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# Taking Voting Rights Seriously: Race and the Integrity of Democracy in America

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SMALL SCHOOL.  
BIG VALUE.

# Taking Voting Rights Seriously: Race and the Integrity of Democracy in America

STEVEN RAMIREZ\* AND ALIZA ORGANICK\*\*

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## INTRODUCTION

The election of 2000 stunned the nation.<sup>1</sup> For the first time, the Supreme Court of the United States intervened to dictate the outcome of a Presidential election.<sup>2</sup> The election triggered controversies ranging from

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\*\* Associate Professor of Law, Washburn University School of Law. I would like to thank my wonderful research assistants, Kimbra Caywood and Grace Talley, for their help with this project. Thanks also to the Washburn Law faculty who provided an opportunity to share our thoughts with them early on. Special thanks to my husband, David Bury, for his research contributions and invaluable insights.

1. The presidential election of 2000 was one of the most tainted elections in American history. Professors Jack M. Balkin and Sanford Levinson have likened it to a “stinking carcass of a pig, dumped unceremoniously into the parlor.” Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1046-50 (2001) (discussing problems with the election of 2000, including disenfranchisement of African Americans).

2. *Bush v. Gore*, 531 U.S. 98 (2000) (holding that Florida could not proceed with a recount in the 2000 presidential election under state law because of inconsistent application of standards governing the recount from county to county). Although President Bush emerged victorious in both the election of 2000 and the election of 2004, there is no available evidence that he directed or had any knowledge of any misconduct. Moreover, even though the Democrats did not prevail in either 2000 or 2004, that does not imply that they are somehow more pure than the Republicans. See Daniel P. Tokaji, *Early Returns on*

election malfeasance to racially-based exclusion of voters.<sup>3</sup> In response, Congress attempted to repair elections, and enacted the Help America Vote Act of 2002 (“HAVA”).<sup>4</sup> The fix did not take, and the election of 2004 suffered from significant questions of legitimacy.<sup>5</sup> This article proceeds from the premise that the elections of 2000 and 2004 may not have reflected the will of the people and that the nation has reason to doubt the legitimacy of the results.<sup>6</sup> Yet, we refrain from entering the controversy swirling about these elections except to note that there is indeed such controversy and it has a basis in fact.<sup>7</sup>

*Election Reform: Discretion, Disenfranchisement and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1207 (2005) (stating that both parties are “relentless” in trying to squeeze out every last vote).

3. See Jamin Raskin, *Suffrage Suffers in the Land of Rights*, L.A. TIMES, Mar. 15, 2004, available at <http://www.dcvote.org/media/media.cfm?mediaID=667&year=2004> (noting that in the election of 2000, Florida’s Secretary of State, who served concurrently as the chair of the Bush Campaign, wrongfully disenfranchised thousands of voters (“most of them minorities”) and that in Mexico a depoliticized commission supervises elections while in the U.S. elections are supervised by partisans).

4. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-545 (Supp. III 2003)).

5. See, e.g., Robert F. Kennedy Jr., *Was the Election of 2004 Stolen?*, ROLLING STONE, June 16, 2006, at 46, 114 (“The issue of what happened in 2004 is not an academic one. For the second election in a row, the president of the United States was selected not by the uncontested will of the people, but under a cloud of dirty tricks.”). It is noteworthy that the Democratic Party investigated the election of 2004 in Ohio and concluded that there was no available evidence John Kerry would have prevailed. DEMOCRATIC NATIONAL COMMITTEE, VOTING RIGHTS INSTITUTE, *DEMOCRACY AT RISK: THE 2004 ELECTION IN OHIO*, SEC. III, 2 (2005).

6. E.g., RON BAIMAN ET AL., U.S. COUNT VOTES’ NATIONAL ELECTION DATA ARCHIVE PROJECT: ANALYSIS OF THE 2004 PRESIDENTIAL ELECTION EXIT POLL DISCREPANCIES 3 (Apr. 12, 2005), available at [http://electionarchive.org/ucvAnalysis/US/Exit\\_Polls\\_2004\\_Mitofsky-Edison.pdf](http://electionarchive.org/ucvAnalysis/US/Exit_Polls_2004_Mitofsky-Edison.pdf) (“The exit pollster of record for the 2004 election . . . projected a Kerry victory by 3.0%, whereas the official count had Bush winning by 2.5%” and the probability of such a discrepancy “range[s] from 1 in 16.5 million to 1 in 1,240. No matter how one calculates it, the discrepancy cannot be attributed to chance.”); William R. Mebane Jr., *The Wrong Man is the President! Overvotes in the 2000 Presidential Election in Florida*, 2 PERSP. ON POL. 525 (2004) (examining ballots from 2000 Florida election and finding that if overvotes were properly tabulated, Al Gore would have won the state by over 30,000 votes); DAN KEATING, *DEMOCRACY COUNTS: THE MEDIA CONSORTIUM FLORIDA BALLOT PROJECT* 8 tbl. 1 (2002), available at [http://www.aei.org/docLib/20040526\\_KeatingPaper.pdf](http://www.aei.org/docLib/20040526_KeatingPaper.pdf) (showing that under four recount scenarios Gore would have won in Florida, but that in three scenarios Bush would have emerged victorious) (unpublished manuscript on file with author).

7. E.g., WHAT WENT WRONG IN OHIO: THE CONYERS REPORT ON THE 2004 PRESIDENTIAL ELECTION (Anita Miller ed., 2005) [hereinafter THE CONYERS REPORT] (summarizing testimony taken by the Democrats on the House Judiciary Committee to document election irregularities in Ohio in 2004 and raising “grave doubts” regarding the legitimacy of the outcome); Christopher Hitchens, *Ohio’s Odd Numbers*, VANITY FAIR, Mar. 2005, at 214, 218 (“Whichever way you shake it, or hold it to the light, there is something

Instead, we simply show that getting elections right is relatively easy and that the law can certainly be structured in a way that assures legitimate election outcomes that reflect the will of the people.<sup>8</sup> Despite this, our election machinery is broken.<sup>9</sup> We examine the meaning of continued weaknesses in our nation's election machinery given the manifest costs in terms of legitimacy to the current ruling coalition.<sup>10</sup> Specifically, we use interest convergence theory to suggest that legitimate elections simply are not of interest to those with power.<sup>11</sup> We conclude that this outcome, seemingly at odds with deeply embedded American values, can only be explained by reference to an equally powerful force – and we identify and test racial dynamics as a prime candidate for this apparent anomalous reality.<sup>12</sup> Therefore, we posit that real reform will be difficult and likely will require more than electoral crises like Florida and Ohio.

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about the Ohio election that refuses to add up.”). In fact, prior to the election of 2004, scientists predicted that inferior election technology could cause a dysfunctional election in swing states like Ohio. Donald Kennedy, Editorial, *Election Science*, SCI., Oct. 29, 2004, at 779 (summarizing flaws in voting technology in terms of verifiability and auditability that could lead to a loss of trust in government if a swing state like Ohio spawns legitimacy questions).

8. International observers noted that our unverifiable voting machinery was inferior to the voting technology used in less developed countries such as Venezuela. Thomas Crampton, *Foreign Eyes on US Voting: Observers Find Their Access Limited and the Ballots Complex*, INT'L HERALD TRIB., Nov. 4, 2004, at 7, available at [http://www.iht.com/articles/2004/11/04/t7\\_1.php](http://www.iht.com/articles/2004/11/04/t7_1.php).

9. Katrina Vanden Heuvel, *Bring Democracy Home*, THE NATION, Nov. 20, 2006, 3, 3-5 (arguing that elections in the U.S. are failing to secure democracy as voting machines are easily hacked and cannot be audited, widespread disenfranchisement continues, that elections are run by partisans, that districts are manipulated to favor incumbents, and that “modern day Jim Crow laws and tactics suppress the vote[.]”).

10. Indeed, there is some cause to think that that electoral dysfunction may be worse today than in 2000. For example, internet voices have suggested that the election of 2004 was “worse” than the election of 2000. William Rivers Pitt, Editorial, *Worse than 2000: Tuesday's Electoral Disaster*, TRUTHOUT.COM, Nov. 8, 2004, [http://www.truthout.org/docs\\_04/110804A.shtml](http://www.truthout.org/docs_04/110804A.shtml). In fact, the election was one of the few to lead to a challenge in the United States Congress—not even the election of 2000 was so challenged. *Bush Carries Electoral College After Delay: Democrats Challenge Ohio Vote, Push Back Official Certification*, CNN.COM, Jan. 6, 2005, <http://www.cnn.com/2005/ALLPOLITICS/01/06/electoral.vote/> (last visited Apr. 15, 2007). Nevertheless, it is impossible to gauge which election was “worse.”

11. Interest convergence theory holds that reform generally transpires in accordance with the needs of those with power. Thus, Professor Derrick Bell posits that reform only occurs in accordance with the interests of those holding political and economic power. Bell has applied this “interest convergence” theory of reform to the judicial abolition of “separate but equal” and to the issue of affirmative action. Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003).

12. The reality of voter disenfranchisement in America is that it invariably impacts minority communities disproportionately. Jesse Jackson & Greg Palast, Op-Ed., *Black*

This article demonstrates that secure and reliable elections are easily achievable in the United States – if those with economic and political power so desired. Given the costs implicit in continued clouds of legitimacy over those currently governing this nation, one would therefore expect strong and decisive action to remedy once and for all race-based electioneering games and faulty voting machinery. The thesis of this article, however, is that this is very unlikely to occur; rather, those with power seem to be exercising an option to use race instrumentally to foil the democratic process and to enhance their electoral interests. Of course, if this thesis is correct, not only does it mean that prospectively no effective voting reform will occur, it also means that there is additional reason to question the legitimacy of these past, tainted elections.<sup>13</sup>

Part I of this article will review the problems with the elections of 2000 and 2004 with a view towards highlighting the primary barriers inherent in the current matrix of election regulation and law that prevents the will of the people from being manifest in election outcomes. Part II will review the major reform – HAVA – that has occurred thus far as a result of these controversies, and will show that this reform is not effective to address the root problems plaguing our democracy. Part III of this article seeks to explain why effective reform did not occur in the wake of the elections of 2000 and 2004, through the use of interest convergence theory and its emphasis on the power of race in America to serve the needs of those with political and economic power. The article concludes that real election reform is not likely to occur because elites find it in their interest to retain the status quo – including the ability to use race instrumentally to manipulate elections. Simply put, controversy-free elections are readily attainable; the fact that powerful segments of our leaders do not secure controversy-free elections in what is supposed to be the world's democratic leader suggests they do not want legitimate elections. This insight is central

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*Voters in United States Disproportionally Disenfranchised*, SEATTLE POST-INTELLIGENCER, Jan. 26, 2005, available at

[http://seattlepi.nwsourc.com/opinion/209316\\_palastjackson26.html](http://seattlepi.nwsourc.com/opinion/209316_palastjackson26.html)

(“Nationwide data gathered by Harvard Law School Civil Rights Project indicate that, of the 2 million ballots spoiled in a typical presidential election, about half are cast by minority voters.”). There have been widespread reports of race-based intimidation, disinformation campaigns designed to suppress voter turnout, and manipulation. *E.g.*, Michael Kunzelman, *Voters Were Intimidated at Polls, Kerry Says: Claims Leaflets Tricked People with False Info*, CHI. SUN-TIMES, Apr. 11, 2005, at 30; Michael Powell & Peter Slevin, *Several Factors Contribute to ‘Lost’ Voters in Ohio*, WASH. POST, Dec. 15, 2004, at A1.

13. See Jimmy Carter, *Still Seeking a Fair Florida Vote*, WASH. POST, Sept. 27, 2004, at A19, available at <http://www.washingtonpost.com/wp-dyn/articles/A52800-2004Sep26.html> (recounting Ford-Carter Commission efforts to secure fair elections and noting that Florida still does not meet basic standards for fairness, including a depoliticized election authority and fair access to voting for all citizens).

to why elections in America are so deeply dysfunctional, both in the past as well as into the future.

## I. THE MATRIX OF ANTIDEMOCRATIC LAWS & PRACTICES

Professor Spencer Overton describes America's complex patchwork of laws and regulations governing our elections as a matrix.<sup>14</sup> These laws and regulations define the extent to which the "will of the people" is manifest in election outcomes.<sup>15</sup> According to Professor Overton, that matrix operates to empower incumbent politicians by permitting them to shape who votes and how the votes are counted.<sup>16</sup> They can manipulate everything from election-district boundaries to the allocation of voting machines, and therefore (often with the help of sophisticated technology) can manipulate electoral outcomes.<sup>17</sup> Partisan election officials and other bureaucrats now exercise often decisive sway over all elements of our lives in a decidedly undemocratic fashion.<sup>18</sup> This dynamic now threatens to put democracy here and abroad at risk: "Efforts by the United States to promote democracy abroad are compromised by the fact that our political process falls short at home."<sup>19</sup>

The full consequences of this matrix are illustrated by what occurred in Ohio in 2004 and Florida in 2000.<sup>20</sup> The problem in both elections essentially revolves around the following flaws: 1) elections in the United States are conducted by partisan election officials; 2) too many voters are disenfranchised through a variety of mechanisms; and 3) there are problems related to voting equipment and technology.<sup>21</sup> Partisan leadership pervades all aspects of the American election matrix from the selection of machinery, to the conduct of election day, to managing the registration process, as well as all levels of the matrix from county election officials to the chief election officer.<sup>22</sup> Partisan administration naturally leads to partisan misconduct.

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14. SPENCER OVERTON, *STEALING DEMOCRACY* 14 (2006) ("the will of the people is channeled by a predetermined matrix of thousands of election regulations and practices").

15. *Id.*

16. *See id.*

17. *Id.* at 14-15.

18. *Id.*

19. *Id.* at 15.

20. One federal judge specifically concluded that Ohio Secretary of State Kenneth Blackwell apparently sought to "accomplish the same result in Ohio in 2004 that occurred in Florida in 2000." *Sandusky County Democratic Party v. Blackwell*, 340 F. Supp. 2d 815, 819 (N.D. Ohio 2004).

21. *E.g.*, THE CONYERS REPORT, *supra* note 7.

22. OVERTON, *supra* note 14, at 32-33.

For example, in Ohio in 2004, the state official overseeing the election was Secretary of State Kenneth Blackwell.<sup>23</sup> Kenneth Blackwell was also “co-chair of the Bush-Cheney campaign.”<sup>24</sup> The House Judiciary Committee Democratic Staff, under the direction of the ranking Democrat, Congressman John Conyers, conducted an exhaustive inquiry into the Ohio election, and focused on this conflict of interest as the key issues:

As to our factual finding: in brief, we find that there were massive and unprecedented voter irregularities and anomalies in Ohio. In many cases these irregularities were caused by intentional misconduct and illegal behavior, much of it involving Secretary of State J. Kenneth Blackwell, the co-chair of the Bush-Cheney campaign in Ohio.<sup>25</sup>

More specifically, the Conyers Report blamed Blackwell for misconduct ranging from disenfranchising Democrats by misallocating voting machines,<sup>26</sup> to restricting access to provisional ballots,<sup>27</sup> to unlawfully challenging minority voters in violation of consent decrees.<sup>28</sup> While the Conyers report is hardly the finding of a neutral arbiter, it seemingly is supported by testimonial evidence.<sup>29</sup> According to the Conyers Report, whether the cumulative effect would have altered the election is unknown.<sup>30</sup> However, the report recognized many serious violations of Ohio’s own laws.<sup>31</sup> Whether the allegations of the Conyers Report are true or false, the fact that a Bush-Cheney campaign official also exercised power over the election at least raises the appearance of impropriety.<sup>32</sup>

This is particularly so after the election of 2000 in Florida was similarly tainted.<sup>33</sup> There, Katherine Harris served as both co-chair of the Bush-

23. THE CONYERS REPORT, *supra* note 7, at 10.

24. *Id.* at 2.

25. *Id.*

26. *Id.* at 22.

27. *Id.* at 29.

28. *Id.* at 32.

29. *See* THE CONYERS REPORT, *supra* note 7, at 24.

30. *Id.* at 100. Professor Tokaji asserts that because the Bush “margin of victory exceeded the margin of litigation” Kerry was wise not to contest the election. Tokaji, *supra* note 2, at 1206, 1239.

31. THE CONYERS REPORT, *supra* note 7, at 100.

32. *See* Mark Crispin Miller, *None Dare Called it Stolen*, HARPER’S, Aug. 2005, at 39, 40-41 (using the Conyers Report as the primary basis for the conclusion that “something went extremely wrong” in the election of 2004). Without relying on the Conyers Report, Professor Overton catalogues the problems in Ohio in 2004 as ranging from four hour long lines at polls due to inadequate machinery (especially in poor and minority communities) to uncounted provisional ballots. OVERTON, *supra* note 14, at 42-48.

33. OVERTON, *supra* note 14, at 28-32.

Cheney campaign and the state's chief election officer.<sup>34</sup> Harris clashed with the Democratic Attorney General over the statutory grounds for permitting a manual recount.<sup>35</sup> Ultimately, the issue went before the Florida Supreme Court, where it was resolved against Harris.<sup>36</sup> Next, Harris announced that all recounts had to be finished by November 14, 2000.<sup>37</sup> Again, she was rebuffed by the state supreme court, which moved the deadline to November 26, 2000.<sup>38</sup> When one county sought a further extension, Harris denied the request.<sup>39</sup> Instead, she certified a Bush-Cheney victory in Florida by 537 votes.<sup>40</sup> The Florida Supreme Court reversed her decision again and ordered a state-wide recount.<sup>41</sup> The United States Supreme Court then reversed the Florida Court, and finally ended the stalemate in favor of Bush-Cheney.<sup>42</sup> Thus, Florida was a precursor for the problems that plagued Ohio in 2004.<sup>43</sup>

Florida also presaged Ohio in terms of the disenfranchisement suffered by voters in general and minority voters in particular. According to the United States Commission on Civil Rights, 2.9% of all ballots (or 180,000) cast in Florida in the election of 2000 were not counted as valid for the presidential contest, and African-Americans were far more likely than non-African Americans to have their ballots rejected.<sup>44</sup> Many never even made it to the voting booth: "Florida's overzealous efforts to purge voters from the rolls, conducted under the guise of an anti-fraud campaign, resulted in the inexcusable and patently unjust removal of disproportionate numbers of African American voters from Florida's voter registration rolls for the November 2000 election."<sup>45</sup> The Commission found that "countless" voters

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34. *Id.* at 29.

35. *Id.* at 30.

36. *Id.*

37. *Id.*

38. *Id.* at 31. The court based its holding on the fact that Harris abused her discretion when she arbitrarily rejected the requests of Palm Beach, Broward, and Miami-Dade counties for an extension on the manual recount. OVERTON, *supra* note 14, at 31.

39. OVERTON, *supra* note 14, at 31.

40. *Id.* at 32.

41. *Id.*

42. *See* Bush v. Gore, 531 U.S. 98, 111 (2000).

43. To be clear, partisanship is bi-partisan. In other words, Democratic as well as Republican election officials are equally prone to fall prey to partisan concerns, consciously or unconsciously. "Indeed, in a study of ballots after the election, Democratic counters were 25 percent more likely to deny that a vote was for Bush than Republican counters." OVERTON, *supra* note 14, at 33.

44. ALLAN J. LICHTMAN, REPORT ON THE RACIAL IMPACT OF THE REJECTION OF BALLOTS CAST IN THE 2000 PRESIDENTIAL ELECTION IN THE STATE OF FLORIDA 3, 4 (2001), <http://www.usccr.gov/pubs/vote2000/report/appendix/lichtman/ltrpt.htm>.

45. U.S. COMM'N ON C.R., VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION xiv (2001).



were denied their rights through this improper purge; other sources suggest the purge wrongfully denied the vote to “tens of thousands.”<sup>46</sup> Thus, either unnecessary ballot spoliation or the improper purge effectively shifted Florida from Gore to Bush.

In Ohio, according to the Conyers Report, Secretary of State Blackwell adopted a restrictive view of which voters could receive a provisional ballot.<sup>47</sup> Such ballots are utilized to permit votes to be cast pending the resolution of validity.<sup>48</sup> Blackwell claimed that properly registered voters who showed up at the wrong location could not cast a provisional ballot.<sup>49</sup> According to the Governor of Ohio, this decision could have thrown away 100,000 votes, mostly in poorer communities where more transient populations are less familiar with the precise location of their precinct.<sup>50</sup> Blackwell also took the position that voters who requested absentee ballots that were not delivered by election day could not cast provisional ballots at the polls.<sup>51</sup> In another controversial decision, Blackwell refused to accept voter registration forms unless on 80 pound paper.<sup>52</sup> While the Secretary reversed this decision, it is clear that numerous voters were dissuaded from voting before the reversal.<sup>53</sup> The Secretary also authorized multiple poll challengers to challenge the validity of voters in largely minority and urban areas.<sup>54</sup> This was but one element of a wide ranging effort that specifically intended to suppress votes in poor and minority areas.<sup>55</sup> Another example came from Cuyahoga County, where Cleveland is located; there, 8,099 provisional ballots were ruled invalid with no notice to the voters of the ruling.<sup>56</sup> It is difficult to escape the conclusion that, like Florida in 2000, Ohio saw a concerted effort to suppress minority and low-income voters through a variety of officially sanctioned methods.

The other fundamental problem plaguing U.S. elections is inferior machinery. Everyone remembers the hanging-chad fiasco associated with

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46. According to an investigative report in *The Nation*, this effort to purge otherwise eligible voters affected “tens of thousands” of voters nearly all of whom were Democrats and nearly half of whom were African-American. Gregory Palast, *Florida's 'Disappeared Voters': Disfranchised by the GOP*, *THE NATION*, Feb. 5, 2001, at 20, available at <http://www.thenation.com/doc/20010205/palast>.

47. *THE CONYERS REPORT*, *supra* note 7, at 24-29.

48. Provisional ballots are a creature of HAVA. Help America Vote Act of 2002, § 302, 42 U.S.C. §15482 (Supp. III 2003).

49. *THE CONYERS REPORT*, *supra* note 7, at 24-25.

50. *Id.* at 24.

51. *Id.* at 41. This decision was struck down as unlawful midway through election day. *Id.* at 41.

52. *Id.* at 30-32.

53. *THE CONYERS REPORT*, *supra* note 7, at 31-32.

54. *Id.* at 37-40.

55. *Id.* at 32-36.

56. *Id.* at 72.

the Florida election of 2000; what is less known is that four years later, seventy percent of Ohio voters used punch card machinery which led to the spoliation of 76,000 ballots.<sup>57</sup> The use of such inferior technology has been empirically shown to have a disparate impact upon African American voters.<sup>58</sup> Ohio also had a problem with the allocation of voting machinery.<sup>59</sup> The Conyers Report concluded that “[t]here was a wide discrepancy between the availability of voting machines in heavily minority, Democratic and urban areas as compared to heavily Republican, suburban and exurban areas.”<sup>60</sup> According to one survey authorized by the Democratic National Committee, long lines discouraged 129,543 voters from casting ballots in Ohio.<sup>61</sup> Thus, the Ohio election, like the Florida election before it, was marred by both inferior voting technology as well as massive voter disenfranchisement.

After the election of 2000 there were widespread calls for reform, which culminated in the passage of HAVA.<sup>62</sup> HAVA almost did not pass at all.<sup>63</sup> Thus, one can consider HAVA to mark the limits of potential election reform. The next part of this article will highlight what HAVA accomplished, and what it did not achieve.

## II. ABORTED REFORM: THE PROBLEMS WITH HAVA

The Help America Vote Act of 2002 (HAVA) was passed as a response to the controversies surrounding the presidential election of 2000.<sup>64</sup> Title I of HAVA provides federal funding for the replacement of voting

57. OVERTON, *supra* note 14, at 47.

58. Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 9, 3-16 (2006) (“there is a racial gap in [voting errors]—particularly with respect to overvotes—that is associated with punch card technology.”).

59. THE CONYERS REPORT, *supra* note 7, at 17-24.

60. *Id.* at 17-18.

61. DEMOCRATIC NATIONAL COMMITTEE, *supra* note 5, at Sec. III 2.

62. Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECT. L.J. 424, 424, 426-428 (recounting the task forces and commissions that investigated the Florida debacle leading up to HAVA).

63. *Id.* at 428.

64. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-545). The goal of the Act was to:

[P]rovide 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, to establish minimum election administration standards for states and units of local government with responsibility for the administration of Federal elections, and . . . other purposes.

Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (quoting preamble).

machines and to train state poll workers.<sup>65</sup> Title II of HAVA created the Election Assistance Commission (EAC).<sup>66</sup> The EAC is responsible for establishing voluntary election guidelines for use by the states as well as certifying voting systems, including both hardware and software.<sup>67</sup> The EAC also has the power to conduct studies to evaluate the effectiveness of state election administration.<sup>68</sup> Title III of HAVA requires states to implement election procedures and technology that meet certain guidelines in federal elections.<sup>69</sup> Among other things, Title III encourages the use of voting systems that allow the voters to verify their votes before casting their ballots, and it directs states to establish uniform standards regarding what counts as a vote.<sup>70</sup> Title IV provides a means of enforcement through the Attorney General's office, which can sue a state that is in violation of the mandatory requirements.<sup>71</sup>

In general, "HAVA provided money and imposed some very general standards, while leaving most of the details of election administration to the states and counties."<sup>72</sup> In other words, "Congress effectively punted."<sup>73</sup> For example, HAVA specifies that the Act cannot be interpreted to prohibit states from using voting equipment used in November of 2000.<sup>74</sup> Moreover, states may continue to use punch card systems and paper ballots so long as the state complies with the general standards of HAVA.<sup>75</sup> Thus, the Act mandates that voters verify their ballot and be given an opportunity to correct their votes;<sup>76</sup> still, a voter education program may suffice if a state uses punch cards or paper ballots.<sup>77</sup> In the end, HAVA paves the way for the continued use of the very voting systems associated with many of the problems plaguing Florida in 2000 and Ohio in 2004.

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65. Help America Vote Act of 2002 §§ 101-106, 42 U.S.C. §§ 15301-15306 (Supp. III 2003).

66. Help America Vote Act of 2002 §§ 201-296, 42 U.S.C. §§ 15321-15472 (Supp. III 2003).

67. Help America Vote Act of 2002 § 202, 42 U.S.C. § 15322 (Supp. III 2003).

68. Help America Vote Act of 2002 § 202(3), 42 U.S.C. § 15322 (Supp. III 2003).

69. Help America Vote Act of 2002 §§ 301-312, 42 U.S.C. §§ 15481-15502 (Supp. III 2003).

70. Help America Vote Act of 2002 § 301, 42 U.S.C. § 15481 (Supp. III 2003).

71. Help America Vote Act of 2002 § 401, 42 U.S.C. § 15511 (Supp. III 2003).

72. Tokaji, *supra* note 2, at 1207-08.

73. *Id.* at 1207.

74. Help America Vote Act of 2002 § 301(c), 42 U.S.C. § 15481(c) (Supp. III 2003).

75. *Id.*

76. Help America Vote Act of 2002 § 301(a)(1)(A), 42 U.S.C. § 15481(a)(1)(A) (Supp. III 2003).

77. Help America Vote Act of 2002 § 301(a)(1)(B), 42 U.S.C. § 15481(a)(1)(B) (Supp. III 2003).

HAVA also appears to attempt to resolve issues of auditability.<sup>78</sup> This was an issue that arose in Ohio in connection with the use of certain electronic voting machines.<sup>79</sup> Specifically, the Act requires that the voting system produce a record of audit capacity.<sup>80</sup> In addition, HAVA mandates a “permanent paper record” but provides no clarification to states as to what that “permanent paper record” should record.<sup>81</sup> Nor is there a definition of what is being audited.<sup>82</sup> The Act could have simply required that retention of a paper record of each vote be maintained for a possible recount after the paper record is verified by the voter.<sup>83</sup> It does not do that now, and is thus unclear at best.<sup>84</sup> Failure to address this shortcoming of HAVA could well prove to be a ticking time bomb.

Nor can the EAC remedy this confounding statute. Instead, HAVA strips the EAC of any regulatory power; it is a mere funding authority and advisory commission.<sup>85</sup> The Act specifies that the EAC shall not have any new governmental power to “issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government.”<sup>86</sup> Furthermore, Title IV provides that the Commission consists of four members, to be appointed by the President, in consultation with the House and Senate Minority and Majority leaders, and with the advice and consent of the Senate.<sup>87</sup> The EAC can only act with the

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78. Help America Vote Act of 2002 § 301(a)(2), 42 U.S.C. § 15481(a)(2) (Supp. III 2003).

79. See, e.g., Adam Liptak, *Voting Problems in Ohio Set off Alarm*, N.Y. TIMES, Nov. 7, 2004, § 1, at 37. Although the problem of electronic voting arose in the Ohio controversy, it apparently did not lead to material changes in the election outcome. Even the most vociferous critics of the election do not target unauditible or hackable electronic voting machines as material. Kennedy, *supra* note 5, at 110. Thus, this seems to be more of a threat to future elections. *A Call For Investigation: Electronic Voting Machines Pose a Grave Threat to Democracy*, Editorial, ROLLING STONE, June 15, 2006, at 54.

80. Help America Vote Act of 2002 § 301(a)(2)(A), 42 U.S.C. § 15481(a)(2)(A) (Supp. III 2003).

81. Help America Vote Act of 2002 § 301(a)(2)(B)(i), 42 U.S.C. § 15481(a)(2)(B)(i) (Supp. III 2003).

82. Help America Vote Act of 2002 § 301(a)(2)(B), 42 U.S.C. 15481(a)(2)(B) (Supp. III 2003).

83. See Stephanie Philips, *The Risks of Computerized Election Fraud: When Will Congress Rectify a 39-Year-Old Problem?*, 57 ALA. L. REV. 1123, 1158-1159 (2006) (citing efforts to amend HAVA to mandate a paper receipt for each vote that could be used to cross-check the accuracy of electronic tabulations).

84. Representative Rush Holt introduced a bill that would require electronic voting equipment to print a paper receipt for each vote. H.R. 550, 109th Cong. (2005).

85. Shambon, *supra* note 61, at 428-29.

86. Help America Vote Act of 2002 § 209, 42 U.S.C. § 15329 (Supp. III 2003).

87. Help America Vote Act of 2002 § 203(a)(1)-(2), 42 U.S.C. § 15323(a)(1)-(2) (Supp. III 2003).

consent of three of four of its members.<sup>88</sup> Thus, the EAC has limited powers and is structured in a way that builds in the prospect of deadlock and the need for bi-partisan support for any action.

An additional criticism of the effectiveness of HAVA relates to its enforcement provisions. The Department of Justice is given the power to seek declaratory and injunctive relief in civil actions.<sup>89</sup> The Act also requires states that accept HAVA funds to establish an administrative mechanism to resolve grievances,<sup>90</sup> yet states are given wide latitude for the implementation of this provision subject only to very broad guidelines.<sup>91</sup> Arguably, an express private right of action for aggrieved voters in federal court could have operated to give HAVA teeth.<sup>92</sup> There is no such provision in HAVA.<sup>93</sup> Nor is the EAC likely to be helpful on this score as the Commission does not even have the ability to make rules binding on states.<sup>94</sup> The best an individual can hope for is that the state will police itself under the administrative grievance process.

HAVA also sought to reform the voter registration process. Section 303 provides that each state must create a computerized voter registration database that is accessible to election officials immediately.<sup>95</sup> Section 302 creates the concept of provisional ballots so that any individual claiming to be a registered voter in the “jurisdiction,” but not listed on the registered voters list, may vote subject to resolution of the voter’s status.<sup>96</sup> These reforms should reduce the number of voters whose names do not appear on a precinct list but who are in fact properly registered to vote.<sup>97</sup> It could similarly reduce the number of voters who appear at the wrong precinct and

88. Help America Vote Act of 2002 § 208, 42 U.S.C. § 15328 (Supp. III 2003).

89. Help America Vote Act of 2002 § 401, 42 U.S.C. § 15511 (Supp. III 2003).

90. Help America Vote Act of 2002 § 402, 42 U.S.C. § 15512 (Supp. III 2003).

91. *See id.*

92. *See* Audra L. Wassom, *The Help America Vote Act of 2002 and Selected Issues in Election Reform*, 29 T. MARSHALL L. REV. 357, 378 (2004) (While HAVA allows an individual action, “it is somewhat akin to letting the fox guard the hen house” because the “state is frequently going to be the entity violating the Act (certainly for purposes of state action under the Fourteenth Amendment).”).

93. *See* Help America Vote Act of 2002 §§ 401-402, 42 U.S.C. §§ 15511-15512 (Supp. III 2003). HAVA allows for actions by the Attorney General for declaratory and injunctive relief as well as state based administrative complaints. Individuals may send complaints to the state, but it is under the State’s discretion to consider these complaints and follow through with their own action.

94. Help America Vote Act of 2002 § 402, 42 U.S.C. § 15512 (Supp. III 2003).

95. Help America Vote Act of 2002 § 303(a)(1)(A)(v), 42 U.S.C. 15483 (a)(1)(A)(v) (Supp. III 2003).

96. Help America Vote Act of 2002 § 302, 42 U.S.C. § 15482 (Supp. III 2003).

97. This was an issue, notwithstanding HAVA, in Ohio in 2004. *See, e.g., THE CONYERS REPORT*, *supra* note 7, at 67; Powell & Slevin, *supra* note 12; Sandusky County Democratic Party v. Blackwell, 340 F. Supp. 2d 815, 817 (N.D. Ohio 2004).

whose votes are therefore not counted.<sup>98</sup> But no provision in HAVA will deter unlawful voter purges as occurred in Florida in 2000, nor elections officials who are determined to prevent voters from registering, as occurred in Ohio in 2004.<sup>99</sup> In short, putting the registration list in electronic format is, in itself, no assurance that a state's chief elections officer will not erect either lawful or unlawful barriers to registration.

All of the above constitute serious shortcomings in HAVA; still, the most transcendent flaw may be the role of partisanship. Most fundamentally, HAVA did nothing to wrest control over the election matrix from partisan politicians.<sup>100</sup> Scholars have proffered numerous proposals for a more depoliticized election authority.<sup>101</sup> But the essential idea is simply that: "To the extent possible, the people running our elections should not have a vested interest in their outcome."<sup>102</sup> The Carter-Baker Commission, which was formed for the express purpose of providing a bi-partisan assessment of the election of 2004, specifically recommended non-partisan election administration.<sup>103</sup> The Carter-Baker Commission studied elections across the world and found that nonpartisan election administration had proven effective in many countries and that there was a global trend in favor of independent election authorities.<sup>104</sup> In fact, 63% of nations surveyed used independent election commissions and only 14% of nations allow the government in power to control elections, as is the case in the U.S.<sup>105</sup> So long as America has partisan election administration the election laws will be interpreted in accordance with partisan concerns instead of best policy.

In any event, it is clear that HAVA is, at best, a stop-gap. Overall, the Carter-Baker Commission found HAVA wanting on numerous fronts.<sup>106</sup> In sum, HAVA left open most of the problems from Florida and Ohio.<sup>107</sup> It leaves partisan election officials in place to impede registration or to purge

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98. This also did not occur in Ohio. See THE CONYERS REPORT, *supra* note 7, at 68.

99. See *id.* at 36.

100. Richard Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 960 (2005) (finding that "HAVA . . . will incrementally, but likely not sufficiently, reduce the possibility of post-election meltdown" and proposing a depoliticized electoral authority as a solution to the problems left unresolved by HAVA).

101. *E.g., id.* at 973-74 (calling for a "non-partisan, professionalized election administration").

102. *Id.* at 974.

103. COMMISSION ON FEDERAL ELECTION REFORM, BUILDING CONFIDENCE IN US ELECTIONS 5, 50 (2005), available at [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf).

104. *Id.*

105. *Id.* at 52.

106. *Id.* at 7.

107. *Id.*

voter rolls.<sup>108</sup> Equipment can still be allocated in accordance with politics.<sup>109</sup> The same equipment used in the 2000 and 2004 elections can be used today and into the indefinite future. Thus, the Carter-Baker Commission articulated “five pillars” which support a comprehensive approach to election reform.<sup>110</sup> The Conyers Report also found that the need for additional legislation was “abundantly clear.”<sup>111</sup> More legislation is needed to address the long lines, voter suppression, and the use of less reliable voting technologies within certain areas of a state.<sup>112</sup> The next part of this article will assess the possibility of getting elections right in the United States.

### III. THE REFORM PROCESS AND THE ROLE OF RACE

Given the catastrophes of Florida and Ohio, one would expect a groundswell of support for a reform centered upon delivering the best election system in the world to the American people.<sup>113</sup> As demonstrated in the prior section, such reform has certainly not occurred. This section attempts to proffer a framework for understanding this anomaly.

In order to understand why electoral deficiencies persist, it is beneficial to understand who the beneficiaries are and who the losers are. Nearly always those with economic and political privilege win in the matrix and those who are most disempowered lose.<sup>114</sup> Our politicized system of elections means that politicians control elections; yet, in order for reform to occur, they would need to cede this control for the benefit of the commonwealth. The Carter-Baker Commission made the same point: “Congress has been reluctant to undertake reform, in part because members fear it could affect their chances of re-election and, when finally pressed by the

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108. THE CONYERS REPORT, *supra* note 7, at 67.

109. COMMISSION ON FEDERAL ELECTION REFORM, *supra* note 103, at 48.

110. *Id.* at 57.

111. THE CONYERS REPORT, *supra* note 7, at 101.

112. *See supra* notes 42-52, 54, 56 and 57 and accompanying text.

113. After all, the American people are fairly cognizant of the deep flaws in our democracy, as acknowledged in the Carter-Baker Commission’s recent surveys, revealing deep skepticism of the integrity and reliability of the American electoral system. COMMISSION ON FEDERAL ELECTION REFORM, *supra* note 103, at 1 (reporting surveys showing that 29 percent of voters were concerned they would encounter problems at the polls and only 48 percent of voters were very confident that their votes were accurately counted after the election of 2004).

114. Jennifer Hochschild, *Introduction and Comments*, 1 PERSP. ON POL. 247 (2003) (positing that voting irregularities represent a “surprisingly simple” means of assuring that the disempowered remain so and that voter suppression always burdens those with the “least education and resources”).

public, Democrats and Republicans have addressed each reform by first asking whether it would help or harm each party's political prospects."<sup>115</sup>

Economists would predict this very outcome in light of increasing economic inequality in America. Inequality has recently reached a historic high in the U.S. Economists have recently shown that enhanced economic inequality leads naturally to enhanced legal and political inequality.<sup>116</sup> Indeed, using the Gilded Age in the U.S. and post-communist Russia as testing grounds, economists have demonstrated empirically that high inequality systematically leads to legal outcomes that favor the rich at the expense of the economically disempowered.<sup>117</sup> The election matrix is certainly no exception. The most disenfranchised are invariably the most disempowered.

Yet, the history of America is contrary to this thesis. Regardless of economic conditions and swings in inequality, the clear historical trend is the steady expansion of democracy in the U.S. Property ownership requirements as a precondition to voting rights have been eliminated.<sup>118</sup> Slavery was abolished and the 15<sup>th</sup> Amendment was enacted to secure the votes of former slaves.<sup>119</sup> Senators have been elected by the people since the enactment of the 17<sup>th</sup> Amendment.<sup>120</sup> Women won the right to vote under the 19<sup>th</sup> Amendment,<sup>121</sup> young adults under the 26<sup>th</sup> Amendment,<sup>122</sup> and the Voting Rights Act of 1965 operated to secure the voting franchise for millions of African-Americans and other minorities.<sup>123</sup> This trend has seemingly overpowered any economic explanation of why we tolerate a second-world democracy today. Democracy seems to be a core American value, immune to attacks from economic and political elites.

There has been another trend, however, that has taken hold in recent elections. The attacks on the franchise have had a powerful racial dimension. The felony disenfranchisement laws have a direct racial correlation as a huge percentage of felons are people of color. African American communities seem to be routinely targeted for vote suppression

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115. COMMISSION ON FEDERAL ELECTION REFORM, *supra* note 103, at 7.

116. Edward Glaeser, Jose Scheinkman & Andrei Schleifer, *The Injustice of Inequality*, 50 J. MON. ECON. 199 (2003).

117. *Id.* at 211-14.

118. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 2* (2000) (stating that only a "small fraction" of Americans voted at the time of the Constitution, as only white, male property owners had the franchise).

119. U.S. CONST. amend. XV.

120. U.S. CONST. amend. XVII.

121. U.S. CONST. amend. XIX.

122. U.S. CONST. amend. XXVI.

123. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).



efforts. In short, race makes the issue of disenfranchisement more palatable to Americans.

Economist Glenn Loury uses the term racial stigma to refer to this dynamic.<sup>124</sup> Racial stigma, according to Loury, refers to the consequences of the social meaning (as opposed to individual attitudes) attached to race.<sup>125</sup> In particular, Loury refers to "unexamined beliefs" that drive public perceptions, influence public opinion, and dominate public policy.<sup>126</sup> For instance, he cites the reception granted *The Bell Curve* in 1994. Since its publication, virtually every element of its thesis regarding race and intelligence has been thoroughly debunked.<sup>127</sup> Nevertheless, Loury argues that its thesis of race-based differences in intelligence still holds sway in the American consciousness.<sup>128</sup> Otherwise, how could our population not find our racial nightmare "disquieting"?<sup>129</sup> Why is there no public angst when African-American males are incarcerated at seven times the rate of white males? What explains the very low frequency of white/African-American marriages relative to the frequency of white/Latino or white/Asian-American marriages?<sup>130</sup> Loury posits that racial stigma explains how public opinion reacts to facts and accounts for our highly racialized society.<sup>131</sup> Racial stigma provides easy comfort for those indulging the societal attitudes about race that permeate each person's socialization.

#### CONCLUSION

Elections in the United States are still exposed to many of the same risks that became manifest in the elections of 2000 and 2004. Despite significant reform efforts, the problems of partisan election officials, minority disenfranchisement, and inferior voting technology remain largely unabated. These problems do not defy solution, as can be shown by state reforms and the electoral approaches of foreign nations. This raises the essential question addressed in this article: if reform is so easy and democracy so dear, then why is our election machinery so dysfunctional?

The answer to this question is not clear. Yet, it seems clear that all of the issues facing our democracy ultimately have a constant theme of favoring those with power and penalizing those without power. Economists

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124. GLENN LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 26-27 (2002).

125. *Id.* at 23.

126. *Id.* at 30-31.

127. *E.g.*, Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 151-54 (2000).

128. LOURY, *supra* note 125, at 70-71.

129. *Id.*

130. *Id.* at 201 fig.19; *id.* at 179 tbl.5.

131. *Id.* at 85-91.

thus provide one explanation: specifically, that increased economic inequality (such as that taking hold in the United States today) predictably leads to laws and political outcomes that favor those with economic and political power over the disempowered. Yet, this ignores a historic reality in the United States of ever increasing democratic empowerment. Thus, in the end, the economic explanation alone is unsatisfying.

Race seems to pervade issues of electoral dysfunction. Race figured prominently in both Florida in 2000 and Ohio in 2004. Glenn Loury uses the term racial stigma to refer to the inability of the America body politic to perceive issues with racial dimensions accurately. This dynamic certainly may explain why Americans have allowed the manifest deficiencies of Florida in 2000 and Ohio in 2004 to persist. This explanation builds upon the economic explanation through interest convergence theory. Simply stated, elites can foist an inferior and manipulable election system on a public blinded by racial stigma. Apparently, considerations of economics and race overwhelm even central values like democracy.

The central teaching of this is not a happy one. Economics, race, and the interests of those with increasing power seem unlikely to permit a deep reform effort anytime soon. The continued toll of race in America appears to therefore include more elections akin to the elections of 2000 and 2004.