the deadline for declaring the results, the role of courts in delaying recounts and determining what would be permitted and how it would be done, partisan officials in key posts, partisan involvement that would be unimaginable in modern democracies elsewhere, the room for manipulation of voter lists, and the variation in balloting methods within the country.

With simple paper ballots; relatively clear and uniform standards in balloting; and centralized, non-partisan authority overseeing the results, relatively little can go wrong, and fairness to all citizens is assured. Neither Canada nor the European Union members have equivalents to butterfly ballots or dimpled chads. Robert Pastor concluded that “[t]he U.S. electoral system is unquestionably the weakest in North America,” pointing out that the United States could learn from the way Canada and Mexico administer elections, voter registration procedures and dealings with technology.¹⁶³ The U.S. electoral system is also undoubtedly weaker than the systems in the majority of the European Union Member States. The United States clearly has the opportunity to benefit from other countries’ electoral experiences. Whether it has the political will, however, is a very different question.

163. Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECTION L.J. 584, 584 (2004).

