

# THE ANALYSIS AND MITIGATION OF ELECTORAL ERRORS: THEORY, PRACTICE, POLICY

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Errors will always plague the counting of votes and, periodically, errors will be big enough to undermine the outcome of a close election. Electoral errors, however, need not be as frequent as they currently are or, when they do occur, as threatening to the legitimacy of an election's result. An analysis of electoral errors, both conceptually and concretely, can lead to proposals that will help reduce their occurrence and their adverse consequences.

This article contributes to this endeavor to minimize the incidence and impact of electoral errors by first defining theoretical methods to measure the extent to which a state's voting process is tainted by error. Second, this article closely examines the way five different states would endeavor to redress four basic types of error that, based on recent experience, might arise. Finally, in light of this analysis, this article proposes specific procedural mechanisms that would tend to protect the legitimacy of an election even when its vote counting is irreversibly infected with error.

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\* Director, Election Law @ Moritz and Robert M. Duncan/Jones Day Designated Professor of Law, Moritz College of Law at the Ohio State University. This article was prepared for the Conference on Elections and Democracy at Stanford Law School, April 6-7, 2007. As mentioned at the outset of Part II, the comparative analysis of how five states would handle four types of electoral errors is part of a larger study of the voting administration laws of these states. I am collaborating in this larger study, which is supported by a grant from the Joyce Foundation, with my Moritz colleagues Steve Huefner and Dan Tokaji. The thoughts in this paper reflect the innumerable insights I have received from working with both these wonderfully enriching colleagues on this and many other projects. This five-state study, particularly the specific analysis in this paper, has benefited immensely from underlying research and analysis conducted by Nathan Cemenska, who in addition to serving as the Web Editor of Election Law @ Moritz is an essential intellectual partner in all of our collaborative ventures. Kathy Hall, Matt Steinke, and especially Paul Venard, research librarians at Moritz, have all also contributed greatly to the preparation of this paper.

## I. THEORY

Since 2000, we have been so used to seeing the voting process malfunction and so focused on fixing the problems that have occurred that we have yet to turn our collective attention to a question of overriding importance: how would we know if the voting process functions properly?

## A. THE INEVITABILITY OF ELECTORAL ERRORS

Perhaps we know what the voting process would look like if it worked perfectly. No eligible citizen who wants to vote would be prevented from doing so. No ballots except those cast by eligible citizens would be counted as valid votes. No ballot cast by an eligible voter would be tainted by improper influence, whether in the form of financial inducement, coercion, or other inappropriate pressure. The tally of all countable ballots would be entirely accurate. The winner would be determined conclusively before the date for taking office. The loser, while disappointed, would accept the final count as correct, reflecting the prevailing democratic choice of the eligible participants.

But the voting process will never work perfectly, at least not in any statewide or other large-scale election, like those involving congressional or even state legislative districts.<sup>1</sup> The problem is not simply, or even primarily, one of inaccurate vote-counting machinery. Even if the machine accurately tallies every ballot it receives, and records no extra (“phantom”) votes, there is no guarantee that eligible citizens were not inappropriately thwarted from casting a ballot. Registration procedures may prevent otherwise eligible citizens from becoming *qualified* to cast a countable ballot. Provisional ballots cast by individuals whom officials find to have been unregistered may be set aside as uncountable, although this official finding might be based on an administrative error.<sup>2</sup>

Alternatively, a polling place may run out of ballots, whether regular or provisional, thereby preventing even admittedly registered voters from casting a ballot. Other polling place problems, like a shortage of poll workers, may cause excessively long lines or, occasionally, prevent a polling place from opening for business at all. Even when a court orders the polling place to stay open for extra hours at the end of Election Day, some registered voters who

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1. I have discussed the implications of this particular point at greater length in Edward B. Foley, *The Legitimacy of Imperfect Elections: Optimality, Not Perfection, Should Be the Goal of Election Administration*, in MAKING EVERY VOTE COUNT: FEDERAL ELECTION LEGISLATION IN THE STATES 97 (Andrew Rachlin ed., 2006), available at [http://region.princeton.edu/media/pub/pub\\_xtra\\_99.pdf](http://region.princeton.edu/media/pub/pub_xtra_99.pdf).

2. For further discussion of circumstances in which provisional voters may be misidentified as unregistered, see Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193, 1195-96 (2005). See also Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. (forthcoming 2007) (describing Equal Protection issues arising from administrative errors in the verification of provisional ballots).

were turned away when they went to the polling place earlier in the day may be unable to return during the extended hours. Consequently, administrative problems can cause these undeniably qualified citizens to fail in their attempt to cast a ballot.

#### B. THE CONCEPTUAL DEVELOPMENT OF AN ELECTORAL ERROR RATE

As the foregoing shows, there are many ways that the operation of a state's voting system may disenfranchise eligible citizens who undertake the steps expected of them in order to vote. If we can accurately identify the number of individuals disenfranchised by the system in any of these ways for any given election, then we can calculate a Disenfranchisement Rate for that election. This Disenfranchisement Rate would be defined as the ratio of disenfranchised individuals to the number of votes actually counted in the election to determine its winner. (A provisional ballot that should have been counted, but erroneously was not, would increase the Disenfranchisement Rate for that election.) This Disenfranchisement Rate would tell us something significant about how well or poorly the state was operating its voting system, with a lower rate obviously being a sign of a better performing system.

But this disenfranchisement of eligible citizens who attempt to vote is only one type of error that can infect the voting process. The counting of ballots that are cast by ineligible voters or that otherwise are invalid is another type of error that can undermine the accuracy of the count. It is not necessary that these invalid ballots be cast and counted as a result of fraud. Their inclusion in the total number of ballots counted may be the result of innocent or negligent mistakes. For example, felons, unaware that they are ineligible, may vote, and the system may fail to detect the mistake. A nursing home resident may receive more assistance in casting a ballot than is permitted under state law (or without the procedural safeguards necessary to avert the risk of undue influence).

The number of invalid ballots cast in most elections in the United States may be relatively small.<sup>3</sup> Nonetheless, it is theoretically possible to calculate precisely an Invalid Ballots Rate for each election. This ratio would identify the percentage of all ballots counted that turned out to have been invalid. Some elections might have higher Invalid Ballots Rates than others, and some states over time might have a higher average Invalid Ballots Rate than other states, suggesting perhaps that their voting systems operate less well on average in this respect than those in other states.

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3. For example, a recent review in Wisconsin found that only eighty-two ineligible felons cast ballots in the State's 2006 general election, which included a total of 2.16 million votes for gubernatorial candidates. See Stacy Forster, *State Board Finds 82 Possible Vote Fraud Cases*, MILWAUKEE J. SENTINEL, Apr. 13, 2007, at B1; Jason Stein, *82 Felons May Have Vote in State*, WIS. ST. J., Apr. 13, 2007, at A1.

It is possible to combine an election's Disenfranchisement Rate and Invalid Ballots Rate into an overall Electoral Error Rate. In essence, this number would capture *both* any "missing votes" that should have been included in the election but were not *and* all those "improper votes" that should have been excluded yet were counted nonetheless. The Electoral Error Rate would express this sum of all wrongly excluded and included votes as a percentage of all votes actually counted.

This Electoral Error Rate would be a powerful measure of how well, or poorly, a state's voting system performed its basic function of accurately aggregating the electoral preferences of the eligible citizens endeavoring to participate in democratic decisions. States that averaged lower Electoral Error Rates than others could claim to have better operating systems.<sup>4</sup> In particular, if it turned out that certain procedures significantly reduced a state's average Disenfranchisement Rate while increasing the state's average Invalid Ballots Rate only slightly, that trade-off in the improvement of the state's average electoral Error Rate would show the procedures to be worthwhile.<sup>5</sup> Conversely, if other measures increased a state's Invalid Ballots Rate while yielding essentially no benefits in terms of a lower Disenfranchisement Rate, that measure would be counterproductive in terms of the state's overall Electoral Error Rate. The ability to evaluate different voting procedures in this way might have a salutary effect on public debate concerning the desirability of those procedures.

In order to turn this Electoral Error Rate into a practical tool for evaluating the actual performance of voting systems, it would be necessary (among other things) to fine-tune what counts as either disenfranchisement or an invalid ballot. Two-hour lines at polling places may constitute disenfranchisement of any qualified voter who can neither wait any longer nor return later during court-ordered extended hours. But what about a one-hour wait? If a polling place never opens because of an unprecedented snowstorm, it is hard to say that the state caused the disenfranchisement of any voters who braved the storm and showed up at the closed precinct attempting to vote.<sup>6</sup> Conversely, if a power outage shuts down the use of electronic voting machines in certain precincts on

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4. Heather Gerken has made a similar point in advocating the creation of a Democracy Index by which to measure the quality of performance by the voting system of each state. Heather Gerken, Commentary, *How Does Your State Rank on the Democracy Index?*, LEGAL TIMES, Jan. 1, 2007, at 36, <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1167386813790>. The specification of a measurable Electoral Error Rate might be one way to implement Professor Gerken's idea of a Democracy Index. For further discussion of her proposal, see Edward B. Foley, Commentary, *Designing the Democracy Index*, Election Law @ Moritz, Jan. 16, 2007, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=103> and Heather Gerken, Commentary, *The Democracy Index: A Reply*, Election Law @ Moritz, Jan. 30, 2007, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=115>.

5. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 651-53 (2007).

6. See *State ex rel. School Dist. No. 56 Traverse County v. Schmiesing*, 66 N.W.2d 20, 27 (Minn., 1954).

election day, and the state has no emergency paper ballots as a back-up plan, the disenfranchisement of voters in those precincts might well be attributable to the state and thus included in the Electoral Error Rate.

Of particular importance in calculating the Electoral Error Rate will be the attribution of errors that cause provisional ballots of unregistered (but otherwise eligible) voters to be rejected. As already suggested, some of these errors may easily be blamed on the state. (For example, state workers misplace registration forms properly submitted by eligible voters.) Responsibility for other errors, however, might be assigned to the voters themselves (if, for example, they make material mistakes in filling out their own registration forms) or third parties (as when groups conducting voter registration drives fail to submit completed forms on time). Similarly, when provisional votes of registered voters are rejected because they are cast in the wrong precinct, should those rejected ballots always be included in the Disenfranchisement Rate (on the ground that the state's voting system prevented the participation of qualified voters who attempted to participate)? Or should disenfranchisement for purposes of the calculation be defined more strictly to encompass only those circumstances in which the state is responsible for the voter's casting the ballot in the wrong precinct?<sup>7</sup>

Similar judgments would need to be made with respect to the Invalid Ballots component of the Electoral Error Rate. We may be confident that absentee votes "purchased" for twenty dollars apiece should be disqualified as invalid, but what if the inducement is much more subtle (e.g. a pastor's praise when church members congregate to fill out their absentee ballots collectively)?<sup>8</sup> Indeed, some of the judgments concerning invalid ballots are the mirror image of those concerning disenfranchisement: suppose provisional ballots have been included in the final count without proper verification; should they be considered invalid for that reason alone, or only upon proof that they were cast by unregistered—or ineligible?—voters? (Presumably, no provisional ballot would ever be double counted in the Electoral Error Rate by being considered *both* on the ground that it was rejected when it should have been

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7. More discussion of policy choices concerning the counting of provisional ballots can be found in WORKING GROUP ON STATE IMPLEMENTATION OF ELECTION REFORM, CENTURY FOUND., *BALANCING ACCESS AND INTEGRITY* (2005), available at <http://www.tcf.org/Publications/ElectionReform/bacomplete.pdf>; Edward B. Foley, Weekly Comment, The Provisional Ballots of Unregistered Voters, *Election Law @ Moritz*, Apr. 5, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/050405.php>. See also EAGLETON INST. OF POLITICS, RUTGERS, STATE UNIV. OF N.J. & MORITZ COLL. OF LAW, OHIO STATE UNIV., REPORT TO THE U.S. ELECTION ASSISTANCE COMMISSION ON BEST PRACTICES TO IMPROVE PROVISIONAL VOTING (2006) [hereinafter BEST PRACTICES REPORT], available at [http://www.eagleton.rutgers.edu/News-Research/Best\\_Practices\\_to\\_Improve\\_Provisional\\_Voting.pdf](http://www.eagleton.rutgers.edu/News-Research/Best_Practices_to_Improve_Provisional_Voting.pdf).

8. John Fortier uses a similar example in his useful book, *ABSENTEE & EARLY VOTING: TRENDS, PROMISES, AND PERILS* 56 (2006), which I have reviewed in Edward B. Foley, *The Where and When of Voting*, 6 *ELECTION L.J.* (forthcoming 2007).

counted *and* on the ground that it was counted when it should have been rejected.)

It is necessary, too, to decide the stage of the vote-counting process at which an election's Electoral Error Rate should be measured. Presumably, states should be given the chance to correct errors that occur in the initial tally, or canvass, of the vote. Consequently, a state's certification of its vote count, which amounts to the official declaration of the election's winner, would seem the appropriate point at which to measure the Electoral Error Rate for that election.

But certifications can be contested on the ground that they are indeed erroneous. The process of resolving such contests may cause the certification to be revised or amended, or even a new certified result to be issued. Thus, perhaps it might make more sense to use whatever final certification occurs in an election as the basis for calculating the Electoral Error Rate.

On the other hand, the existence of an election contest introduces a whole new dimension to the question of whether the state's voting process is working properly. By definition, the filing of a contest is a signal that there is a plausible basis for claiming that the process has not worked properly and needs rectification before the declared winner has a right to take office. It may be necessary, then, to separate "disputed elections" (defined as elections in which a post-certification contest occurs)<sup>9</sup> into a distinct category and calculate separate Electoral Error Rates for undisputed and disputed elections.

Alternatively, and perhaps more usefully, one could calculate Electoral Error Rates for the pre-contest certifications of disputed elections, in order to compare those rates to the rates of undisputed elections. After all, the scrutiny of the contest process would reduce the error rates for those elections where high pre-contest errors triggered the contests. Comparing "pre-contest" and "no-contest" error rates would be more apples-to-apples, whereas comparing "post-contest" and "no-contest" error rates seems more apples-to-oranges. (Of course, one could look at the post-contest error rates of disputed elections to compare, within this specific group, how successfully the contest process is able to reduce errors.)

### C. THE CONCEPTUAL DEVELOPMENT OF A "FAILED ELECTION" TEST

This discussion of contests might lead one to abandon the effort to calculate Electoral Error Rates. Why bother, one might ask, when the only thing that matters is whether errors get corrected when they are disputed? If vote-counting errors in a particular election are small enough that they are not worth contesting, then what is the point of attempting to calculate the election's error rate precisely? The system worked well enough to perform the task it is

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9. The term "contested elections" would be misleading, unfortunately, as that term is already used to indicate an election in which more than one candidate has entered the race.

designed to do: identify the correct winner of the election. In this particular instance, the process did this—without dispute—even if it may have excluded some votes that should have been included or included some votes that should have been excluded.

There is some obvious force to this line of inquiry, and it makes sense to focus on disputed elections as a particular cause for concern in attempting to determine how well a state's voting system operates.<sup>10</sup> Nonetheless, there is reason to be concerned about error rates in elections even when those error rates are not large enough to affect the determination of which candidate won. In particular, the disenfranchisement of an eligible citizen who attempts to vote violates that citizen's basic right to participate in democratic government. It is worth identifying the extent to which this harm occurs, even if the affront of disenfranchisement does not cause the wrong candidate to take office.<sup>11</sup> Likewise, the inclusion of invalid ballots taints the integrity of the voting process even when those ballots do not affect the outcome, and we have an interest in knowing the prevalence of this taint. In fact, it may be reassuring if it turns out that the frequency of invalid votes being counted is so low as to rarely risk the consequence of the wrong candidate being elected.

#### 1. THE IDEA OF A MAXIMUM ACCEPTABLE ELECTORAL ERROR RATE

In addition to comparing Electoral Error Rates among states, it would be valuable to develop a standard for the threshold that demarcates an unacceptably high Electoral Error Rate. To be sure, if one state had an average Electoral Error Rate of one miscounted vote (either wrongly excluded or wrongly included) for every one thousand votes counted by the state, whereas another state had only half as many errors on average (one per two thousand counted votes), we might ask why the former state could not reduce its average Electoral Error Rate so as to equal the latter's. But even if the latter's Electoral Error Rate was the best in the nation, we also might reasonably wonder whether it would be possible for this state to reduce its own Electoral Error Rate and, thus, whether its current rate should be condemned as unacceptably high.

One must resist the temptation to say that any Electoral Error is unacceptable. Politicians sometimes pronounce that one disenfranchised voter, or one unlawful ballot included in the count, is one too many. Despite the rhetorical attractiveness of this assertion, it is untenable as a realistic standard by which to evaluate the performance of a state's voting system. Because we already know that perfection is an unattainable standard, we must instead

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10. *See infra* Part I.C.2.

11. Doug Chapin has also observed the importance of making this distinction in his *Lessons Learned*, part of electionline.org's BRIEFING: THE 2006 ELECTION 4 (2006), available at <http://www.electionline.org/Portals/1/Publications/EB15.briefing.pdf>.

develop the concept of an acceptably low Electoral Error Rate. Below this threshold, a state's voting system can be excused for making mistakes. An electoral system that performs within this standard can be said to be performing well, although the errors that it does commit are obviously regrettable. By contrast, an electoral system that exceeds this threshold is unreasonably error prone and thus can be labeled as performing poorly.

Currently, the field of voting administration lacks any such threshold standard for distinguishing acceptably low from unacceptably high error rates. Other fields of human endeavor have confronted this task and adopted their own threshold error rates to evaluate the quality of their performance. One common standard is called "Six Sigma," which is a statistical concept that refers to six standard deviations from the mean, and corresponds to a threshold error rate of 3.4 per million. Industrial firms, like General Electric, use Six Sigma to assess their procedures for mass-producing consumer products.<sup>12</sup> For example, if General Electric manufactured five defective light bulbs per million, Six Sigma would label that error rate too high. Conversely, if General Electric produced only two defective light bulbs per million, that error rate would be tolerable according to the Six Sigma standard.

Familiarity with recent elections in the United States suggests that the Six Sigma standard would be excessively aspirational at this stage in the development of improved voting administration practices. Surely, many recent elections would not come close to meeting this standard. For one thing, considering just the Invalid Ballot Rate, while this rate may be low in most elections, available evidence suggests that it is not so low as to be below five invalid ballots for each million counted.<sup>13</sup> Moreover, while it is difficult to ascertain the number of provisional ballots that are wrongly rejected, all signs indicate that this number would be larger than ten, or even one hundred, for every million votes counted (whether provisional or regular), and that number would not include any other voter disenfranchised for any other reason.<sup>14</sup>

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12. General Electric, Our Company: What is Six Sigma?, <http://www.ge.com/en/company/companyinfo/quality/whatis.htm> (last visited Apr. 26, 2007).

13. Although only eighty-two ineligible felons cast ballots in Wisconsin's 2006 general election out of 2.16 million total ballots counted, see *supra* note 3, that percentage is almost ten times the error rate that would be acceptable under the Six Sigma standard. In the Washington gubernatorial election of 2004, there were 1678 unlawful ballots included among the 2.8 million counted. See *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. June 6, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/oraldecision.pdf>.

14. One study of provisional voting in the 2004 election found that states with more experience in administering provisional voting tended to count more provisional votes than states with less experience, suggesting that inexperience leads to administrative errors that disqualify provisional ballots that should have been counted. See BEST PRACTICES REPORT, *supra* note 7, at 12 ("The experienced states counted an average of 58% of the provisional ballots cast, nearly double the proportion in the new states, which counted just 33% of cast provisional ballots."). In the less experienced states, provisional ballots accounted for one-half of one percent of all ballots cast in the 2004 general election in those states. *Id.* Even if



Indeed, even just the rate at which voting machines miscount the ballots they receive tends to exceed this Six Sigma standard.<sup>15</sup>

Thus, it may be too ambitious to propose a threshold Electoral Error Rate of one hundred per million votes counted. But I would like to suggest that standard as a reasonably attainable goal worth striving for in the next dozen years, so that by 2020 states would be held accountable to this standard, even if they currently lack the infrastructure to meet this standard now. Any such standard, of course, is necessarily somewhat arbitrary. But this standard conforms to appropriate expectations about the accuracy of the count in an election: if one million votes have been counted, then anything more than one hundred errors seems excessively high. Put differently, to tolerate one thousand errors per million votes counted—to change the threshold by one order of magnitude—would seem to acquiesce in an unduly sloppy voting system. But much less important than accepting my threshold standard as the correct one is the willingness to adopt any such threshold standard at all. Right now, the field of voting administration is flying blind, without any way to determine whether a state's voting system is performing either tolerably well or intolerably poorly.

## 2. DEFINING “BOTCHED” AND “FAILED” ELECTIONS

As it turns out, the need to identify a Maximum Acceptable Electoral Error Rate applies not only to undisputed elections, where the task is to determine whether the voting system malfunctioned even though it did not make a difference to the correct determination of the election's winner. This threshold is also necessary to assess the performance of the system in disputed elections, where vote-counting errors indeed may affect the correct determination of the outcome. Of course, one never wants errors to prevent the identification of an election's rightful winner, but one needs to know whether improper administration of the voting process should be held accountable for the breakdown if it does occur.

A hypothetical example may help to illustrate this point. Suppose the certified result of an election shows the winning candidate to have a margin of victory of only sixty votes, with one million total votes counted. Suppose further that the losing candidate (for simplicity, assume it is just a two-candidate race) claims that this certified result is tainted by one thousand errors: 750 improperly disenfranchised voters and 250 invalid ballots included in the count. This Electoral Error Rate is ten times the threshold for the

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just one-tenth of the variance in uncounted provisional ballots between the more and less experienced states was caused by error, the result percentage of uncounted ballots—0.0125%, or 125 per million—would far exceed the Six Sigma standard.

15. See generally Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711, 1755-1760 (2005) (discussing available data).

maximum acceptable rate I have proposed, thereby suggesting that misadministration has caused a cloud to hang over the result of the race.

We can imagine, however, that the contest of this result by the losing candidate is able to resolve a large portion of these errors. Wrongly rejected provisional ballots may now be counted, and perhaps some of the allegedly invalid ballots turn out to be valid after all (voters alleged to have been ineligible were misidentified). As a result of these corrections, the revised margin of victory stands at forty votes. But there remain ninety errors that cannot be corrected (at least not completely): ninety ballots cast by voters conclusively determined to be ineligible, but irretrievably commingled with all the valid votes counted.

Now the Electoral Error Rate for the revised result falls below the threshold of the maximum acceptable. In this circumstance, one might be charitable and say that one could not expect the voting system to be more accurate than it ultimately was and, therefore, the system should not be blamed for being infected with more irremediable errors than the margin of victory. After all, had the initial certified result contained only ninety errors, all of which turned out to be irremediable, we would say that the system had performed with a tolerably low error rate—as well as reasonably could be expected. It just so happened that this particular election was one in which the margin of victory was lower than the highest acceptable error rate.

Thus, fixing a standard for the Maximum Acceptable Electoral Error Rate gives precision to the concept of a “statistical tie” in the context of counting votes. When the margin of victory is below this threshold, we cannot reasonably expect the voting system to accurately identify the winner. In this circumstance, a contest of the result might be resolved in either of three ways. First, after the contest has corrected all errors susceptible to correction and is left with an irreducible number larger than the margin of victory, the tribunal might literally flip a coin in recognition that result is a “statistical tie” that is not capable of accurate resolution through the counting of votes.<sup>16</sup> Second, the tribunal might order a re-vote, despite the huge expense of doing so, in the hope that enough minds have changed about which candidate should win, or there is enough difference in the turnout of the eligible electorate, to make the margin of victory in the re-vote greater than the Maximum Acceptable Electoral Error Rate.<sup>17</sup> Third, the tribunal can simply leave in place the certified result, corrected insofar as feasible, on the ground that it is no less arbitrary than a coin toss and, rather than holding a re-vote now, the polity can wait for a new election when this winning candidate’s term in office is up.

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16. See generally Michael Pitts, *Heads or Tails?: A Modest Proposal for Deciding Close Elections*, 39 CONN. L. REV. 739 (2006).

17. My colleague Steve Huefner has considered the circumstances in which a revote would be appropriate. See Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. (forthcoming 2007).

To be abundantly clear, the situation is entirely different if the irreducible error rate remains above the maximum acceptable, even after the contest of the election has scrutinized all the claimed errors. In other words, suppose that the contest ends with a certified margin of victory of 125 votes, with one million votes counted. But the contest also ends with eight hundred invalid ballots commingled with all the valid votes. There may be good reason to believe that these invalid ballots make all the difference in the outcome of the election: perhaps they were cast in precincts that voted heavily in favor of the candidate with the 125-vote margin of victory. But one cannot be sure that the invalid ballots favored this winning candidate in roughly the same proportion as the total votes counted from the precinct in which they were cast. (For example, if these invalid ballots were cast by felons, maybe there is a reason to think that felons in that precinct skew differently in their support of the competing candidates than the precinct as a whole.)<sup>18</sup>

In this situation, one reasonably can say that the inescapable cloud over the result of the election was caused by the unacceptably high error rate in the voting process. This situation is not one involving a so-called “statistical tie.” Rather, this situation is one in which the voting process *should* have been able to accurately identify the election’s winner but, because of a malfunction attributable to improper administration, was unable to do so.

Thus, in the context of disputed elections, the Maximum Acceptable Electoral Error Rate enables us to develop a Botched Election Test. A Botched Election is one in which the margin of victory is larger than this threshold of acceptable error and yet the voting process is unable to identify the winner without the taint of error—because the number of irremediable errors exceeds this margin of victory. A state’s Botched Election Rate could be defined as the ratio of Botched Elections to the total number of elections held. Arguably, this ratio should include a factor representing the average margin of victory in the total number of elections, the reason being that a Botched Election is more egregious to the extent that the margin of victory is greater. In any event, a properly defined Botched Election Rate would be an especially powerful measure of an election system’s malfunctioning. It would capture the extent to which sustained misadministration was causing the voting process to fail in its essential purpose.

This idea of a Botched Election Test, however, needs to be refined in one very important respect. It is not enough that the voting process yield an indisputable winner, whose victory is untainted by error, when the margin of victory exceeds the Maximum Acceptable Electoral Error Rate. It is necessary

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18. The trial judge in rejecting the contest of the 2004 gubernatorial election in Washington rested his decision on precisely this point. See *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. June 6, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/oraldecision.pdf>.

also that this indisputable winner emerge from the voting process by the time the winner is supposed to take office.

Thus, suppose on the date for taking office, the margin of victory stands at 150 (out of one million ballots counted), but nine hundred votes remain in dispute. We can imagine that the proceedings for resolving the contest of the election increase the margin of victory to two hundred and fix the number of irremediable errors to seventy-five. This outcome ordinarily would be considered an electoral success: the number of errors is acceptably low and, furthermore, is too small to cast doubt on the winner's victory. But this final outcome occurs too late for the process to be considered successful. It is reasonable to expect that, unless the margin of victory is below the maximum acceptable error rate, the voting process will yield a clear outcome before the time to take office. Its inability to do so is attributable to the improper administration of the voting process, and thus this situation should be viewed as a Failed Election, even if further proceedings would reduce the error rate to an acceptable level and/or below the final margin of victory. In this way, we can define a Failed Election Test as a modification of the previous Botched Election Test, to incorporate the necessity of identifying a winner by the date on which the winner is to take office.<sup>19</sup> In turn, a state's Failed Election Rate would be percentage of the state's elections that fail in this respect, and again this failure rate might include a factor to reflect the extent to which the elections in the state produce tight margins of victory and thus are more susceptible to this kind of failure.

## II. PRACTICE

It would be immensely instructive if we could measure a state's Electoral Error Rate or Failed Election Rate or conduct any of the other empirical inquiries described above. But the data for doing so does not yet exist, and thus, for the present, evaluating the performance of a state's voting system in these ways must remain in the realm of theory.

By contrast, there is data—huge amounts of it—on how states handle allegations that errors affect the determination of which candidate won an election. This data comes in the form of judicial rulings (and related legal provisions) on contests brought in an effort to overturn an election's result. In virtually every state, the law allows a losing candidate (or sometimes even voters themselves) to contest the result of an election on the basis of the two types of errors that we have been considering: “missing votes” that should have been included but were not, and “invalid votes” that were counted although

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19. The idea of a “failed election” is further refined at the end of Part III of this paper in order to take account of lessons learned from considering the interest that disputed elections end with the identification of a legitimate winner, even when the accuracy of the vote count inevitably remains disputable.

they should have been excluded.<sup>20</sup> State law usually permits the courts to remedy these errors, except for adjusting the officially certified totals for each candidate, only when the errors are numerous enough to change which candidate wins (or, occasionally, preclude the identification of a winner). Even so, these judicial rulings serve as a proverbial treasure trove of real-world examples of electoral errors that occur and how they potentially affect the basic task of accurately determining the winner. These rulings, then, can provide insights—even if only anecdotally—into a state’s susceptibility to a “yes” answer on the Failed Election Test (“yes” meaning, again, that the election failed to produce a legitimately identifiable winner by the date for taking office). Perhaps, too, an examination of these rulings can reveal clues about how states can improve their practices so as to reduce the incidence of failed elections or, better yet, avoid the kinds of errors that lead to these contests of elections.

Despite the existence of this data, it has only just begun to be studied systematically.<sup>21</sup> What follows here is just a small portion of a more comprehensive endeavor that is underway, and it is only a preliminary assessment of even that small portion. As part of a study of five midwestern states supported by the Joyce Foundation, my Moritz College of Law colleagues and I are examining how the laws of these states would handle various electoral errors that might arise. Here I consider just four types of errors, two involving allegedly “missing” votes and two involving allegedly “invalid” ballots. Still, focusing just on how these five states would handle these four errors paints a picture of the divergent ways geographically proximate states address the risk of a failed election.

#### A. FIVE STATES, FOUR TYPES OF ERRORS

The five states in question are Illinois, Michigan, Minnesota, Wisconsin, and Ohio (all of which border the Great Lakes). The four types of errors studied, all drawn from recent real-world examples, are:

1. **Unverified Ballots.** Suppose that over ten thousand ballots are cast by voters who did not sign the poll book in advance and thus whose eligibility was never verified and whose identity cannot now be determined. This type of error occurred in Cuyahoga County, Ohio, in November 2006 when disarray at polling places caused poll workers to permit individuals to bypass “check-in” lines and directly cast ballots

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20. Huefner discusses these state laws in *Remedying Election Wrongs*, *supra* note 17.

21. An early draft of Huefner’s work, *supra* note 17, has already been recognized as the seminal piece on this topic. See Election Law Blog, <http://electionlawblog.org/archives/007303.html> (Nov. 26, 2006, 09:40 PM).

on electronic machines.<sup>22</sup> Although no statewide election in Ohio last year turned out to be close enough to be affected by this breakdown in the voting process, we can easily imagine that situation occurring: just think if the initial returns on election night in 2008 show the Democratic candidate ahead in Ohio by under one thousand votes, with reports emerging that the same problem occurred again in Cuyahoga County as happened in 2006. Because Cuyahoga County leans heavily Democratic,<sup>23</sup> the allegation quickly would arise that these ten thousand ballots, which should not have been cast without verifying the voter's eligibility, negate the validity of the outcome. The Republican candidate most likely would have prevailed statewide had these ten thousand tainted ballots been excluded from the count, or so the argument would go.

This same scenario can be replicated in the four other states. We can imagine ten thousand extra ballots, which were cast by voters who never signed in and whose eligibility was never verified, in Chicago, Detroit, Minneapolis, or Milwaukee. In each case, we can imagine the claim arising that these improperly cast ballots invalidate the result of a statewide race where the margin of victory in favor of the Democratic candidate is under one thousand votes.

2. **Ballot Shortage.** Suppose, conversely, that over ten thousand qualified voters, after having waited in line at their proper polling places, abandoned their attempt to vote because the polling place never received the equipment necessary for them to cast their ballots. A situation like this occurred in Maryland during the primary election of 2006: a key piece of technology necessary to operate the voting machines was omitted from the materials delivered to polling places, and no form of emergency "back-up" paper ballots was supplied for use in the event of a technological failure.<sup>24</sup> We can imagine, then, an equivalent ballot shortage occurring in any of the five states we are considering, and we can further assume that, if this shortage occurred in heavily Democratic precincts during an election in which the Republican candidate won by a very slim margin, a contest would

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22. Joan Mazzolini, *Thousands Voted Illegally*, THE PLAIN DEALER, Dec. 5, 2006, at A1.

23. In 2004, John Kerry received two-thirds of the presidential votes cast in Cuyahoga County, with President Bush receiving only one-third. See CUYAHOGA COUNTY, PRESIDENTIAL RECOUNT SUMMARY REPORT (Dec. 17, 2004), [http://boe.cuyahogacounty.us/results/history/2004/110204\\_GE\\_Pres\\_Recount\\_Summary.txt](http://boe.cuyahogacounty.us/results/history/2004/110204_GE_Pres_Recount_Summary.txt). The results were similar in 2000. See Cuyahoga County, Amended Official Results (Feb. 13, 2001), [http://boe.cuyahogacounty.us/results/history/2000/110700\\_GE\\_Summary.pdf](http://boe.cuyahogacounty.us/results/history/2000/110700_GE_Summary.pdf).

24. For news accounts of Maryland's difficulties in 2006, see, e.g., John Fritze & Doug Donovan, *O'Malley Moves to Reassure and Mobilize Voters*, BALTIMORE SUN, Oct. 30, 2006, at 1B; Melissa Harris, *Ehrlich Warns Voting 'Crisis'; Backup Plans Urged Due to Area Shortages in Absentee Ballots*, BALTIMORE SUN, Oct. 27, 2006, at 1B; Deborah Hastings, *Highlights of State Voting Problems*, CENTRE DAILY TIMES, Oct. 22, 2006, at A7.

occur presenting the mirror image of the claim arising in the context of the Unverified Ballots situation. Here, Democrats would claim that the disenfranchisement of over ten thousand voters caused by the ballot shortage invalidates the narrow Republican victory of under one thousand votes. Had these admittedly qualified voters—assume there are verified affidavits from them all—been supplied the ballots that they were entitled to receive, the Democrats would argue, then the Democratic candidate would have prevailed.

3. **Unregistered Provisional Voters.** In contrast to the Ballot Shortage situation, where there are no ballots from the disenfranchised voters that can be added to the count afterwards, we can imagine a scenario in which there are ten thousand uncounted ballots that could be included in a revised count if the initial exclusion of them is subsequently deemed erroneous. This issue would arise if there were ten thousand provisional ballots cast by unregistered but otherwise eligible voters, and the reason they were unregistered is that they made an inadvertent error on the registration form that they had timely submitted. This issue, in fact, arose in Ohio during the presidential election of 2004, but the claim that thousands of provisional ballots were wrongly rejected on this ground was abandoned once it became clear that that they would not make a difference to the outcome.<sup>25</sup>

Still, we can imagine the same kind of claim arising again in an election where the counting of these provisional ballots would make a difference. Suppose there are ten thousand of these uncounted provisional ballots from heavily Democratic precincts in an election where the Republican candidate's margin of victory among counted ballots is, again, under one thousand. In this scenario, Democrats would argue that admittedly eligible voters who submitted timely registration forms should not be disenfranchised just because of an innocent, nonmaterial error that the state did not give them an opportunity to correct.

4. **The Improper Influencing of Absentee Votes.** This fourth scenario is the mirror image of the third: here there is a reason to claim that a number of votes included in the count should be deemed unlawful. The claim is strongest when the improper influence is clearest: absentee voters are given payments by partisan operatives in exchange for casting their ballots for that party's candidate. Evidence has emerged that this kind of wrongdoing has occurred, at least sporadically, in local elections in various states.<sup>26</sup> Thus, we can imagine it occurring again in any of the five states we are considering, yet this time

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25. See Foley, *The Promise and Problems of Provisional Voting*, *supra* note 2, at 1201-2.

26. See FORTIER, *supra* note 8, at 54-56.

affecting a statewide race with a close outcome. Suppose, for example, that the Democratic candidate is certified the winner by two hundred votes, but there is strong evidence (perhaps in the form of confessions with corroborating testimony) that individuals associated with a pro-Democratic group paid three hundred absentee voters twenty dollars each to fill out their ballots for the Democratic candidate.

This scenario, interestingly, contrasts with the Unverified Ballots situation. There it is unknown (and unknowable) whether the unverified ballots, which were cast without following an important procedural safeguard, were actually cast by unqualified voters. (Indeed, it seems probable that, had proper procedures been followed, many of these voters would have turned out qualified, or at least eligible.) Here, conversely, it is known exactly what is wrong with these absentee ballots: they are tainted by improper financial inducement. The only question is what to do once this fact is uncovered. Republicans, presumably, will argue that their candidate must be declared the true winner, or at least the election voided, because the number of improper absentee ballots exceeds the Democratic candidate's certified margin of victory.

## B. A STUDY OF HOW THE FIVE STATES HANDLE THE FOUR TYPES OF ERRORS

### 1. UNVERIFIED BALLOTS

Excluding Ohio, the four other states all use optical scan ballots either exclusively or primarily, and the largest cities in those four states—Chicago, Detroit, Minneapolis, and Milwaukee—are optical scan jurisdictions.<sup>27</sup> Statutes in these four states require, in the event that more ballots are cast in a precinct than the number of voters who signed in to vote, that precinct officials must randomly withdraw the same number of ballots as the difference between the total cast and the total signed in.<sup>28</sup> Precinct officials are supposed to perform

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27. See Ill. State Bd. of Elections, Voting System by County, <http://www.elections.il.gov/VotingInformation/VotingEquip.aspx> (last visited Apr. 26, 2007); Minn. Sec'y of State, Voting Equipment Listing by County (Aug. 25, 2006), [http://www.sos.state.mn.us/docs/minnesota\\_voting\\_equipment\\_2006.xls](http://www.sos.state.mn.us/docs/minnesota_voting_equipment_2006.xls); Wisc. State Elections Bd., <http://elections.state.wi.us/docview.asp?docid=2728&locid=47> (last visited Apr. 26, 2007). In Michigan, the Secretary of State prescribes a uniform voting system for the entire state. MICH. COMP. LAWS ANN. § 168.37 (West 2007). The Secretary has determined that all precincts will use optical scan voting machines. Press Release, Mich. Sec'y of State, Halfway there! (Apr. 19, 2005), <http://www.michigan.gov/sos/0,1607,7-127-115817--,00.html>. Ohio counties are divided approximately half and half between DRE's and optical scan machines. Ohio Sec'y of State, Your Vote Counts, <http://www.sos.state.oh.us/sos/yvc/index.htm> (last visited Apr. 26, 2007).

28. In Illinois, see 10 ILL. COMP. STAT. ANN. 5/17-18, 5/18-9, 5/24B-10 (West 2007). In Minnesota, see MNN. STAT. ANN. § 204C.20, 206.86 (West 2007). In Wisconsin, see



this “random withdrawal” procedure before they forward the total votes for each candidate to central election officials.

This statutory requirement is an attempt to rectify a procedural error by a fair method. Inevitably, however, it is an imperfect attempt. No one knows how many of the unverified ballots were cast by qualified voters, with the consequence that there is no substantive error in including this subset of unverified ballots within the vote count. Indeed, randomly withdrawing ballots from the total cast at the precinct necessarily will remove some ballots of voters who did sign in and whose right to vote in the election is unquestionable. This “random withdrawal” procedure arguably disenfranchises these voters, although it is understandable why the statutes require it.

Furthermore, there is no guarantee that the “random withdrawal” procedure removes ballots cast for each candidate in the same proportion as the unverified ballots. Of course, once the unverified ballots are commingled with the rest, there is no way to extract them to determine for which candidates they were cast. Random withdrawal presumably will tend to extract ballots cast for each candidate in roughly the same portion as the precinct totals for each candidate, and perhaps it is safe to presume that the procedural errors that caused unverified ballots to be cast affected to the same extent supporters of each candidate in the precinct—such that the portion of unverified ballots for each candidate should be the same as each candidate’s percentage of the total precinct vote. But these presumptions reflect a kind of rough justice, not an exact remedy.

The four states that require this “random withdrawal” procedure diverge, however, on what happens if and when precinct officials fail to comply with it. The Minnesota Supreme Court appears to insist on compliance and, in a contest of an election, will order election officials to follow this procedure and adjust vote totals accordingly.<sup>29</sup> Similarly, the Michigan Supreme Court has ordered election officials engaged in a statewide recount to conduct a random withdrawal when precinct officials violated their obligation to do so initially.<sup>30</sup>

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WISC. STAT. ANN. § 9.01(1)(b)(4) (West 2007). In Michigan, see MICH. COMP. LAWS ANN. § 168.802 (West 2007).

29. See *Johnson v. Tanka*, 154 N.W.2d 185 (Minn. 1967). As a preliminary matter, however, the Minnesota Supreme Court will require local officials to remove ballots that were not properly initialed by precinct officials. *Id.* at 188. If, after these un-initialed ballots are removed, the total number of ballots cast exceeds the number of voters who signed in to vote, then the election officials are obligated to use the method of random withdrawal to remedy this unlawful excess. *Id.* Of course, both steps of this two-part process have the consequence of removing ballots that may have been cast by qualified voters and thus are faulty solely because of errors committed by precinct officials. Nonetheless, the Minnesota Supreme Court observed that “[t]he liberal principles which generally hold that neglect and carelessness of election officials should not deprive a person of his right to vote must yield to the express provisions of this statute as it applies to the disposition of excess ballots.” *Id.* at 187.

30. *Groesbeck v. Bd. of State Canvassers*, 232 N.W. 387, 390 (Mich. 1930).

“The function of the recount board,” the court reasoned “carries the authority to do what inspectors should have done in the count,” or else “a recount would be futile.”<sup>31</sup>

The Wisconsin Supreme Court, however, takes an entirely different approach. In a contest of an election premised on the failure of precinct officials to engage in random withdrawal as required by state law, the court held that it was impermissible for the judiciary to rectify this mistake unless the contestant has specific proof that the excess ballots (of those who did not sign in) were cast by ineligible voters or otherwise invalid.<sup>32</sup> The court observed that precinct officials, as opposed to a judge in the subsequent contest, might be able to recollect “personally” that eligible individuals had cast ballots without first signing in—and thus justify the refusal to remove their ballots.<sup>33</sup> In any event, the court surmised that, when a vote is cast by an individual who did not sign in, the chances are at least as good that the voter was qualified and the mistake was caused by official error, rather than that the voter was ineligible or voted more than once.<sup>34</sup> If official error was indeed the cause of the excess ballot, then it would be wrong for the court to attempt to remove it from the vote count: “To reject it without proof of illegality or fault on his part would disenfranchise the voter.”<sup>35</sup>

In a case involving a large number of unverified ballots, like the ten thousand we are hypothesizing in a statewide race decided by fewer than one thousand votes, it would be virtually impossible to prove how many of these ballots were cast by ineligible voters or were otherwise invalid. Consequently, if they were cast in Milwaukee, the state supreme court would let them remain in the count that determines the winner, despite the statutory obligation to remove them as best as possible by means of random withdrawal.<sup>36</sup> Conversely, if they were cast in Minneapolis or Detroit, the state supreme court seemingly would insist on compliance with the statutory requirement to eliminate this number of excess ballots from the vote count, even if the consequence is to

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31. *Id.* Accordingly, the court ruled that the state recount board “should make the proper withdrawal of excess ballots and proceed with the recount of the precincts so involved.” *Id.*

32. *Ollmann v. Kowalewski*, 300 N.W. 183, 185-86 (Wisc. 1941).

33. *Id.*

(It might be that on checking the lists some person whose name was on the registry list was not checked as voting whom the election officials personally knew to have voted. This appearing[,] the lists could be corrected and all ballots counted. No such opportunity exists when the discrepancy appears in the proceedings before the court.)

34. *Id.* at 186 (“It is more likely that the election clerks made a mistake in checking someone who voted, than that any of things stated [by the contestant] happened.”).

35. *Id.*

36. To be sure, if precinct officials had complied with the statutory requirement of random withdrawal, the court would not subsequently order them to return these ballots to the pile to be counted.

withdraw the ballots of eligible voters and the resulting change in vote totals produces a different winning candidate.

What the judiciary in Illinois would do in this situation is somewhat less clear. It might use a remedy of “proportionate deduction” rather than random withdrawal.<sup>37</sup> Proportionate deduction is a mathematical procedure by which the court reduces the total vote for each candidate by the proportion of votes that each candidate received in a precinct having returns that include unlawful ballots.<sup>38</sup> Thus, if ten thousand excess ballots were cast in precincts that voted for the Democratic candidate in a sixty-forty ratio, the court using this procedure would deduct six thousand votes from the Democratic candidate’s statewide total, and four thousand votes from the Republican’s. Proportionate deduction thus changes the vote count directly, whereas random withdrawal requires a new count after the required number of ballots have been removed. In the election we have been hypothesizing, where the Democrat was certified the winner by less than one thousand votes, the two thousand-vote difference in the number of votes deducted from each candidate’s totals would change the outcome of the election, making the Republican the winner.

Ohio, unlike these other four states, has no statutory requirement of random withdrawal in the event that more ballots are cast than voters who sign in. Ohio law, moreover, permits counties to use touchscreen voting machines, and they are used in Cuyahoga County, the state’s largest, which includes Cleveland.<sup>39</sup> It is not clear how random withdrawal would occur in the context of touchscreen voting, unless some kind of software protocol were developed to conduct this procedure (or, even more speculatively, the mandatory Voter Verified Paper Audit Trails<sup>40</sup>—which are spooled in rolls—were cut and manipulated to conduct some kind of manual random withdrawal of them).

Ohio law does require that voters sign in before casting a ballot,<sup>41</sup> and the state supreme court has declared the requirement “mandatory,” suggesting it would rule an election void where the number of ballots in violation of this requirement exceeds the winning candidate’s margin of victory.<sup>42</sup> As a result of a new provision enacted by Ohio’s legislature in 2005, however, the state’s judiciary lacks authority to consider a contest of any election to a federal office,

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37. See *Boland v. City of La Salle*, 19 N.E.2d 177 (Ill. 1939). Although the statute calls for random withdrawal by precinct officials, in circumstances where they fail to comply with this requirement the Illinois courts may simply engage in proportionate deduction, a remedy they apply in many election contests, rather than requiring precinct officials to go back and manually conduct random withdrawal.

38. For more on proportionate deduction, see Huefner, *supra* note 17.

39. Cuyahoga County Bd. of Elections, Electronic Voting, <http://boe.cuyahogacounty.us/electronicvoting.htm> (last visited Apr. 26, 2007).

40. See OHIO REV. CODE ANN. § 3506.10(P) (West 2007).

41. OHIO REV. CODE ANN. § 3505.18(A)(1) (West 2007).

42. *Crane v. Perry County Bd. of Elections*, 839 N.E.2d 14, 20 (Ohio 2005). In that case, the evidence did not demonstrate existence of enough excess ballots to undermine the election’s outcome. *Id.* at 22.

including a presidential election.<sup>43</sup> Consequently, if ten thousand excess ballots are cast in Cleveland in 2008, and the Democratic candidate for president wins Ohio by less than one thousand votes, there no longer is the ability under Ohio law for its judiciary to consider any possible remedy for this major electoral error, which casts doubt on the validity of the election's result.

The variation that exists among these five states in how to handle the problem of unverified ballots, especially after precinct officials have failed to exclude these ballots from the returns they forward to election boards for the official count, indicates that it is an error that has no easy solution. Nonetheless, the very vexing nature of this error suggests that it would be an important component in any effort to calculate a state's Electoral Error Rate, if only to provide an incentive for states to reduce the frequency of this type of error. Moreover, when it does occur, and when it is large enough to cast doubt on the accuracy of the election's outcome, the inability to rectify this error in any procedurally specified manner—most dramatically illustrated by Ohio's lack of any procedure for doing so in a federal election—would justify classifying the election as a failure in accordance with the Failed Election Test. Certainly, an election tainted in this way would be unable to yield an indisputable winner. Even in Minnesota and Michigan, where the courts would order compliance with the well-established procedure of random withdrawal, an election decided on this necessarily arbitrary basis might not qualify as a successful operation of the voting process, but instead could be classified as a "botched" election.

## 2. BALLOT SHORTAGE

With varying degrees of clarity, the judicial opinions of the five states indicate that courts will invalidate an election where a substantial shortage of ballots prevented qualified voters who went to the polls from participating in the election.

Ohio has the most directly applicable precedent on this point. In one case, the court voided an election because officials violated a statute requiring precincts to have on hand a specified number of ballots and, because of the shortage that resulted from this violation, at least forty-six qualified voters who went to the polls were unable to cast a ballot, whereas the winning candidate's margin of victory was only forty-four.<sup>44</sup> Interestingly, the court opined that it

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43. OHIO REV. CODE ANN. § 3515.08(A) (West 2007)

([T]he nomination or election of any person to any federal office, including the office of elector for president and vice president and the office of member of congress, shall not be subject to a contest of election conducted under this chapter. Contests of the nomination or election of any person to any federal office shall be conducted in accordance with the applicable provisions of federal law.)

44. *In re* Election of Council of Village of Oak Harbor, 118 N.E.2d 692 (Ohio Ct. Com. Pl. 1953). According to the statutory formula, the precinct was required to have at

would void the election even if the evidence had showed that only “one person was refused a ballot” because of the shortage. “The knowledge that the ballots were exhausted,” the court explained, “might keep many from even approaching the polls . . . .”<sup>45</sup>

Whether or not the stringency of this opinion would be followed in a subsequent case, no Ohio court would have jurisdiction to consider the issue if it arose in the context of a federal election. Thus, the anomaly might arise where the same ballot shortage causes an Ohio court to invalidate an election for state office, but the result of the election for federal office is left standing, even though the margin of victory in the federal election was much smaller and, thus, much more in doubt. To be sure, if the ballot shortage occurred in a presidential election, voiding all the presidential votes cast by Ohioans on election day may not be a practical remedy, even if the state courts still had jurisdiction to issue this decree. After all, the rest of the nation would already have expressed their presidential preferences, and if the race for the White House all came down to Ohio (as it did in 2004), it might be problematic to redo the presidential vote in just this one state, when everyone knows the outcome there will be decisive. Under the circumstances, perhaps the only practical remedy for a potentially outcome-determinative ballot shortage in a presidential election is a political, rather than judicial, solution (achieved initially in the state’s legislature and then ultimately in Congress). Still, if a shortage of ten thousand ballots in Cleveland equally tainted the outcome of close races for both governor and U.S. senator held the same day, it seems odd that state law would authorize its courts to void the gubernatorial election, while simultaneously sending to the Senate a candidate whose certified victory is not worthy of being upheld.

None of the other four states differentiates between elections for state or federal office, presidential or otherwise, with respect to this or any of the other three types of error under consideration. Wisconsin precedent indicates that the authority of a state court to invalidate an election because of a ballot shortage depends on the severity of the shortage. In a 1981 decision, *McNally v. Tollander*,<sup>46</sup> where a ballot shortage caused by official misfeasance prevented forty percent of the electorate from voting, the Wisconsin Supreme Court voided the election. In so holding, the court distinguished a nineteenth-century case in which it had upheld an election with a thirteen-vote margin of victory, even though eighteen qualified voters had been erroneously denied a ballot.<sup>47</sup> The hypothetical circumstance in which ten thousand qualified Milwaukee

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least 1512 ballots, whereas only 600 were initially delivered, and then only an extra 300 later on election day. *Id.* at 695.

45. *Id.* at 696.

46. 302 N.W.2d 440 (Wisc. 1981).

47. 302 N.W.2d at 444-45 (citing *State ex rel. Wold v. Hanson*, 58 N.W. 237 (Wisc. 1894)).

voters are turned away from the polls because of a ballot shortage, in a statewide race with a total of three million ballots cast and a margin of victory of under one thousand votes, is a fact pattern that falls somewhere in between these two precedents. The stronger argument would seem to be that the hypothetical is closer to the more modern precedent and should be controlled by it. But either result—setting aside the election or letting it stand despite the inevitable taint—is an indication of electoral failure on the part of the state’s voting process. (As long as the margin of victory is above three hundred votes, the state’s electoral system could not avoid blame for this failure on the ground that the result was a “statistical tie,” below the threshold of maximum acceptable error.)

Although even less clear than in Wisconsin, Minnesota law would appear to require invalidation of an election that is tainted to this degree as a result of a ballot shortage caused by official misconduct or, perhaps, ineptitude. The Minnesota Supreme Court has said that an election will be void when “the cumulative effect of . . . serious violations . . . is to cast doubt and suspicion upon the election and impeach the integrity of the vote.”<sup>48</sup> But the court made that statement in the context of rather different facts: precinct officials allied with a particular candidate violated procedures for counting ballots, including tampering with seals that were supposed to keep the count secure, and returns from this precinct were suspiciously late, with a suspicious number of missing ballots that might have been used to alter the vote totals from that precinct.<sup>49</sup> The court said that “there is no necessity of proving actual fraud” (and “no fraud ha[d] been shown” in the case).<sup>50</sup> But the circumstances hinted at fraud, whereas a ballot shortage—even a massive one citywide—may suggest nothing more than administrative mismanagement or incompetence. Fortunately, Minnesota does not appear to have suffered from such a problem, at least not enough to have this kind of situation tested in its courts.

Similar to Minnesota, Illinois law is suggestive but not definitive on this point. Its precedents also say that an election is void where errors are “so pervasive as to undermine the integrity of the vote.”<sup>51</sup> But exactly what circumstances meet this standard, and whether the hypothetical of a ballot shortage somewhat greater than the margin of victory would do so, remain unclear. Meanwhile, Michigan law is least clear of all. The most that can be said is that its courts might intervene based on the general principle permitting such intervention where “serious error . . . may have affected the outcome of the election.”<sup>52</sup>

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48. *In re Contest of Election of Vetch*, 71 N.W.2d 652, 660 (Minn. 1955).

49. *Id.* at 656.

50. *Id.* at 658.

51. *Andrews v. Powell*, 848 N.E.2d 243, 252 (Ill. 4th App. Dist. 2006) (citing *Graham v. Reid*, 779 N.E.2d 391, 396-97 (Ill. 1st App. Dist. 2002)).

52. *Smith v. Scio Twp.*, 433 N.W.2d 855, 859 (Mich. Ct. App. 1988) (citing *St. Joseph Twp. v. City of St. Joseph*, 127 N.W.2d 858 (Mich. 1964)).

## 3. UNREGISTERED PROVISIONAL VOTERS

The advent of provisional voting as required by the Help America Vote Act of 2002 (HAVA) is too new for any judicial precedents to have arisen on how to handle this particular problem. Nonetheless, the statutes of these five states are revealing on this point.

Minnesota and Wisconsin avoid this problem entirely by having Election Day Registration.<sup>53</sup> No eligible voters who go to the polls in those two states will have their ballot rejected because they inadvertently made a mistake in filling out their registration forms. The same is true in Michigan, although it lacks Election Day Registration. Michigan achieves this result by counting a provisional ballot, even though there is no valid registration form on file, as long as the provisional voter demonstrates eligibility and swears that he or she submitted a timely registration form.<sup>54</sup> Thus, Michigan voters who make an innocent mistake on their timely registration forms can still have their ballots counted just by showing their eligibility when they vote (or up to six days later).

Illinois and Ohio, by contrast, provide no such safety net for the eligible voter who makes this kind of innocent mistake. The statutes in both states explicitly require that a provisional voter be *registered* in order for the provisional ballot to count.<sup>55</sup> It might be argued that election officials ought to consider voters to be registered when they submit timely forms, even when they make inadvertent mistakes on those forms, along as they clear up those errors in the context of casting a provisional ballot. But the statutes in those two states do not explicitly impose this kind of obligation on election officials, and it seems unlikely that the courts in those states would do so. (Again, a state court in Ohio would have no power to even consider the question in the context of an election to federal office.)<sup>56</sup>

The difference on this point between Michigan, on the one hand, and Illinois and Ohio, on the other, suggests that these latter states disenfranchise eligible voters unnecessarily. To be sure, states should have considerable leeway in how they design and implement their voting systems. But it is hard to see what interest Illinois and Ohio have in rejecting these provisional ballots cast by eligible voters, when Michigan so easily counts them—unless those other states provide voters with an adequate opportunity before election day to correct any inadvertent errors on their timely registration forms.<sup>57</sup> In a presidential election especially, where the electoral interests of all Americans

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53. MINN. STAT. ANN. § 201.061(3) (West 2007); WISC. STAT. ANN. § 6.55(2)(a)(1) (West 2007).

54. MICH. COMP. LAWS ANN. § 168.523a(1) (West 2007).

55. 10 ILL. COMP. STAT. 5/18A-15(b)(3) (West 2007); OHIO REV. CODE § 3505.183(B)(1), (B)(4)(a)(i) (West 2007).

56. See *supra* note 43.

57. See Foley, *The Provisional Ballots of Unregistered Voters*, *supra* note 7.

are affected by the voting procedures in each state, there may be a paramount national value that should prevent the disenfranchisement of eligible citizens because of an easily correctable technical deficiency. In any event, an effort to identify a state's Disenfranchisement Rate probably should include provisional ballots rejected on this basis, simply to show that the provisional voting procedures of a state like Michigan tends to count more ballots cast by eligible citizens than those in states like Illinois or Ohio.

#### 4. UNDUE INFLUENCE OF ABSENTEE BALLOTS

There is no doubt that the courts in Michigan and Illinois would overturn an election where the evidence showed that partisan operatives paid enough absentee voters to make the difference in the outcome of the election. The Michigan Supreme Court has voided an election where financial inducement was provided to procure favorable in-precinct votes, which is ordinarily more difficult to accomplish than payments for absentee ballots.<sup>58</sup> Likewise, a recent Illinois decision invalidated 38 absentee ballots that had been cast in circumstances involving improper partisan influence, with the consequence that the judiciary awarded the election to the candidate whose total votes were initially lower but who subsequently had more—once 38 votes were subtracted from the candidate whose campaign had engaged in the improper influence over these ballots.<sup>59</sup>

Language in opinions from Wisconsin and Minnesota suggests that the courts there would also reverse the result of an election if the evidence showed that more absentee voters had received payments from affiliates of the winning candidate than the winning candidate's margin of victory.<sup>60</sup> The same is true of Ohio.<sup>61</sup> Once again, however, Ohio's new statute would prevent its courts from implementing this remedy if the election were a federal one.<sup>62</sup> Thus, the evidence of absentee ballot fraud in an Ohio congressional election might be overwhelming, and yet there would be not a thing an Ohio court could do to prevent the beneficiary of this fraud from being declared the winner under state law.

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58. *St. Joseph Township v. City of St. Joseph*, 127 N.W.2d 858 (Mich. 1964).

59. *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1207 (Ill. 1st App. Dist. 2004). There, a partisan official merely watched the absentee voters fill out their ballots.

60. *Lanser v. Koconis*, 214 N.W.2d 425, 428 (Wisc. 1974) ("If the record in this case indicated the slightest evidence of any fraud, connivance or attempted undue influence, we would have no hesitancy in declaring the absentee voters' ballots invalid."); *In re Contest of Election of Vetsch*, 71 N.W.2d 652, 659 (Minn. 1955) (invalidating vote of precinct where the election was riddled with irregularities, including "improper handling of ballots by the village clerk" and "unauthorized issuance of absentee ballots").

61. *See In re Concerned Citizens of Ward 17, Precinct L*, 468 N.E.2d 791 (Ohio Ct. Com. Pl. 1984); *see also In re Election of Nov. 6, 1990 for Attorney General*, 569 N.E.2d 447, 450 (Ohio 1991) ("clear and convincing evidence" of fraud will justify judicial intervention to overturn election result).

62. *See supra* note 43.



The risk of absentee ballot fraud is a concern in Ohio,<sup>63</sup> especially now that the state has adopted no-excuse absentee voting.<sup>64</sup> One must hope that no major election in the state has its outcome clouded by evidence of improper influence over the casting of absentee ballots. But state law must be prepared for this possibility, including in the elections to federal office that the state's voting system administers. If the state's voting system is unable to accurately identify the true winner of an election it has held to fill a federal office, then the citizens of the state would be better served if state law provided some kind of procedure to address this malfunctioning of the state's voting process.

### III. POLICY

There is much that one can recommend to improve the operation of a state's voting process just based on the relevant law that would apply to the four types of errors in the five states that we have focused on. Some of these policy-oriented observations were already suggested in the above discussion of this law:

1. States should devise ways to avoid disenfranchising eligible voters simply because of minor errors on their registration forms, although the particular way of doing so—(a) Election Day Registration; (b) counting provisional ballots in this category; or (b) adopting pre-election methods to correct these errors—should be left to each state's discretion;
2. Ohio should consider repealing, or amending, its anomalous provision that prevents its state courts from remedying errors committed by state officials that undermine the accuracy of the elections the state conducts to represent its citizens in federal offices even when state law would require state courts to remedy those same errors insofar as they undermine the accuracy of elections to state offices held simultaneously;
3. Congress should consider whether the unique national interests associated with presidential elections, combined with the unique difficulties of remedying errors that undermine the presidential vote of the electorate in a single (potentially decisive) state, warrant additional national legislation to establish standards and procedures for redressing voting errors that occur in presidential elections.

Additional specific policy recommendations could be drawn from even this limited five-states-four-scenarios analysis. Extending this kind of inquiry to other states and additional scenarios involving other types of electoral errors

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63. See *State v. Jackson*, 811 N.E.2d 68 (Ohio 2004) (criminal allegations of improper partisan influence of nursing home voters during 2004 presidential election).

64. OHIO REV. CODE § 3509.02 (West 2007) (as amended by Sub. H.B. 234, 126th Gen. Assem. (Ohio 2005)).

that can (and do) occur would yield, undoubtedly, an even richer and more robust set of policy recommendations.

Here, however, I wish to raise three general points that emerge from this limited and preliminary study.

#### A. THE NEED FOR STATES TO LEARN FROM EACH OTHER'S EXPERIENCE

Some of the variation in how the five states handle each of the four errors results from deliberate decisions already made in state law, either by the state's legislature or by the state's judiciary in a precedent that addresses the issue. But much of the variation—and uncertainty—on how these states might handle situations new to each of them results from the fact that the law in some states is not specific on points definitively resolved in other states.

The relative thinness of state law on what to do about problems that might arise—indeed have arisen elsewhere (recall that all four of the hypothesized scenarios are derived from real-world events)—is perhaps a salutary sign in one respect. Serious errors that undermine the outcome of an election arise relatively infrequently, especially in a major election, where the consequence would cause a state's legislature to review the rules for resolving election contests. Not surprisingly, then, each state's law consists primarily of only those judicial precedents involving the few outcome-affecting errors that happened to have occurred there. Indeed, one has to look back to court cases from many decades ago—the 1930s, for example—to find applicable precedent, if it exists at all.

States, however, need not wait for a problem to occur in one of their own elections in order for their laws to provide instructions on how to redress the problem. One of the most fundamental and oft-cited principles of the law that governs the resolution of disputed elections is that it is far preferable for the method of resolution to be specified in advance of the dispute, rather than developed after the ballots have been cast in the disputed election.<sup>65</sup> To be sure, it is impossible for state law to anticipate in advance all the myriad of errors, with their limitless permutations, that might undermine the outcome of an election. Nonetheless, it is possible for each state's law to do much better in this regard simply by incorporating lessons from the errors that have happened in other states.

Each state, therefore, should establish a periodic review procedure whereby it studies electoral errors that have occurred in other states, especially those that have caused a contest of an election, since the last periodic review. Based on this study, each state will analyze its own existing laws to see how it

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65. I have discussed this point previously. See Foley, *The Promise and Problems of Provisional Voting*, *supra* note 2, at 1203-04. My colleague Dan Tokaji has also made this a theme of his work. See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1243-44 (2005).

would address the situation if those same errors had occurred there. To the extent that the state's law is unclear on this point, or otherwise needs revision in light of the new information from other states, the state would revise its laws accordingly. Institutionally, it would be necessary for each state to lodge this law-revision authority in an administrative agency, as it would be unlikely that the state's legislature would be in a position to conduct these periodic reviews (which, ideally, would occur at least every other year). Multi-state organizations could assist each state with the gathering of information necessary to conduct these periodic reviews, but it remains the responsibility of each state to put in place the mechanism necessary to implement its own periodic review—and, as needed, revision—of its own laws.

Other scholars have suggested “audits” of state voting procedures along these lines.<sup>66</sup> The study here of just five states, focusing solely on how each would address four basic types of errors, underscores the pressing need for implementing a regular audit mechanism of this kind. If nothing else, an audit mechanism focusing on the rules for resolving election contests would be a valuable contribution.

#### B. THE VALUE OF CREATING SPECIALIZED ELECTION COURTS TO HANDLE ELECTION CONTESTS

Even if states implement the kind of periodic review-and-revision process just recommended, there still will arise unforeseen situations in which errors in the voting process threaten to undermine the accuracy, and thus the legitimacy, of an important election. When this occurs, a state's law will be unclear on how to handle the situation, and yet the state's judiciary will still be required to resolve any contest of the election that results (as it most likely will, when the stakes are high, the margin of victory narrow, and the problem large enough).

The particular difficulty that emerges in this situation is that expectations concerning the judiciary's capacity to resolve election contests according to law exceed reality. The prevailing public conception of courts, right or wrong, is that their job is to decide cases according to the requirements laid down by law, applying these requirements to the objectively determined “true” facts of the case, without regard to discretionary considerations of politics. The public, for better or worse, has very little appreciation for the indeterminacy that necessarily affects many areas of law, and that observation applies even to highly educated members of the public, including government officials and other opinion leaders, who are not themselves attorneys.

Whether that indeterminacy or the public's contrary perception is problematic in other areas of law, it presents a particular difficulty in the context of disputed elections. Elections, of course, are inherently political

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66. See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 954 (2005).

enterprises. Their appropriately competitive nature intensifies the partisanship of the political battles they generate. The public recognizes that a political institution of government, like a legislature, where one party by design exercises control as a result of prevailing in previous democratic elections, cannot be expected to adjudicate fairly a dispute that has arisen concerning the counting of votes in a new election, which pits that one party against its political opposition for future control of the government. Consequently, when the authority to adjudicate that dispute is given to a court, in contrast to a political institution of government, the public expects that the court will serve as a neutral, non-partisan tribunal, resolving the dispute according to the dictates of previously laid-down law, not based on any political considerations that the judges happen to harbor at the time.

When the existing law is insufficiently clear on how to resolve the election dispute, however, the law cannot constrain the courts, and judges are free to decide the case according to politics, as they often appear to do—especially when the election is a prominent one. One need look only to disputed gubernatorial elections that occurred in Illinois and Minnesota for confirmation of this point. In 1982, Republican incumbent James Thompson narrowly defeated his Democratic opponent, Adlai Stevenson III, in their race for Governor of Illinois—the margin was 5074 out of almost four million votes counted. Stevenson contested the election on the ground that widespread electoral errors required the invalidation of enough ballots to negate this margin of victory. By a four-to-three vote, the Illinois Supreme Court rejected this contest.<sup>67</sup> Similarly, in the 1962 election for governor of Minnesota, the initial count of ballots had the Republican incumbent, Elmer Anderson, behind his Democratic challenger, Karl Rolvaag, by only fifty-eight votes (out of more than one million cast). A partial recount, however, showed Anderson winning by 142 votes. The state canvassing board refused to accept the partial recount, and Anderson sued, claiming that the board was required to do so. The Minnesota Supreme Court agreed with Anderson in a three-to-two decision.<sup>68</sup> (Even so, a subsequent full recount ultimately showed Rolvaag the winner, by ninety-one votes.)<sup>69</sup>

Whether these split decisions of the two state supreme courts, each by a bare one-vote majority, precisely correspond to the partisan affiliations of the judges on those courts is beside the point.<sup>70</sup> Nor does it matter whether any of

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67. *In re* Contest of Election for Governor, 444 N.E.2d 170 (Ill. 1983).

68. *In re* Application of Anderson, 119 N.W.2d 1 (Minn. 1963).

69. RONALD F. STINNETT & CHARLES H. BACKSTROM, RECOUNT 1 (1964).

70. In the case of the Minnesota Supreme Court, its three-to-two split was exactly along partisan lines, much to the dismay of opinion leaders in the state. As a result, to conduct the full recount of the 1962 gubernatorial vote, the parties agreed to the appointment of a special three-judge court that would be structurally bipartisan in composition, having one judge associated with each major party and the third recognized to be a moderate in neither party's camp. See STINNETT & BACKSTROM, *supra* note 69, at 96-98. This creation of

these judges were actually motivated by political considerations, rather than their good faith perception of what the law required of them. Rather, the problem is that these teeter-totter rulings reveal that the applicable law is not so crystal clear that the judges have no choice but to follow its command, and therefore the judges are free to decide the case in accordance with their political preferences if they are so inclined.

When cases like these are dependent on the personal identity of the particular judges who happen to sit on the court at the time they are decided (as is true whenever a four-to-three, or three-to-two, decision might have gone the other way with just one change in the composition of the court), the risk is that the outcome will depend on how many Democrats or how many Republicans hold those seats. While that risk exists in other kinds of cases, it is particularly acute in election contests. There is no point in letting the state's supreme court, rather than its legislature, resolve the dispute over which candidate will become governor, if the court's resolution will be just as politically motivated as the legislature's.

The solution to this problem is to design a specialized court for election contests. The blueprint for this court must accept the inherently political nature of these contests. It also must recognize the likelihood that the applicable law—even if specified in advance as far as possible—may be insufficiently constraining to prevent judges from deciding these cases based on their own political motives. There are many different ways one might develop this blueprint, and here is not the place to explore the different possibilities.<sup>71</sup> For sake of illustration, it suffices to sketch the outlines of one such option.

Consider a five-member court that convenes only when an election contest is filed. Its members consist of four judges who already sit on other general-jurisdiction state courts. These four members are selected, one each, by the majority and minority leaders of both houses of the state legislature. These selections occur at set intervals, so that these members of the court are known in advance of any election contest that may occur. The fifth member is an attorney, whether a currently sitting judge or not, chosen by the mutual agreement of the other four members. This fifth member also serves for a specified term, with a new fifth member chosen by the other four current

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the special recount court is an ad hoc example of my proposal for an institutionalized bipartisan elections court.

In the Illinois Supreme Court's four-to-three vote, the three dissenters were all Democrats, and three of the four justices in the majority were Republican. *See* Daniel Elger & Michael Arndt, *Adlai Concedes Defeat: Bid for Recount Loses in 4-3 Court*, CHI. TRIB., Jan. 8, 1983, at W1 (describing the lone Democratic justice in the majority as a "maverick"). Thus, one Democratic justice switched sides to prevent the decision to reject the Democratic candidate's contest from being entirely along party lines.

71. Again, the ad hoc tribunal created by the parties to handle the recount of the 1962 gubernatorial election in Minnesota provides a successful example of one way to structure a specialized court of this kind. *See* STINNETT & BACKSTROM, *supra* note 69, at 96-98.

members, when the previous fifth member's term has expired. In this way, also, the fifth member is always specified before an election contest arises.

Designed this way, the five-member tribunal would represent a balanced blend of law and politics. With four of the five members required already to be judges, and the fifth required to be a lawyer, the hope would be that these individuals would make their best efforts to decide any election contest according to law, rather than politics. (The reason for not requiring the fifth member to be a judge as well is that other four members might decide that the fairest, most impartial attorney they could choose—in the event that these four split along party lines—is an individual not currently serving as a state judge.) But to guard against the inevitable risk that politics will affect the decision that the four legislatively appointed members make in an intensely disputed election contest, the most that one can wish is that the fifth member is an individual who fairly serves as a neutral because of the method by which that individual is chosen.

Of course, one might think that an inherently bipartisan structure of this kind would be preferable for state courts of general jurisdiction, not just specialized tribunals for resolving election contests. But that topic is one for another occasion. Even if there are good reasons for selecting general-jurisdiction judges in the way that states currently do, those selection methods are not well suited for courts tasked with the expectation of resolving election contests according to the rule of law. It would be better to acknowledge the limitations of law in its ability to settle election disputes free of political bias and thus, design for these cases a special elections court with a built-in bipartisan structure.

### C. BETTER AND WORSE ELECTORAL BREAKDOWNS

If analyzing the election contests from these five states has yielded a point worth emphasizing, it is this: while some electoral errors are irremediable in the sense that no indisputable winner can emerge from the contest, it nonetheless matters to the legitimacy of the new officeholder how the state's law attempts to cope with the breakdown of the electoral process that has occurred.

To be sure, the fact that some electoral errors are unfixable places a premium on the ability of a state to reduce the incidence of them in the first place. That is why being able to measure a state's Electoral Error Rate and, especially, its Failed Election Rate would be so valuable. As an additional incentive for states to stay out of trouble, we might want to add an Election Contest Rate, which simply would capture the percentage of a state's election outcomes that end up in litigation.<sup>72</sup> On the principle that election contests are

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72. One should include in this measurement an election contest that is litigation in a legislative rather than judicial proceeding, to take account of circumstances—like those

to be avoided if at all possible, tracking a state's susceptibility to these disputes would prompt states to reduce the errors that provide grounds for litigation. (Of course, we might want to factor in the extent to which the state has elections with close margins of victories, since a state does not deserve much credit for avoiding contests in uncompetitive races.)

But too much attention to the mere incidence of contests might cloud the key point that, once a contest has occurred, there are better and worse ways of resolving it, even if the resolution cannot fix the electoral errors in the sense of identifying the truly indisputable winner. What makes the resolution of an election contest better or worse has little to do with the substance of the rule that a state adopts for coping with an unfixable error. As we saw from our five-state study, when confronted with the problem of more unverified ballots than the winning candidate's margin of victory, there is something to be said for the procedure of random withdrawal (as Minnesota and Michigan would insist upon) and something to be said for letting the ballots remain in the count unless specifically proven invalid (as Wisconsin would require). Neither approach fixes the problem; either way, there remains reasonable doubt about which candidate really received more valid votes.

What is important, instead, is that the state choose in advance a clear rule for handling this contingency if it does occur—and that the tribunal responsible for resolving the contest of the election abide by whatever rule was adopted in advance. Procedural predictability and regularity of this kind would be the best resolution of the contest, in this circumstance of substantively unfixable errors. In the absence of a clear-cut rule in advance, the second-best resolution would be a decision reached by a tribunal perceived by both sides to be structured so that it is scrupulously neutral and fair. This second-best solution, again, is procedural rather than substantive in nature.

Either of these procedural mechanisms can give the result of an election contest a kind of legitimacy, even if the final vote count itself remains unsatisfactorily tainted by error. That is why, in making my first two policy recommendations, I urge reforms that would increase the likelihood of these procedural mechanisms working as intended in the event of an election contest. Even as we should encourage states to prevent electoral errors in the first place, we should also encourage them to adopt procedural mechanisms that foster the legitimacy of the elected officeholder despite the inherent uncertainty of the error-filled vote count that caused this candidate to be declared the winner. An election contest that ends with the losing candidate conceding the legitimacy of the winning candidate's right to take office, as determined according to the previously established rules and procedures for adjudicating the election contest, is not entirely a failure, even though it certainly is not an unqualified success.

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caused by Ohio's new law prohibiting judicial contests of federal elections—that require the litigation to occur in the legislature rather than in court.

In this respect, it is worth recalling the distinction between the Botched Election Test and the Failed Election Test. A “botched election” is one where errors have caused a candidate’s victory to be disputable. A “failed election” is one where there is no identifiable winner by the time for taking office. Any election that ends up in a contest where it is impossible to fix the errors in the sense of removing the doubt over the accuracy of the vote totals received by the candidates qualifies as a “botched” election.<sup>73</sup> But if an election contest ends with the losing candidate accepting the legitimacy of the candidate’s victory, even when the accuracy of the vote count remains clouded by error, because the contest was adjudicated fairly according to procedures well designed for this purpose—and if the losing candidate’s acceptance of this legitimacy can come before the time of the winner to take office—then this election deserves not to be classified as a complete failure. In other words, this particular election should be included in the Botched Election category, but it should escape the condemnation of the Failed Election Test.

It is certainly a worthy goal for a state to reduce its Botched Election Rate, but even better would be for all states to reform their election contest procedures so that each and every one of them is able to maintain a Failed Election Rate of zero. Entirely error-free elections are impossible. In other words, no state can be expected to reduce its Electoral Error Rate to zero. For the same reason, it will not be possible to eliminate Botched Elections entirely. But, through the procedural mechanisms suggested, it would be possible for a state to never have another Failed Election.

#### IV. CONCLUSION

The systematic study of voting administration is still a young discipline, and much work remains to be done. The theoretical considerations set forth at the outset of this article need to be debated and refined, even before any attempt to translate them into practical proposals occurs. The kind of state-by-state comparison conducted in the middle of this article needs to be expanded and evaluated, as do the policy proposals that emanate from both the theory and the state-by-state analysis. Yet this article is a start. If it causes a conversation on whether there are better ways to define a Failed Election Test, which in turn generates additional proposals for procedural reforms that would enhance the legitimacy of elections where the results are unavoidably infected with administrative error, that contribution would be worthwhile enough.

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73. This is subject to the qualification that the margin of victory must exceed the Maximum Acceptable Electoral Error Rate.