

ARTICLE

REMEDYING ELECTION WRONGS

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Many matters of U.S. election administration have attracted significant popular, political, and scholarly attention in recent years. Largely slighted, however, has been the matter of how the various state election systems respond when an election outcome is unsettled or contested. Moreover, some recent electoral reforms, such as widespread provisional balloting and increased use of no-fault absentee voting, actually may increase the frequency with which contested elections occur. This Article explores the complex issues that arise in remedying a failed election, and urges states to refine and clarify their remedial standards and procedures for resolving an election dispute.

One unmistakable impact of the incredibly close 2000 presidential race and the dramatic litigation over its outcome is that the American public now pays substantially more attention to how states conduct their elections. Much of this attention has focused—properly—on adopting reforms to avoid the kinds of problems that famously plagued Florida in 2000, whether in matters of ballot design, voting technologies, or recount procedures.¹ As a result, most states have strengthened their voting processes in a number of important ways to reduce the risks of election difficulties.² Meanwhile, Congress has enacted the Help America Vote Act (“HAVA”),³ which encourages states to update their voting systems, standardize their voting registration requirements, and otherwise improve their election processes.⁴ Addi-

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¹ Summaries and analyses of the 2000 election are voluminous. *See generally, e.g.,* RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Cass R. Sunstein & Richard A. Epstein eds., 2001); Symposium, *Recounting Election 2000*, 13 *STAN. L. & POL’Y REV.* 1 (2002); Gillian Peele, *The Legacy of Bush v. Gore*, 1 *ELECTION L.J.* 263 (2002).

² For a state-by-state list of recent election reforms, see [ELECTIONLINE.ORG](http://www.electionline.org), *ELECTION REFORM: WHAT’S CHANGED, WHAT HASN’T AND WHY 2000–2006*, at 39–72 (2006), available at <http://www.electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf>.

³ Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

⁴ *See, e.g.,* 42 U.S.C. § 15481 (Supp. 2006) (voting systems requirements); 42 U.S.C. § 15302 (Supp. 2006) (replacement of punch card or lever voting machines); 42 U.S.C. § 15483 (Supp. 2006) (computerized statewide voter registration list requirements and requirements for voters who register by mail); 42 U.S.C. § 15482 (Supp. 2006) (provisional voting and voting information requirements).

tional congressional action in this area has been proposed,⁵ and many state-level reforms will continue to occur.

Largely absent, however, has been meaningful discussion of how to improve the way that state election systems respond when elections still go awry, as they inevitably will.⁶ That is, notwithstanding the array of recent reforms that should help to reduce the frequency of election miscues, post-election controversies nonetheless are sure to recur. For instance, the bare fact of an incredibly close election, such as the 2004 Washington gubernatorial election,⁷ can highlight the imperfections that exist in most election processes and potentially create an election crisis, even without the presence of more systematic failures. Meanwhile, systematic failures also are likely to continue to occur on occasion, whether in the form of the nonuniform standards employed in Florida for counting punch cards in the 2000 election,⁸ the incredibly long lines in some Ohio precincts in 2004,⁹ or the apparent flaw in the ballot layout for the thirteenth congressional district in Sarasota County, Florida, in 2006.¹⁰ Any number of other possible scenarios may similarly create a pressing need for an answer to the question of what to do when an election goes wrong or its outcome is for some reason in doubt.¹¹

Furthermore, some recent election reforms actually may have the unintended result of increasing the number of occasions when an election outcome can be meaningfully contested. For instance, increased use of both absentee and provisional ballots¹² may have the effect of increasing the “margin of litigation.”¹³ Although in any particular election a number of

⁵ Some proposals in the 109th Congress included H.R. 5913, 109th Cong. (2d Sess. 2006) (proposing to require government photo identification in order to vote); H.R. 3058, 109th Cong. § 83 (1st Sess. 2005) (proposing to fund the Election Assistance Commission to carry out election reform portions of HAVA); H.R. 550, 109th Cong. (1st Sess. 2005) (proposing to require paper audit trails for electronic voting equipment); S. 17, 109th Cong. (1st Sess. 2005) (proposing to amend HAVA in several respects); S. Con. Res. 53, 109th Cong. (1st Sess. 2005) (proposing to express the “sense of Congress that any effort to impose photo ID requirements for voting should be rejected”).

⁶ See *infra* notes 136–37 and accompanying text.

⁷ See SAM REED, WASH. SEC’Y OF STATE, 2004 GOVERNOR’S RACE (2004), http://www.secstate.wa.gov/elections/2004gov_race.aspx (providing complete election results from the Washington gubernatorial race); see also Symposium, *Where’s My Vote? Lessons Learned from Washington State’s Gubernatorial Election*, 29 SEATTLE U. L. REV. 313 (2005).

⁸ See *supra* note 1 and accompanying text.

⁹ See *Waiting Was the Hardest Part*, COLUMBUS DISPATCH, NOV. 3, 2004, at 1A.

¹⁰ See Lloyd Dunkelberger, *Computer Code at Heart of Congressional Election Dispute*, GAINESVILLE SUN (Fla.), Dec. 21, 2006, available at <http://www.gainesville.com/apps/pbcs.dll/article?AID=/20061221/LOCAL/612210369/-1/today> (describing several proffered explanations for abnormally high rate of undervoting in Sarasota County); *infra* note 46 and accompanying text.

¹¹ See *infra* Part I.A.

¹² Provisional ballots are ballots offered to voters who cannot satisfy poll workers that they are eligible to vote. Issues concerning the eligibility of these voters can then be resolved after the election, and all provisional ballots determined to have been cast by eligible voters then can be processed and included in the vote totals.

¹³ See Daniel Tokaji, *Are Election Reforms Increasing the Margin of Litigation?*, ELEC-

other factors will affect how large or small the margin of litigation is, there is merit to the claim that some recent election reforms, by expanding the number of votes that may remain at issue after election day, may actually have the unintended effect of increasing the likelihood of contested elections.¹⁴ For example, some election reforms expanding the use of provisional ballots may result in a large number of provisional ballots whose eligibility for inclusion may be contested, and will not be determined until after the election.¹⁵ Meanwhile, other reforms leading to the increased use of absentee ballots may mean that allegations of absentee fraud will call a greater number of ballots into question.¹⁶

This Article explores what remedies are and should be available whenever some systemic election failure has occurred or whenever an election is within the margin of litigation. It describes the range of potential election problems, as well as their possible solutions, and creates a framework for identifying the most appropriate options for addressing particular problems. In doing so, this Article calls upon states to think more carefully about how to remedy an election failure.¹⁷

TION LAW @ MORITZ WEEKLY COMMENT, June 21, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/050621.php>. The phrase “margin of litigation,” which gained widespread use during the 2004 presidential election, describes an election outcome close enough to draw post-election legal action. *See id.* Gratifyingly, the 2006 congressional election did not produce a dramatic increase in post-election litigation, despite prospects that it might. *See* Edward B. Foley, *Will the Election System Function Properly This Year?*, ELECTION LAW @ MORITZ WEEKLY COMMENT, Sept. 5, 2006, <http://moritzlaw.osu.edu/electionlaw/comments/2006/060905.php>. In fact, the only major election to end up in court was the race for Florida’s thirteenth congressional district. *See* ELECTIONLINE.ORG, BRIEFING: THE 2006 ELECTION 1–3 (2006), available at http://www.electionline.org/Portals/1/Publications/EB15_briefing.pdf.

¹⁴ *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 957–59 (2005) (cataloguing a dramatic increase in the number of election cases since 2000). However, this increase cannot be wholly attributed to the underlying facts necessary to support such litigation becoming more commonplace. At least some of this increase (and perhaps much of it) may instead reflect candidates’ and the public’s increased awareness of the potential of post-election litigation that *Bush v. Gore* precipitated. *See id.*

¹⁵ Well-intentioned efforts to provide all eligible voters the right to vote by guaranteeing any person who appears at a polling place at least a provisional ballot have dramatically increased the number of ballots cast provisionally. *See* ELECTIONLINE.ORG, *supra* note 2, at 32–33.

¹⁶ *See id.* at 28–29 (reporting that in 2000, twenty-nine states required an excuse to vote absentee, while only twenty-three required such an excuse in 2006); *see also* JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS 54–57 (2006); Edward B. Foley, *Will the Expansion in Absentee Voting Yield an Increase in Abuse?*, ELECTION LAW @ MORITZ WEEKLY COMMENT, Mar. 28, 2006, <http://moritzlaw.osu.edu/electionlaw/comments/2006/060328.php>; CTR. FOR DEMOCRACY AND ELECTION MGMT., BUILDING CONFIDENCE IN U.S. ELECTIONS—REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 2005, at 35–36 (2005), available at http://www.american.edu/ia/cfer/report/full_report.pdf.

¹⁷ The term “election failure” describes any election that does not satisfactorily produce an answer to the choice on which the electorate is voting. It does not necessarily describe a design flaw, however, as even a perfectly designed system could generate a tie vote. In any event, it is unrealistic to expect perfection in the design of our election systems; even

The general issue of how to remedy an election failure in turn generates a number of specific related questions. Among these are (1) when to invalidate some portion of votes; (2) when, if ever, to use statistical adjustments to correct vote totals for demonstrated errors; (3) in what circumstances to compromise the anonymity of the polling booth by compelling voters to reveal their ballot choices; (4) whether to adjust election rules once an election is underway; and (5) when to take the dramatic steps of either postponing an election or invalidating a completed election and holding a new one. Although many state courts have had to deal with these questions on an ad hoc basis over the years, these questions have not received much scholarly or popular attention.¹⁸ They also admit of few easy answers and require balancing a number of fundamental values, such as fairness, balloting access, election integrity, public trust, accuracy, and accountability.

Furthermore, a number of still deeper issues are lurking beneath the questions of how to remedy an election failure. For example, how much reliability and certainty do or should we expect from our election processes? What costs are we willing to pay for this certainty? How much public money are we willing to spend? How much personal convenience or privacy are we willing to sacrifice? How long are we willing to wait for the final determination of an election? Who should bear the burdens of post-election uncertainty and of resolving that uncertainty? What is the appropriate role of the judiciary in resolving election problems? When should courts eschew intervention, and when should they act aggressively to protect democratic processes?

In raising and reflecting on these and other questions, this Article proceeds in four Parts. Part I briefly describes several prototypes of election miscues and the range of existing remedial tools available to respond

in a well-designed system the reality is that some implementation error is almost always present. While such error usually is harmless, it inevitably gets intense scrutiny when an election is close.

¹⁸ Some of these issues were addressed by a younger Kenneth Starr, see Kenneth W. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U. L. REV. 1092 (1974), and by a 1975 article containing a section on "Postelection Remedies," see *Developments in the Law—Elections*, 88 HARV. L. REV. 1114, 1298–1339 (1975). Since then, the legal literature has not focused much sustained attention on these issues, with the exception of the variety of articles analyzing *Bush v. Gore* and the specific problems in Florida in the 2000 election. See, e.g., Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud: Learning from Florida's Presidential Election Debacle*, 63 U. PITT. L. REV. 159 (2001); Daniel Tokaji, *First Amendment Equal Protection: On Discretion, Inequality and Participation*, 101 MICH. L. REV. 2409, 2487–95 (2003); Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609 (2002); see also R. Michael Alvarez, Betsy Sinclair & Richard L. Hasen, *How Much is Enough? The "Ballot Order Effect" and the Use of Social Science Research in Election Law Disputes*, 5 ELECTION L.J. 40 (2006) (urging caution in applying generalized social science data to resolve particular election contests); *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1155–65, 1188–1200 (2006) (summarizing ways to adjust election outcomes for illegal votes, and describing frequent judicial reluctance to remedy election administration problems).

to these unsettled election outcomes. Part II identifies several competing values and priorities relevant to assessing the strengths and weaknesses of election remedies. As this Part notes, these sometimes conflicting values will often require trade-offs as states work to promote and prioritize these values independently of any particular election controversy. To highlight these values and trade-offs, Part III discusses several prominent election failures and discusses the appropriate responses. Finally, Part IV urges states to reconstitute the remedies available for election problems, capitalizing on the judicial branch's strength in fact-finding while sparing the judiciary from making ad hoc policy choices with obvious partisan implications. This Part argues first that state election codes should provide a clearer articulation of which specific remedies are appropriate for particular types of election failure. It then identifies several additional issues that a state election contest statute should address with clarity. It also recommends that nonjudicial forums, such as administrative or legislative tribunals, be empowered to settle some election disputes, and that citizens be encouraged to adjust their expectations about our election processes—and about the appropriate remedies for failures in these processes—in recognition of the practical impossibility of developing a flawless system.

I. EXISTING REMEDIAL SCHEMES FOR COMMON ELECTION MISCUES

At the outset, it is worth noting that whenever an election outcome is in doubt, the typical first step is to retabulate the ballots. This process is an integral part of routine election administration,¹⁹ and most states have fairly detailed statutory provisions governing when and how deputized election workers are to count and recount the election returns.²⁰ Especially since the 2000 election, many states have taken a closer look at these provisions of their code.²¹

In some respects, many of these statutes are holdovers from the days of paper ballots.²² Indeed, as states increasingly rely on electronic voting,

¹⁹ The right to a recount is a statutory right that did not exist at common law. *See, e.g.*, *Abbene v. Bd. of Election Comm'rs of Revere*, 202 N.E.2d 827, 829 (Mass. 1964); *Eldredge v. Nickerson*, 78 N.E. 461, 462 (Mass. 1906); *In re Hearst*, 76 N.E. 28, 29 (N.Y. 1905); *Coe v. State Election Bd.*, 221 P.2d 774, 776 (Okla. 1950).

²⁰ For background regarding state laws concerning recounts, see Daniel Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711 app. B at 1817–36 (2005). During the 2000 election, some states' recount provisions became famous for identifying how many corners needed to be detached in order for a hanging chad to be included in a recount. *See, e.g.*, Joseph Crawford, *Michigan's Recount—No Dimples, Dapples or Disarray*, GRAND RAPIDS PRESS (Mich.), Dec. 22, 2000, at A12 (describing Michigan's requirement that at least two corners be detached).

²¹ Questions receiving the most attention concern whether to require a paper trail to accompany electronic voting and whether a paper trail should be the official ballot in the event of a recount. *See* Peter Katel, *Voting Controversies*, 16 *CQ RESEARCHER* 745, 750 (2006), available at <http://library.cqpress.com/cqresearcher/getpdf.php?type=color&file=cqr20060915C.pdf>.

²² Many updated recount statutes explicitly contemplate electronic voting. *See, e.g.*,

recount mechanisms may come to look more and more anachronistic, although the creation of paper audit trails may keep the practice of recounting ballots alive in some jurisdictions.²³ However, in other jurisdictions recounts are now accomplished at the simple touch of a button.²⁴ Recounts serve only a very narrow purpose in these jurisdictions, given that the original count occurred through an electronic tabulation process that is almost certain to generate an identical result when repeated. Ultimately, in many close elections the real fight therefore is not over whether to conduct a recount, but rather over *which* ballots to count.²⁵

Accordingly, in addition to recount provisions, typical state election codes also include contest provisions that establish a judicial procedure to resolve those elections that remain unsettled even after an administrative recount, or whose final results are otherwise disputed. These provisions authorize the judicial branch (or occasionally some other tribunal) to resolve what otherwise traditionally would have been deemed nonjusticiable political questions.²⁶ Unfortunately, however, these election contest provisions often provide courts with little substantive guidance for determining whether a remediable election failure in fact has occurred, and if so, how to remedy it.²⁷ Instead, the focus of typical contest statutes is on the procedures for bringing a contest action.²⁸ Many courts adjudicating election problems therefore have had to develop their own standards for deciding if an actionable failure has occurred and how to resolve it. The unsurprising result has been a variety of judicially developed tests for when

FLA. STAT. ANN. § 102.141(6)(a)–(c) (West 2006) (differentiating between procedures for touchscreen voting and optical scan voting); 10 ILL. COMP. STAT. ANN. § 5/22-9.1 (West 2006); OKLA. STAT. ANN. tit. 26, § 8-114 (West 2005).

²³ Some states that have chosen to use electronic voting machines with paper audit trails provide that for purposes of a recount, the official ballot is the paper audit trail. *See, e.g.*, CAL. ELEC. CODE § 19253(b)(1) (West 2005); 10 ILL. COMP. STAT. § 5/24C-2 (2003); OHIO REV. CODE ANN. § 3506.18(A) (West 2006). In the event of a recount, these paper audit trails may be incredibly difficult to count, perhaps more difficult than manually recounting punch cards or other types of previously used paper ballots (as when the audit trail is recorded sequentially on a continuous paper scroll, which is harder to handle and read than a stack of individual punch cards or ballots).

²⁴ *See, e.g.*, N.M. Stat. Ann. § 1-1-6 (West 2006) (defining “recheck” as method of recounting electronic ballots by regenerating printout of electronic record for comparison with original printout).

²⁵ *See infra* Part I.B.2.

²⁶ *See, e.g.*, *Johnson v. Stevenson*, 170 F.2d 108, 110 (5th Cir. 1948); *Griffin v. Buzard*, 342 P.2d 201, 202 (Ariz. 1959); *McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981); *Missouri ex rel. Bouchard v. Grady*, 86 S.W.3d 121, 123–24 (Mo. Ct. App. 2002); *cf. Whitley v. Cranford*, 119 S.W.3d 28, 31–32 (Ark. 2003) (ordering new elections solely on authority of state constitution’s provision requiring “free and equal” elections). *But see State ex rel. Nicely v. Wildey*, 197 N.E. 844, 847 (Ind. 1935) (holding that “courts have inherent power to protect the sovereign people, and those who are candidates for office or claiming title to or rights in an office from fraud or unlawfulness”). *See generally* 26 AM. JUR. 2D *Elections* § 412 (1996) (describing election contest as “purely a constitutional or statutory proceeding”).

²⁷ *See Developments in the Law—Elections, supra* note 18, at 1311.

²⁸ *See id.* at 1306–07.

courts will uphold, invalidate, call for a rerunning of, or themselves declare the winners of, a contested election.²⁹

Disputed election outcomes can arise from any number of causes. A few examples, followed by an identification of typical judicial responses to them, will help to set the stage for a discussion of the challenges of seeking to remedy these election miscues.

A. *Typical Kinds of Election Miscues*

The primary causes of election failures can be divided into two categories: fraud and mistake. Voting fraud of course is a long-standing plague of democratic elections.³⁰ Fraud involves a deliberate attempt to manipulate the system unfairly, usually by candidates or their supporters. In contrast, mistake involves an unintentional disturbance or distortion of the election processes, usually caused by those administering the election. Many instances of both mistake and fraud may have little or no impact on the validity of the election outcome, however, and may even go undetected.

In addition to these two primary causes of election failures, there are at least two other possibilities: improper conduct by candidates or their supporters that does not fit the ordinary definition of voting fraud but nevertheless may provide grounds for questioning the integrity of the election (such as campaign spending in excess of agreed-upon limits); and “acts of God,” such as hurricanes or other natural disasters, terrorist attacks, massive power failures, or other events outside the control of candidates or election officials that significantly disrupt the ability of voters to cast their votes or to have them properly counted.

1. *Fraud*

Voting fraud can be committed by dishonest candidates who clearly have a motive to commit it if they can find an opportunity to do so. It also can be committed by polling judges or other elections officials, who typically have much greater opportunity, provided they have a motive. Fraud can also be committed by isolated individuals or organized groups among the electorate, whose motives and opportunities may both be more attenuated.

Although a variety of media reports and other anecdotal accounts have convinced much of the American public that our elections today are fre-

²⁹ See *infra* Part I.B.

³⁰ See generally TRACY CAMPBELL, *DELIVER THE VOTE* (2005) (providing a provocative account of the range of election fraud that the United States has experienced throughout its history); John Fund, *How to Steal an Election*, CITY J. (2004), available at http://www.city-journal.org/html/14_4_urbanities-election.html.

quently tainted by voter fraud,³¹ demonstrated cases of actual fraud are relatively uncommon, given the frequency with which Americans vote and the number of races involved.³² Nevertheless, concerns about fraud understandably shape many features of our election system,³³ and credible allegations of voting fraud must be taken seriously.

Moreover, maintaining a sound mechanism for responding to credible allegations of fraud ought in principle to reduce the instances of fraud. Such a mechanism can include both civil and criminal penalties, as discussed below.³⁴ However, where sanctions alone have failed to deter election fraud, some additional remedy designed to rectify election fraud may often be necessary, at least if the fraud calls into question the outcome of the election.

Voting fraud that may call election outcomes into question can be grouped into several categories. One type of fraud is the manipulation of the number of raw votes cast, as in stuffing the ballot box. The modern day equivalent of ballot-box stuffing is tampering with the electronic counts on the voting equipment. Special access to the equipment is generally required to perpetrate this type of fraud.

Alternatively, the raw vote can be manipulated through voting by individuals who are not eligible to vote. Perpetrators of this brand of fraud may have fraudulently registered, may vote on behalf of dead people, or may vote multiple times. This type of fraud requires no special access to voting equipment.

Similarly, absentee ballot fraud can be accomplished without any special access. Fraudulent absentee balloting may frequently be used as one vehicle for accomplishing voting by ineligible individuals, because it is often harder to detect than in-person voting by ineligible individuals.³⁵ But absentee ballot fraud also encompasses voting by *eligible* voters who allow

³¹ See, e.g., JOHN FUND, STEALING ELECTIONS 1–9 (2004); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Melt-down*, 62 WASH. & LEE L. REV. 937, 942 (2005); Stephanie Philips, *The Risks of Computerized Election Fraud: When Will Congress Rectify a 38-Year Old Problem?*, 57 ALA. L. REV. 1123, 1123–50 (2006).

³² See Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1; DAVID CALLAHAN & LORI MINNITE, DEMOS, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 4 (2003); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 644–50 (2007); Tova A. Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 SEATTLE U. L. REV. 353, 361–62 (2005).

³³ Not only are many features intended to reduce the possibility of fraud, but the possibility that fraud may have occurred often gives losing candidates a basis for contesting an election. See 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, 105 (Andrew Rachlin ed., 2006).

³⁴ See *infra* Part I.B.4.

³⁵ See FORTIER, *supra* note 16, at 52–55; John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 512–13 (2003); Wang, *supra* note 32, at 389–90.

a third party to cast or influence their vote,³⁶ a practice equally antithetical to free elections. Accordingly, a number of restrictions on absentee voting processes are designed to guard against these problems.³⁷ However, these restrictions are difficult to police, and often become a primary source of controversy in election contests. In fact, absentee ballot fraud is one of the most common causes of election failures.³⁸

Another category of voting fraud that can be accomplished without special access to the mechanics of the election process is preelection deception of voters (or potential voters) in ways that may affect who votes or how they vote. For instance, in the 2004 and 2006 elections, several reports circulated of voters receiving leaflets or phone calls announcing an incorrect voting day or location.³⁹

A final category of fraud is after-the-fact distortion of the raw vote, either through outright false reporting of precinct tallies or through the intentional alteration, destruction, damage, or loss of physical ballots or memory cards.⁴⁰ Only those with official access to the ballots are likely to be in a position to accomplish this type of election fraud.

2. Mistake

Mistakes by election officials also can easily throw an election into question whenever those mistakes cannot be corrected before election day or cannot be remedied by provisional voting or a recount process. For instance, in one recent election-day blunder, the outcome of an Ohio school levy, apparently having failed by one vote, was cast in doubt when election officials realized that two voters each had innocently voted twice, first by absentee ballot and then again in person on election day after an election judge mistakenly advised them that their absentee ballots had not arrived at the board of elections.⁴¹ Before anyone determined this advice was mistaken, both the absentee votes and the election day votes of these two voters had already been added to the final tally.⁴²

³⁶ See, e.g., *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1187–91, 1206–07 (Ill. App. Ct. 2004) (describing candidate's unlawful efforts to assist absent voters in casting their ballots).

³⁷ See FORTIER, *supra* note 16, at 58.

³⁸ See FUND, *supra* note 31, at 145; FORTIER, *supra* note 16, at 53.

³⁹ See Jeff E. Schapiro, *FBI Looks Into Voter Intimidation*, RICHMOND TIMES-DISPATCH (Va.), Nov. 7, 2006, at A6; Jerry Seper, *Early Charges of Vote Fraud Suggest a Raft of Challenges; Parties, Interest Groups Claim Bungling, Dirty Tricks*, WASH. TIMES, Nov. 3, 2004, at A11.

⁴⁰ See *In re Gen. Election for Dist. Justice*, 670 A.2d 629, 633 (Pa. 1996) (describing ballot tampering that occurred after election day).

⁴¹ See Holly Zachariah, *London Schools Contest One-Vote Election Loss in Court: District Asks to Have Double Votes Tossed Out*, COLUMBUS DISPATCH, Nov. 25, 2004, at D8.

⁴² See *id.*

Absentee ballot problems account for a large portion of mistake-based allegations of election failures.⁴³ But an irreversible mistake could also be as straightforward as the loss of a precinct's paper ballots or, the functional equivalent, the failure of an electronic voting machine (and its backup count) because of irretrievable damage or unreadability.⁴⁴ Mistakes could also include errors in who is allowed to vote, errors (including miscommunications) in voting instructions, errors in providing appropriate accommodations for voters with disabilities, other errors related to polling place operations, and confusing, misleading, or defective ballots or equipment.⁴⁵

This last type of mistake is exemplified by the screen layout of the electronic voting machines in 2006 in Sarasota County, Florida, which may have contributed to a surprisingly high number of undervotes in the congressional race in that county.⁴⁶ It is also exemplified by the design of the butterfly ballot used in 2000 in Palm Beach County, Florida, which had the wholly unanticipated but undeniable effect of inflating the number of votes officially cast for Patrick Buchanan well above the number of voters who had intended to mark their ballot for Buchanan.⁴⁷ Notably, although this aspect of the Florida 2000 election may have provided Al Gore with the best moral argument that he should have won the election, the ballot design impact was quickly dismissed as not legally remediable.⁴⁸

⁴³ See, e.g., *Miller v. Picacho Elementary Sch. Dist. No. 33*, 877 P.2d 277, 279 (Ariz. 1994) (setting election aside because of irregularities associated with absentee ballots); *Womack v. Foster*, 8 S.W.3d 854, 871–76 (Ark. 2000) (invalidating several hundred absentee ballots with various types of irregularities); *Boyd v. Tishomingo County Democratic Executive Comm.*, 912 So. 2d 124, 131–32 (Miss. 2005) (discussing several types of irregular absentee ballots and invalidating some).

⁴⁴ See, e.g., *Bauer v. Souto*, 896 A.2d 90, 94 (Conn. 2006) (finding that a voting machine malfunctioned and failed to record votes for one candidate); *LaCaze v. Johnson*, 310 So. 2d 86, 87 (La. 1974) (finding similarly that a voting machine malfunctioned).

⁴⁵ See, e.g., *Foulkes v. Hays*, 537 P.2d 777, 779 (Wash. 1975) (finding that election officials failed to preserve and safeguard ballots between canvassing and recount).

⁴⁶ *Newspaper Links Age, 'Undervotes,'* ORLANDO SENTINEL, Jan. 3, 2007, at C5 (citing data showing a higher undervote where the median age was over sixty-five and stating “[s]everal experts have said the trend supports the theory that poor ballot design made the District 13 race hard to see on Sarasota County’s touch-screen machines”).

⁴⁷ See Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793, 795, 802–03 (2001); see also Jon Sawyer, *Party Spin Doctors Battle for Public Opinion: Both Camps Distort Truth in Florida*, ST. LOUIS POST-DISPATCH, Nov. 15, 2000, at A15 (describing Buchanan himself as “sure” that most of the 3407 ballots cast for him in Palm Beach County were intended for Gore); Don Van Natta Jr., *Counting the Vote: The Ballot; Gore Lawyers Focus on Ballot in Palm Beach County*, N.Y. TIMES, Nov. 16, 2000, at A29 (describing *New York Times*’ analysis of Palm Beach voting patterns).

⁴⁸ See *Fladel v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000) (holding that claim of confusing ballot design did not state cause of action for non-compliance with election statute); see also David Von Drehle et al., *In Florida, Drawing The Battle Lines: Big Guns Assembled as Recount Began*, WASH. POST, Jan. 29, 2001, at A1. But see Stephen J. Mulroy, *Substantial Noncompliance and Reasonable Doubt: How the Florida Courts Got It Wrong in the Butterfly Ballot Case*, 14 STAN. L. & POL’Y REV. 203, 204 (2003); Stephen J. Mulroy, *Right Without a Remedy? The “Butterfly Ballot” Case*

A more frequent ballot preparation mistake involves improper ballots or equipment that omit or mislabel a race or a candidate. For instance, in 1996 the voting machine in one New Mexico precinct listed the wrong candidates' names for two races, which were decided by margins of eleven and ninety-eight voters, respectively.⁴⁹ Because some sixty-six voters had used the defective machine, the outcome of both races conceivably could have been different had the machine properly named the candidates.⁵⁰

Post-election controversies related to errors in the casting of ballots by voters with disabilities have often involved the question of whether some voters received improper assistance, either at the polls or in filling out an absentee ballot. For instance, one recent local election in Mississippi turned in part on the validity of a score of absentee ballots, all cast by disabled voters and all witnessed by the same person.⁵¹ Because some of the ballots were not properly completed or were otherwise suspect, the trial court invalidated all of them.⁵² In another Mississippi case, the court vacated the results of an election because poll workers had provided assistance to many more voters than the "blind, disabled or illiterate" voters for whom the election code permitted voting assistance.⁵³ As jurisdictions continue to implement new technologies that reduce the need for disabled voters to receive voting assistance, the instances of allegations of improper assistance may decline. Meanwhile, however, failures to provide accessible equipment for disabled voters could continue to trigger post-election contests in close races.⁵⁴

and Court Ordered Federal Election "Revotes," 10 GEO. MASON L. REV. 215, 216–17 (2001) (arguing that a judicial remedy should have been available).

⁴⁹ See *Gunaji v. Macias*, 31 P.3d 1008, 1010 (N.M. 2001).

⁵⁰ See *id.* at 1010, 1017–18 (holding that the proper remedy was not to call a new election but to throw out all the votes from the precinct using the faulty machine); see also *Whitley v. Cranford*, 119 S.W.3d 28, 31–32 (Ark. 2003) (upholding lower court's decision to void election for justice of the peace because 183 ballots omitted that race and margin of victory was only 55 votes); *Lakes v. Estridge*, 172 S.W.2d 454, 456 (Ky. 1943) (invalidating school board election when ballots in three precincts omitted several candidates' names, notwithstanding election officials' handwritten corrections to ballots); *Ferguson v. Rohde*, 449 S.W.2d 758, 760 (Ky. Ct. App. 1970) (finding that balloting equipment omitted a candidate's name).

⁵¹ *Campbell v. Whittington*, 733 So. 2d 820, 825–26 (Miss. 1999).

⁵² *Id.*; see also *Dugan v. Vlach*, 237 N.W.2d 104, 106 (Neb. 1975) (refusing to count disabled voter's ballot that did not meet statutory criteria).

⁵³ *O'Neal v. Simpson*, 350 So. 2d 998, 1008 (Miss. 1977); see also *Brooks v. Crum*, 216 S.E.2d 220, 223–24, 227–28 (W. Va. 1975) (rejecting votes from entire precinct in which election workers provided voting assistance to large numbers of voters who were not eligible to receive assistance).

⁵⁴ See, e.g., Douglas Hadden, *Voters Handicapped*, PAWTUCKET TIMES (R.I.), Nov. 15, 2006, available at http://www.zwire.com/site/news.cfm?newsid=17472755&BRD=1713&PAG=461&dept_id=24491&rft=6 (describing widespread malfunctioning of AutoMark ballot readers for visually impaired voters).

3. *Nonfraudulent Misconduct*

Particularly given the increasing number of substantive constraints on the election process (including HAVA, state voter registration processes, the ever-changing landscape of campaign finance regulation, and more), candidates or their supporters may violate election laws in ways other than outright voting fraud. Like actual voting fraud, however, these violations may in some circumstances undermine the reliability of the election outcome. For instance, when a whole group of absentee ballots is filled out at a single get-out-the-vote rally, suspicions may arise about how accurately these ballots reflect the will of the individual voters.⁵⁵

Wyoming's contest statute offers one possible method of addressing some of these concerns by expressly providing that a victorious candidate's violation of any one of a variety of prohibited election activities (such as electioneering at the polls) constitutes grounds for contesting the candidate's victory.⁵⁶ In contrast, an Arizona court concluded that a candidate's electioneering in a polling place in violation of the state election code did not constitute grounds for a new election.⁵⁷

In a recent case, the Maryland Court of Appeals rejected a challenge predicated on the victor's failure to file a required campaign finance report.⁵⁸ Although Maryland law prohibits a person from running for or assuming public office if the person has not filed the required reports,⁵⁹ the court held that the matter was ripe before the election and should have been resolved then.⁶⁰ However, other types of campaign finance violations might not be ripe until after an election and arguably could have a real (if not quantifiable) impact on the outcome. This would be the case if, for example, in the final days of a campaign a candidate who has agreed to accept public funding nonetheless violates the spending limits upon which the public funding is predicated.

4. *Extrinsic Events or "Acts of God"*

A final category of problems that may cast the validity of election results into doubt are circumstances that involve "acts of God," which are dramatic events outside the control of election administrators or candidates. For instance, the devastating Hurricane Katrina of 2005 and the

⁵⁵ See FORTIER, *supra* note 16, at 56; Foley, *supra* note 33, at 107.

⁵⁶ See WYO. STAT. ANN. § 22-17-101(v) (2006) (referencing the criminal provisions in WYO. STAT. ANN. §§ 22-26-101 to 22-26-121 (2006), which prohibit such misdemeanor conduct as electioneering within 100 feet of a polling place or possessing alcoholic beverages at a polling place, as well as more serious felonies such as bribery or tampering with ballot boxes and machines).

⁵⁷ See *Fish v. Redeker*, 411 P.2d 40, 43 (Ariz. Ct. App. 1966).

⁵⁸ See *Ross v. State Bd. of Elections*, 876 A.2d 692, 706 (Md. 2005).

⁵⁹ See MD. CODE ANN., ELEC. LAW § 13-332 (West 2006).

⁶⁰ See *Ross*, 876 A.2d at 706.

terrorist attacks of September 11, 2001, each caused major disruptions to democratic processes. Hurricane Katrina's long-term dislocation of hundreds of thousands of people from New Orleans and surrounding communities dramatically altered local elections months later,⁶¹ while the attacks on the World Trade Center interrupted a New York City primary election already underway on the day of the attacks.⁶² In both cases, the effect was not to call concluded elections into doubt, but to require an adjustment of when and how the elections would occur. However, it is not difficult to hypothesize that similar occurrences in the days or hours after the close of polling could upset a concluded election.

B. Existing Remedial Approaches

How do our current state election systems attempt to fix election failures? Florida's highly publicized efforts to settle its 2000 presidential election demonstrated that, in theory, the touchstone for resolving election difficulties is the "intent of the voters."⁶³ As Alexander Hamilton famously said, "the people should choose whom they please to govern them."⁶⁴ But when fraud, mistake, or other election distortions or disruptions have occurred, how to ascertain whom the voters have chosen is not always so clear. Although most state election codes include provisions that create processes by which aggrieved candidates or voters may seek judicial review of election outcomes, these provisions often provide courts little substantive guidance.⁶⁵ As a result, courts asked to adjudicate election controversies must often draw upon common law and equitable principles to fashion appropriate remedies for particular circumstances not specifically addressed in their state's applicable election code.⁶⁶ In fashioning such remedies, courts typically grant forms of relief that can be

⁶¹ See *National Briefing South: Louisiana: New Orleans Election Postponed*, N.Y. TIMES, Dec. 13, 2005, at A31 (describing Louisiana Governor's indefinite suspension of New Orleans elections); Gary Rivlin, *New Orleans Election in Doubt*, N.Y. TIMES, Dec. 3, 2005, at A15 (describing Louisiana Secretary of State's recommendation that New Orleans' February 2006 election be postponed as long as eight months because of Katrina's disruptive impact).

⁶² See *Primary Elections are Cancelled*, N.Y. L.J., Sept. 12, 2001, at 3.

⁶³ *Gore v. Harris*, 772 So. 2d 1243, 1253 (Fla. 2000), *rev'd sub nom. Bush v. Gore*, 531 U.S. 98 (2000); *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1282 (Fla. 2000). However, in *Bush v. Gore*, the U.S. Supreme Court was sharply critical of the "intent of the voter" standard when employed without some uniform, objective criteria for determining the will of particular voters whose ballots are ambiguous. 531 U.S. at 104–06.

⁶⁴ 2 ELLIOT'S DEBATES 257 (2d ed. 1859), available at <http://memory.loc.gov/cgi-bin/ampage>.

⁶⁵ See *infra* notes 132–35 and accompanying text; see also *Developments in the Law—Elections*, *supra* note 18, at 1311 (describing election contest statutes as providing "little guidance as to the grounds that are cognizable").

⁶⁶ See, e.g., *Gunaji v. Macias*, 31 P.3d 1008, 1014–15 (N.M. 2001) (deciding to throw out all votes from precinct using machine that listed wrong candidates' names rather than call new election); *State ex rel. Olson v. Bakken*, 329 N.W.2d 575, 580 (N.D. 1983).

grouped into a handful of categories: recounts; adjustment of vote totals; new elections; fines and penalties; and injunctions concerning some aspect of an ongoing or future election.

1. *Recounts*

Recount procedures are at the heart of most states' statutory codes for handling close election contests.⁶⁷ Administrative recounts, which are routine in close elections, can be of two basic varieties. First, many states provide for an automatic recount if initial election results are within a sufficiently close margin, usually measured in terms of a percentage of the total vote.⁶⁸ Second, many states allow administrative recounts upon request, while often requiring the requesting party to cover the costs.⁶⁹

Automatic recounts are perhaps best viewed as part of ordinary election processes, rather than as mechanisms for resolving contested elections. That is, automatic recounts occur simply as part of determining official election returns. They are designed primarily to identify and correct mistakes in initial vote tabulations, and are an implicit acknowledgment that our election processes are not error-free. Of course, recounts themselves are not guaranteed to be error-free, although they may conceivably be conducted more carefully and deliberately than initial counts.

Requested recounts, on the other hand, often play a more remedial function. This kind of recount may seek to call into question the official returns, or to focus attention on some disputed portion of votes, perhaps in tandem with allegations of fraud or mistake. But in most states, it is difficult to challenge the legality of a particular ballot or set of ballots in either a requested or an automatic recount proceeding. Instead, these issues usually are addressed in contest actions, in which courts or other tribunals are authorized to adjudicate allegations of voting irregularities. For example, more than fifty years ago, the Kentucky Supreme Court explained that when a candidate seeks a recount to correct for ballots tainted by irregularities, a contest action is the proper forum.⁷⁰ The court observed that "[the] increasing efforts . . . to litigate election irregularities in recount proceedings" perhaps were a result of the court's "failing to mark clearly and distinctly the dividing line between a recount proceeding and a contest suit."⁷¹

⁶⁷ See *supra* notes 19–25 and accompanying text.

⁶⁸ See Tokaji, *supra* note 20, at 1817–36. A few states even conduct some form of recount in every race, as an audit or check on their processes. See *id.*

⁶⁹ See *id.*

⁷⁰ See *Hogg v. Howard*, 242 S.W.2d 626, 628 (Ky. 1951).

⁷¹ *Id.*; see also *Kearns v. Edwards*, 28 A. 723, 724 (N.J. 1894) (holding that ministerial recount process is inappropriate forum for determining legality of ballots); cf. *Carlson v. Oconto County Bd. of Canvassers*, 623 N.W.2d 195, 197 (Wis. Ct. App. 2000) (finding that contest statute is the "exclusive remedy" for election fraud or irregularity).

Nevertheless, the dividing line between recounts and contests still remains less than clear in some jurisdictions. Moreover, in many contest actions, what the contestant seeks is effectively a judicially conducted or supervised recount.⁷² For instance, fifteen years before the Supreme Court in *Bush v. Gore* invalidated recounts conducted under standards that varied among counties,⁷³ a congressional candidate in Indiana asked the state courts supervising a recount to impose uniform standards for conducting the recount across fifteen counties.⁷⁴ In other states, a timely demand for a recount is a prerequisite to filing a contest action,⁷⁵ and in any event a recount may serve to set the stage for an election contest.⁷⁶

2. Adjustments to Vote Totals and Election Outcomes

As previously noted, the issue underlying many election recount proceedings is often *which* votes to count. Election officials may have some authority to disqualify ballots that they determine have been cast fraudulently or in error, but courts (or administrative tribunals) presented with an election contest frequently must determine the validity of some subset of votes allegedly tainted by mistake or fraud. Such tribunals may often face difficult issues in making these determinations.

Whether disputed votes are in fact valid can depend on a number of factual and legal questions. One set of questions involves the eligibility of the voters who cast the disputed ballots. For example, were they eligible to register and to vote in their district?⁷⁷ Did they properly complete the registration process? Did they properly establish their identities when they voted?⁷⁸ Did they properly complete absentee ballots?⁷⁹ Are there ballots that cannot be attributed to voters who signed the poll books?⁸⁰ Another set of questions focuses on the sufficiency of ballots or voting equipment.

⁷² See, e.g., *Hendon v. N.C. State Bd. of Elections*, 633 F.Supp. 454 (W.D.N.C. 1986) (describing a contest action in which plaintiffs requested a court-ordered recount that would include “split ticket” votes cast for a specific candidate on a ballot that was also marked as a straight-ticket ballot for the opposite party).

⁷³ 531 U.S. 98, 110 (2000).

⁷⁴ See *McIntyre v. Fallahay*, 766 F.2d 1078, 1080 (7th Cir. 1985) (explaining that the federal court to which the proceedings had been removed no longer had a justiciable issue once the House of Representatives had adjudicated the election).

⁷⁵ See, e.g., *Miller v. County Comm’n of Boone County*, 539 S.E.2d 770, 777 (W. Va. 2000) (interpreting West Virginia election law, W. VA. CODE ANN. §§ 3-6-9, 3-7-6 (West 1999), as requiring contestant who seeks to challenge validity of ballots to request recount first).

⁷⁶ See, e.g., ALA. CODE § 17-16-21(d) (West 2007) (describing a recount that changes vote totals sufficiently to alter an election outcome as “grounds for an election contest” rather than cause for automatic adjustment of certified winner).

⁷⁷ See, e.g., *Waltman v. Rowell*, 913 So. 2d 1083, 1086 (Ala. 2005).

⁷⁸ See, e.g., *Jones v. Jessup*, 615 S.E.2d 529, 531 (Ga. 2005).

⁷⁹ See, e.g., *Cochran v. Grubbs*, 913 So. 2d 446, 448 (Ala. 2003).

⁸⁰ See, e.g., Joan Mazzolini, *Thousands Voted Illegally*, PLAIN DEALER (Cleveland), Dec. 5, 2006, at A1.

Does a particular ballot meet the statutory requirements for clearly discernible voter intent?⁸¹ Did the ballot design allow voters to make a free choice among all candidates?⁸² Were the ballots properly secured, both before and after voting, to ensure the reliability of the vote?⁸³

Furthermore, once courts (or other election tribunals) identify a set of invalid votes, they then must face the often equally difficult legal issue of deciding what relief to grant. One of two principal kinds of relief available in a contest action, discussed immediately below, is to adjust the vote totals by discounting the votes found to be invalid. The second principal kind of relief, discussed in the subsequent section, is to void the entire election, leaving the contested office vacant until a new election is held.⁸⁴

The most compelling case for adjusting election results arises when the specific tainted votes, rather than just the total number of affected votes, can be identified. If the particular invalid votes are known, then a court can subtract those votes from the official tally and declare as the winner the candidate who has the most remaining votes.⁸⁵ For instance, in a recent judicial election in Arkansas, the outcome was reversed when 518 invalid absentee ballots were specifically identified and removed from the official count because the ballots were not obtained or submitted in compliance with absentee balloting requirements.⁸⁶ In 2004, when the two voters in the aforementioned Ohio election (decided by a one-vote margin) were found to have voted both in person and by absentee ballot,⁸⁷ their subsequent voluntary testimony about how they had voted allowed the court to conclude that no adjustment was necessary because the outcome would not change.⁸⁸

⁸¹ See, e.g., *Big Spring v. Jore*, 109 P.3d 219, 220 (Mont. 2005) (clarifying legal standard of ballots invalidated by overvotes); *In re Election for Sch. Comm. Representative for Dist. 3 in Portland*, No. CV-04-695, 2004 WL 3196881, at *3 (Me. Super. Dec. 3, 2004).

⁸² See, e.g., *Whitley v. Cranford*, 119 S.W.3d 28, 30 (Ark. 2003) (ordering a new election when the margin was 55 votes and 183 ballots improperly omitted the race from ballot).

⁸³ See, e.g., *In re Petition to Contest the Gen. Election for Dist. Justice in Judicial Dist. 36-3-03*, 695 A.2d 476, 479 (Pa. Commw. Ct. 1997) (describing ballot tampering after voting had concluded).

⁸⁴ See *infra* Part I.B.3.

⁸⁵ If discounting the illegal votes will not change the outcome, courts generally will not adjust the official results of the election, and instead will affirm the outcome based on the original tally. See 26 AM. JUR. 2D *Elections* § 438 (1996). An alternative framework would be to adjust the totals anyway, even when the outcome would remain unchanged, if only for the sake of greater historical accuracy. However, to obtain judicial relief a contestant is ordinarily required to prove sufficient illegal votes to call the outcome into question. See *id.* When that predicate is not met, courts effectively have no authority to alter the election results, even if some illegal voting can be proven.

⁸⁶ See *Womack v. Foster*, 8 S.W.3d 854, 863, 875–76 (Ark. 2000).

⁸⁷ See *Zachariah*, *supra* note 41 and accompanying text.

⁸⁸ See *Randy Ludlow, Double Votes Moot in Levy Loss; Couple Says They Split on London Schools Tax*, COLUMBUS DISPATCH, Dec. 17, 2004, at 1A. In some instances of voter fraud, courts have compelled the voters to disclose for whom they voted, creating an exception to the sanctity of the secret ballot. See *infra* notes 150–53 and accompanying text. Yet voter testimony in such instances may not always be sufficiently reliable, as the

However, when the tainted votes cannot be specifically identified, as is often the case, the proper remedy is less clear. Nevertheless, when the number of tainted votes exceeds the margin of victory, most courts have a comparatively easy time resolving the contest if the ostensible victor of the election is demonstrated to be the intended beneficiary of vote fraud. In such a circumstance, courts will often presume that all of the illegal votes favored the victor (even if the votes cannot be specifically identified) and will deduct that number of votes from the official tally, thereby reversing the outcome.⁸⁹

Courts face a more difficult question when the total number of votes demonstrated to have been tainted by fraud or misconduct is less than the margin of victory but when the fraud may have extended to additional votes. In some such instances, courts have merely voided the election,⁹⁰ or have even concluded that the fraud was sufficiently minor to let the election stand.⁹¹ In other cases, courts have reversed the election outcome, thereby emphasizing that even attempted election fraud can be fatal to a candidate's chances.⁹² Otherwise, an unscrupulous candidate, thinking that "the worst that will happen is a new election," might not be sufficiently deterred from committing fraud.⁹³

For instance, in another Florida contest shortly before *Bush v. Gore*, the courts threw out the results of the 1997 Miami mayoral race.⁹⁴ The trial court concluded that a large number of absentee ballots favoring the apparent victor had been cast fraudulently.⁹⁵ Although the trial court had called for a new election, the appellate court concluded that it should send a stronger message to discourage voting fraud by disqualifying all absentee ballots.⁹⁶ Without the absentee ballots, the runner-up became the winner.⁹⁷

voters themselves may choose to testify falsely in order to produce the outcome they desire, and because they have voted secretly, their testimony may not be amenable to independent verification.

⁸⁹ See *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1207 (Ill. App. Ct. 2004). In some states, candidates proven to have committed fraud are disqualified from office. See, e.g., HAW. REV. STAT. § 19-4 (2006).

⁹⁰ See, e.g., *Pabey v. Pastrick*, 816 N.E.2d 1138, 1154 (Ind. 2004) (ordering special election to remedy pervasive fraud that rendered it impossible to know true winner of regular election); see also *infra* Part I.B.3.

⁹¹ See, e.g., *Nugent v. Phelps*, 816 So. 2d 349, 357 (La. Ct. App. 2002); *Rogers v. Holder*, 636 So. 2d 645, 650, 652 (Miss. 1994) (holding that it would be "imprudent" to void all absentee ballots when only twelve of eighty-five were proven illegal).

⁹² See, e.g., *Bolden v. Potter*, 452 So. 2d 564, 567 (Fla. 1984); *Ellis v. Meeks*, 957 S.W.2d 213, 217 (Ky. 1997).

⁹³ *In re* Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for Miami, Fla., 707 So. 2d 1170, 1174 (Fla. Dist. Ct. App. 1998).

⁹⁴ *Id.*

⁹⁵ See *id.* at 1172.

⁹⁶ See *id.* at 1174.

⁹⁷ See *id.* A less radical historical approach, where the party affiliation of those casting an invalid ballot is known, was to attribute the vote to that party's candidate. See, e.g., *Talbott v. Thompson*, 182 N.E. 784, 789 (Ill. 1932).

Similarly, on occasion courts have simply rejected all votes from a particular precinct where voting irregularities occurred.⁹⁸ As with invalidating all absentee ballots, the effect of this adjustment is to disenfranchise an entire subset of voters, some (or perhaps many) of whose ballots are not invalid. Despite this consequence, when courts have been unable to ascertain which candidates benefited from the illegal votes, they sometimes have preferred this remedy over requiring a new election.⁹⁹ The alternative of holding a new election effectively amounts to disenfranchising *everyone* who voted, although it also provides everyone with a second opportunity to exercise their franchise.

Another option, especially for nonfraudulent voting irregularities that have affected an identifiable group of voters, is the remedy of “proportional deduction.”¹⁰⁰ A court using this remedy makes an educated guess about who benefited from the invalid votes, usually by ascribing to the group of invalid votes the same distribution of votes for specific candidates as is found across all the ballots cast in the entire precinct where the invalid ballots were cast.¹⁰¹ For instance, if ten felons are found to have cast invalid ballots in a precinct that voted sixty percent for Candidate A and forty percent for Candidate B, then the felons’ ballots would be treated as though six ballots favored Candidate A and four ballots favored Candidate B.¹⁰²

While proportional deduction has often been used to resolve election contests, at least one court has criticized its use. A Washington trial court adjudicating that state’s 2004 gubernatorial election contest recognized that proportional deduction may be methodologically unsound because it usually assumes, without adequate foundation, that the invalid votes in a particular precinct are representative of all votes in the precinct.¹⁰³ That is, the ten felons in the example above are assumed as a class to be representative of the rest of the voters in that precinct, when in fact the ten felons instead may disproportionately favor one of the candidates. Though it might be possible to develop more sophisticated proxies that would take into account a number of additional demographic factors to predict for

⁹⁸ See, e.g., *Application of Bonsanto*, 409 A.2d 290 (N.J. App. 1979); *Burkett v. Francesconi*, 23 A.2d 780, 782–83 (N.J. 1942); *Vigil v. Garcia*, 87 P. 543, 545–46 (Colo. 1906).

⁹⁹ See *Vigil*, 87 P. at 545–46.

¹⁰⁰ See *Developments in the Law—Voting and Democracy*, *supra* note 18, at 1156.

¹⁰¹ See, e.g., *Canales v. City of Alviso*, 474 P.2d 417, 422–23 (Cal. 1970) (describing proportional deduction as an appropriate standard when no evidence for allocating votes exists); *McNabb v. Hamilton*, 181 N.E. 646, 647 (Ill. 1932) (apportioning disputed ballots in same proportions as overall vote); *In re Durkin*, 700 N.E.2d 1089, 1095 (Ill. App. Ct. 1998) (approving use of proportional deduction and rejecting use of party affiliation as methods for allocating invalid votes).

¹⁰² See *Huggins v. Superior Court in and for County of Navajo*, 788 P.2d 81, 85–86 (Ariz. 1990).

¹⁰³ See Transcript of Oral Decision at 15–17, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. June 6, 2005) [hereinafter *Borders Transcript*] (terming this problem the “ecological fallacy”).

whom invalid votes were actually cast, for now proportional deduction remains a fairly crude tool.¹⁰⁴

3. *New Elections*

The remaining alternative for remedying an unreliable election outcome, whether it occurs as a result of fraud or mistake, is to invalidate the election and hold a new one. Courts have resorted to this remedy in a variety of circumstances, and many courts have wrestled with whether and when they have authority to order a new election.¹⁰⁵

Although examples of ordering a new election at the federal level are rare,¹⁰⁶ the remedy is not uncommon in local elections. For instance, in an Alabama mayoral race in 1984, one of four voting machines was conclusively shown to have failed to register any votes cast for one of the four candidates. The Alabama Supreme Court ordered the rerunning of the entire election, overruling the trial court's remedy of new balloting only for those voters who voted on the defective machine.¹⁰⁷

But whether and when the remedy of a new election is available is often unclear. Relying on different provisions of Louisiana's election contest statute, the Louisiana Supreme Court divided over whether the statute permitted a new election as a remedy for widespread fraud when the fraud was not specifically shown to have affected the result.¹⁰⁸ Two dissenting justices agreed with the trial court that a new election was appropriate because the proven fraud made it "impossible to determine the result" of the election, but the majority interpreted the contest statute as allowing a new election only if fraud is proven to have occurred in numbers "sufficient to change the result."¹⁰⁹

¹⁰⁴ In addition, proportional deduction has received "virtually no academic commentary." *Developments in the Law—Voting and Democracy*, *supra* note 18, at 1156.

¹⁰⁵ See, e.g., *Pabey v. Pastrick*, 816 N.E.2d 1138, 1141 (Ind. 2004) (concluding the court has authority to order new election when candidate's misconduct makes it impossible to determine election's outcome).

¹⁰⁶ The 1974 election for one of New Hampshire's U.S. Senators produced a two-vote margin of victory. Nine months later, after a protracted election contest, the U.S. Senate declared the seat vacant and New Hampshire held a new election. See ANNE M. BUTLER & WENDY WOLFF, U.S. SENATE ELECTION, EXPULSION AND CENSURE CASES FROM 1793 TO 1990, S. DOC. NO. 103-33, at 421–25 (1st Sess. 1995).

¹⁰⁷ See *Ex parte Vines v. Allen*, 456 So. 2d 26, 28 (Ala. 1984); see also *Bauer v. Souto*, 896 A.2d 90, 99 (Conn. 2006) (ordering a new election after a lever machine was proven not to have recorded votes); *Whitley v. Cranford*, 119 S.W.3d 28, 30 (Ark. 2003) (ordering a new election when margin was 55 votes in an election where 183 ballots improperly omitted the race).

¹⁰⁸ See *Savage v. Edwards*, 722 So. 2d 1004, 1004–08 (La. 1998).

¹⁰⁹ *Id.* The same conceptual disagreement is reflected in the Indiana Supreme Court's reversal of a trial court's refusal to order a new election in the face of widespread absentee ballot fraud. See *Pabey*, 816 N.E.2d at 1151. Although the number of absentee ballots cast vastly exceeded the margin of victory, the trial court had interpreted the contest statute to require proof to a "mathematical certainty" of enough illegal votes to alter the outcome. *Id.* at 1149. The Indiana Supreme Court instead concluded that a new election was required

This interpretive disagreement arose under Louisiana's contest statute even though in many other respects the Louisiana statute provides more guidance than a typical state election code. For instance, Louisiana's contest statute makes explicit that in some circumstances the appropriate remedy for an election failure may be a "restricted election,"¹¹⁰ which allows some subset of voters to vote again.¹¹¹ Courts in several other jurisdictions have on occasion ordered just such a remedy, but without clear statutory authority to do so.¹¹²

Yet even when courts believe they have the authority to call for a new election, they are quite reluctant to do so, and for good reason.¹¹³ Courts must be satisfied both that an election failure has occurred and that the failure is significant enough to taint the outcome. The margin of victory usually plays a determinative role in answering this latter question. For instance, in 2004 some Louisiana polling places opened late.¹¹⁴ A Louisiana appellate court ordered a new election for one race in which the margin of victory was less than ten votes,¹¹⁵ but upheld the original results of another contest in which the margin of victory was over 9000 votes.¹¹⁶ Accordingly, if the margin of victory is slim, it is much more likely that a court will conclude that an election failure renders the outcome unreliable. Nevertheless, even large margins can become suspect if a sufficiently serious failure occurs.

Concerns about protecting ballot secrecy can also increase the need to call for new elections.¹¹⁷ For instance, in a 1999 Louisiana sheriff's race, the court ordered a new election after determining that the three-vote margin of victory had included the votes of five invalid absentee ballots.¹¹⁸ Although the court was able to identify the five voters who cast these defective absentee ballots, it was not prepared to order them to disclose their votes, and concluded that "because of the constitutional guarantee to secrecy of the ballot . . . , it is impossible to determine the result of this runoff election."¹¹⁹

because the absentee ballot fraud "substantially undermin[ed] the reliability of the election and the trustworthiness of its outcome." *Id.* at 1150–51.

¹¹⁰ LA. REV. STAT. ANN. § 18:1432(A) (2007).

¹¹¹ *See* *Jenkins v. Williamson-Butler*, 883 So. 2d 537, 539–40 (La. 2004).

¹¹² *See, e.g.,* *Gunaji v. Macias*, 31 P.3d 1008, 1012, 1016–18 (N.M. 2001) (creating an equitable remedy of partial revote, in contrast to code requirement of disregarding the entire precinct); *State ex rel. Olson v. Bakken*, 329 N.W.2d 575, 579–82 (N.D. 1983) (approving the equitable remedy of partial special election for an identified set of voters whose votes were not counted).

¹¹³ *See infra* Part IV.A.

¹¹⁴ *See Jenkins*, 883 So. 2d at 540.

¹¹⁵ *Id.* at 541.

¹¹⁶ *Hester v. McKeithen*, 882 So. 2d 1291, 1294 (La. 2004).

¹¹⁷ *See, e.g.,* *Hester v. Kamykowski*, 150 N.E.2d 196, 200–01 (Ill. 1958) (ordering a new election because see-through ballots printed on low-quality paper compromised the secrecy of the election).

¹¹⁸ *Adkins v. Huckaby*, 755 So. 2d 206, 208 (La. 2000).

¹¹⁹ *Id.* at 222. This is in contrast to cases in which courts have compelled witnesses

4. Criminal Penalties, Fines, and Damage Awards

Criminal punishment for the wrongdoer constitutes an entirely different class of remedies for fraud and other forms of election misconduct. Many state codes classify some types of election fraud as felonies and other types of election misconduct as misdemeanors, and establish corresponding punishments. Such remedies do nothing to correct whatever flawed outcome has resulted from the misconduct, however, but serve instead to deter future election problems. The mere threat of criminal punishment ideally reduces the incidence of election fraud and some types of election misconduct. In addition, election officials who engage in fraud, misconduct, or neglect of duty typically can be removed from their positions.¹²⁰

In some circumstances, a qualified elector whose voting rights have been violated may bring a civil action for damages,¹²¹ and in recent years some commentators have encouraged additional use of damage actions to encourage better election processes.¹²² However, it is often difficult for a particular voter to show sufficient injury-in-fact to support a civil action for violation of voting rights.¹²³

5. Other Injunctive Relief

Enjoining some aspect of the conduct of an election, either prior to or during the election, is a final tool appropriate for remedying certain types of election failures.¹²⁴ This sort of injunctive relief may apply to

who voted fraudulently to disclose for whom they voted, in order to enable the court to adjust the vote totals accordingly. *See infra* note 151 and accompanying text. It also is in contrast to circumstances in which voters have voluntarily disclosed for whom they voted in order to resolve an election dispute. *See supra* note 88, *infra* note 150, and accompanying text.

¹²⁰ *See, e.g.*, OHIO REV. CODE ANN. § 3501.27(A) (West 2006) (stating that “[n]o person who has been convicted of a felony or any violation of the election laws . . . shall serve as an election officer”); *id.* § 3501.22(A) (providing that the election officers of the precinct “may be summarily removed from office at any time by the board for neglect of duty, malfeasance, or misconduct in office or for any other good and sufficient reason”).

¹²¹ *See Gage v. Monescalchi*, 793 N.Y.S.2d 235, 235 (N.Y. App. Div. 2005). *But see Hutchinson v. Miller*, 797 F.2d 1279, 1280 (4th Cir. 1986) (holding that federal courts should not entertain claims for damages caused by election irregularities).

¹²² For instance, attorney Hugh Lee, who participated in the litigation of the 2000 Florida election, has urged greater use of 42 U.S.C. § 1983 (2006). *See Lee, supra* note 18; *see also* SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* 1073–86 (rev. 2d ed. 2002) (discussing damages remedy for defective elections).

¹²³ *See Santana v. Registrars of Voters of Worcester*, 502 N.E.2d 132, 135 (Mass. 1986) (finding no basis for damages for deprivation of voting rights absent financial loss or physical or emotional injury).

¹²⁴ Injunctions can also occasionally cover conduct after an election, as with an injunction against counting ballots pending the resolution of a controversy about their eligibility or against a candidate taking office. *See, e.g.*, *Tate-Smith v. Cupples*, 134 S.W.3d 535, 537 (Ark. 2003) (enjoining victor from taking office until contest was resolved); James M. Fischer, *Preliminarily Enjoining Elections: A Tale of Two Ninth Circuit Panels*, 41 SAN

polling places, poll workers, elector qualifications, and candidates and their supporters. Such injunctive relief is most often employed to compel performance of obligations that are already clearly established.

Courts are understandably more reluctant to order an injunction on the eve or in the middle of an election than well before it.¹²⁵ Nevertheless, many examples exist of judicial intervention in an election already underway. When equipment malfunctions or polling places do not open on time, courts may order polls to remain open longer than normal¹²⁶ or require the use of alternative methods of voting.¹²⁷ When poll workers are not properly performing their duties, courts may direct them to do so.¹²⁸

Injunctive relief also sometimes includes postponing an election,¹²⁹ as New York courts and its Governor did on September 11, 2001.¹³⁰ This tends to be a rare and serious event, given that candidates, parties, election officials, and the public all have prepared for a race to occur on a certain date, and have rationed their funds and energy in anticipation of that date. The additional costs of rerunning an election are likely to be substantial. On the other hand, these costs are often preferable to going ahead with an election that is likely to result in an indeterminate, unreliable, or unacceptable outcome. For example, postponing the New York election

DIEGO L. REV. 1647, 1648–49 (2004); Suzy Loftus, *Punch-Card Ballots, Residual Votes and the Systematic Disenfranchisement of Minority Voters: A Look at the Decision to Allow the California Recall Election to Proceed*, 39 U.S.F. L. REV. 763, 782–85 (2005).

¹²⁵ See *Developments in the Law—Voting and Democracy*, supra note 18, at 1188–1200 (discussing judicial reluctance to interfere with ongoing elections).

¹²⁶ See, e.g., Diana Marrero & Deborah Barry, *Voting Problems Widespread*, GANNETT NEWS SERV., Nov. 8, 2006, available at <http://www.deseretmorningnews.com/dn/view/0,1249,650205323,00.html> (describing Indiana court order that polls “remain open nearly three hours past the regular closing time to make up for late openings”); William Presecky, *Kane County Judge Backs Counting Overtime Ballots: Democrats Lose Appeal About Elgin Township*, CHI. TRIB., Nov. 29, 2006, at M4 (describing a court order to keep polls open an extra ninety minutes because “numerous problems prevented voting from starting on time”). Most states already require that all voters in line at the time polls are scheduled to close be allowed to vote, however. See, e.g., IDAHO CODE ANN. § 34-2422(1) (2007); ME. REV. STAT. ANN. tit. 21-A, § 626(2)(A) (2006); NEB. REV. STAT. § 32-908(3) (2006); NEV. REV. STAT. § 293.305(1); N.M. STAT. ANN. § 3-8-45(A) (2007); OHIO REV. CODE ANN. § 3501.32(A) (2007); see also Barry H. Weinberg & Lyn Utrecht, *Problems in America’s Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 430 (2002) (“Most states provide that any voter in line at the time of poll closing is entitled to vote.”).

¹²⁷ See *Waiting Was the Hardest Part*, COLUMBUS DISPATCH, Nov. 3, 2004, at 1A (describing judicial order that election workers provide paper ballots to voters waiting in long lines).

¹²⁸ See, e.g., Warren Richey, *GOP Slips at Foley Scandal’s Epicenter*, CHRISTIAN SCI. MONITOR, Oct. 27, 2006, at USA2, (referencing a judge’s order that poll workers not explain to voters why disgraced Florida Congressman Mark Foley’s name was on the ballot instead of the name of the actual candidate Joe Negron).

¹²⁹ See *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 912, *rev’d on reh’g en banc*, 344 F.3d 914 (9th Cir. 2003); *Gilmore v. Green County Democratic Party Exec. Comm.*, 368 F.2d 328, 329 (5th Cir. 1966); *cf. Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988) (vacating trial court’s order enjoining judicial election).

¹³⁰ See *Primary Elections Are Cancelled*, N.Y. L.J., Sept. 12, 2001, at 3.

already underway on September 11, 2001, was obviously the right decision, given how completely disrupted New Yorkers' lives were that day.¹³¹

* * *

Given the preceding range of available remedies, most states' existing election contest statutes do little to constrain a court's choice when some election irregularity is proven. A typical contest statute provides only that the finder of fact is to determine who received the majority of votes, or otherwise declare the result.¹³² Alternative versions specify that the court may order a new election for "irregularities of sufficient magnitude to cast doubt on the validity,"¹³³ or provide no express identification of possible remedies.¹³⁴ As one Indiana trial court recently noted, "Indiana election law provides little insight into the appropriate remedy available in this proceeding. Case authority [interpreting such statutes] on election contests provides virtual[ly] no guidance for circumstances where widespread misconduct has impacted the absentee ballots cast in an election."¹³⁵

Furthermore, with the dramatic exception of the scholarship on the 2000 presidential contest, academic commentary also has focused scant attention on the comparative strengths of these post-election remedies, or the appropriate circumstances for their use. Understandably, articles about *Bush v. Gore* and the 2000 Florida presidential election have focused primarily on issues of federalism, equal protection, and presidential elections, rather than broader questions about the general appropriateness of election remedies. The overwhelming bulk of legal scholarship concerning the role of courts in policing democratic elections has focused on how to conduct these elections, rather than on ways to correct errors after they have occurred.¹³⁶ Likewise, the issue of post-election remedies does

¹³¹ See generally Diane Cardwell, *Questions Face Elections Board Before Primary*, N.Y. TIMES, Sept. 20, 2001, at A20; Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 FORDHAM URB. L.J. 523, 525-27 (2005); Clyde Haberman, *Reaffirming Democracy, Here and Now*, N.Y. TIMES, Sept. 22, 2001, at A9.

¹³² See, e.g., COLO. REV. STAT. § 1-11-216 (2006); N.J. STAT. ANN. § 19:29-8 (West 2006); MISS. CODE ANN. § 23-15-951 (West 2006); WYO. STAT. ANN. § 22-17-08 (2006); N.D. CENT. CODE § 16.1-16-08 (2006) (prohibiting voiding election unless the contestee "connived" to produce illegal votes or number of illegal votes is greater than margin of victory).

¹³³ MO. REV. STAT. § 115.593 (2006).

¹³⁴ See, e.g., HAW. REV. STAT. § 11-174.5 (2006); KAN. STAT. ANN. § 25-1448 (2006). The Texas statute provides a particularly succinct statement: a tribunal may "declare the outcome" if it "can ascertain the true outcome" but "shall declare the election void if it cannot ascertain the true outcome." TEX. ELEC. CODE ANN. § 221.012 (West 2006).

¹³⁵ *Pabey v. Pastrick*, 816 N.E.2d 1138, 1140 (Ind. 2004) (quoting *Pabey v. Pastrick*, No. 45D10-0305-MI-007, at 99 (Ind. Super. Ct. 2003)).

¹³⁶ One of the two principal election law casebooks devotes one chapter to describing "Remedial Possibilities for Defective Elections." See ISSACHAROFF ET AL., *supra* note 122, at 1039-88. The other principal election law casebook contains only isolated, brief refer-

not appear to be on the reform agendas of any of the prominent policy organizations most actively studying the election process.¹³⁷ Accordingly, a more systematic evaluation of the appropriate remedies for election failures is necessary. The remaining Parts of this Article begin that effort.

II. FUNDAMENTAL VALUES UNDERLYING THE CHOICE OF APPROPRIATE ELECTORAL REMEDIES

Having set out a sample of election problems and the kinds of remedies typically available to resolve them, this Article now considers several interrelated and sometimes conflicting values of our election system that should constrain or shape the aforementioned remedies. These values include (1) fairness and legitimacy; (2) voter anonymity; (3) accuracy and transparency; (4) promptness and finality; and (5) efficiency and cost.¹³⁸ Moreover, to the extent that the judicial branch is responsible for implementing the remedies for election failures, the desirability of these remedies must also be assessed in terms of their implications for separation of powers.

Indeed, even before thinking about how various judicial remedies are shaped by or measure up against each of these values, it bears emphasis that it is highly preferable to avoid judicial involvement in elections altogether, especially after voting has begun.¹³⁹ It is therefore crucial to continue to refine other election processes in order to reduce the need for election-day or post-election remedies. Any after-the-fact solutions risk at the very least being perceived as upsetting normal democratic processes, and thereby undermining the legitimacy of election outcomes. Accordingly, all election “reforms” should be evaluated in terms of their impact on the margin of litigation.¹⁴⁰

Efforts to minimize the likelihood of post-election litigation are especially important in developing the standards and procedures governing

ences to the topic of remedies. See DANIEL H. LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW* (2d ed. 2001).

¹³⁷ These organizations include The National Research Commission on Elections and Voting, see <http://elections.ssrc.org>; electionline.org; The Century Foundation, see <http://www.reformelections.org>; The Brennan Center for Justice, see <http://www.brennancenter.org/subpage.asp?key=38&projkey=76>; and The United States Election Assistance Commission, see www.eac.gov. Similarly, the National Conference of State Legislatures has not focused its efforts on encouraging and tracking state reforms in this area. See NCSL ELECTION REFORMS TASK FORCE, *THE STATES TACKLE ELECTION REFORM*, Mar. 24, 2003, <http://www.ncsl.org/programs/legismgt/elect/taskfc/electtaskfc.htm>.

¹³⁸ These are by no means the only values important to our election processes, but they are the values most directly implicated in the choice of how to remedy election failures. Other values, such as accessibility to the ballot or the security and integrity of the voting process, may have greater salience in evaluating other components of an election system. See, e.g., Wang, *supra* note 32, at 354; Tokaji, *supra* note 20, at 1774.

¹³⁹ See Hasen, *supra* note 31, at 995–99; see generally JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006).

¹⁴⁰ See *supra* note 13 and accompanying text.

absentee and provisional ballots. To date, a large fraction of election contests have involved absentee ballots.¹⁴¹ Now that federal law has mandated the use of provisional ballots,¹⁴² the dramatic increase in the number and proportion of provisional ballots cast may result in substantially more post-election challenges involving these kinds of ballots as well.¹⁴³ For disputes involving either type of ballot, the best reforms will reduce the causes of contested elections rather than merely regularize the manner in which electoral systems deal with the controversies once they have already developed. States should thus strive both to ensure that the availability of absentee ballots does not increase opportunities for fraud and to reduce the need for provisional ballots (while still guaranteeing a provisional ballot to any voter who is not allowed to vote a regular ballot and ensuring that all voters are provided with convenient voting options). But where best efforts fail to prevent a post-election controversy, the available remedies should seek to honor the following fundamental, though potentially conflicting, values.

A. Fairness and Legitimacy

As with the election process itself, remedial processes need to be both fair and perceived as fair.¹⁴⁴ Although fairness can be evaluated in a variety of ways, one measure of fairness is the degree to which a system treats candidates equally (as opposed to favoring one candidate or one type of candidate over another). For instance, a system that always awards an unresolved election to the incumbent or to the incumbent's party would not be accepted as fair, even though it would have the virtue of producing

¹⁴¹ See *supra* notes 35–38, 43, and accompanying text.

¹⁴² See HAVA, § 302, 42 U.S.C. § 15482 (Supp. 2006).

¹⁴³ Such challenges often revolve around the question of *which* provisional ballots to count, an issue that may loom large in any election close enough to trigger a recount. The standard for determining this issue has been the subject of intense scrutiny during the past several years. See, e.g., Gerald M. Feige, *Refining the Vote: Suggested Amendments to the Help America Vote Act's Provisional Balloting Standards*, 110 PENN ST. L. REV. 449 (2005); Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193 (2005); David C. Kimball, Martha Kropf & Lindsay Battles, *Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election*, 5 ELECTION L.J. 447 (2006); *Two Steps Forward, One Step Back, and a Side Step: Asian Americans and the Federal Help American Vote Act*, 10 ASIAN PAC. AM. L.J. 31, 58 (2005). Administrative and legislative guidelines addressing this issue are already plentiful. See, e.g., MICH. COMP. LAWS ANN. § 168.813 (West 2005) (stating that a provisional ballot should only be tabulated if a voter's valid voter registration is located or if an elector's identity is verified with acceptable identification such as a driver's license and verification of current address).

¹⁴⁴ The typical mantra of healthy elections is that they be "free and fair." For instance, the U.S. State Department has published a series of one-page primers on the fundamentals of democracy, including a discussion of the key principles of democratic elections titled "Free and Fair Elections." U.S. DEP'T OF STATE, PRINCIPLES OF DEMOCRACY: FREE AND FAIR ELECTIONS (2005), available at <http://usinfo.state.gov/products/pubs/principles/election.htm>.

a prompt resolution of the election. More generally, a remedial system with any built-in bias that favors incumbents, the majority party, or candidates with friends or relatives on the boards of elections, could not be considered fair. Avoidance of such bias is therefore a key consideration in structuring a sound remedial system.

Another measure of fairness is the degree of equality with which a system treats votes. This measure was at the heart of the U.S. Supreme Court's opinion in *Bush v. Gore*, which invalidated the 2000 Florida recount under the Equal Protection Clause because the recount standards varied from county to county.¹⁴⁵ Greater uniformity in recount and contest procedures would reduce the potential for certain votes to disproportionately affect election outcomes. The extent to which *Bush v. Gore* ultimately will be read to require that election contest procedures treat votes equally remains to be seen,¹⁴⁶ but this goal of equal treatment of votes is laudable, whether motivated by equal protection concerns or simply an interest in fundamental fairness.

Ensuring that the public perceives and accepts a remedy as fair is equally important to the legitimacy of an election remedy. Public acceptance of the process through which the system resolves election failures ultimately involves a complex mix of overlapping factors that sometimes are in tension with each other. For instance, the public not only must believe that the remedial system treats both candidates and voters equally, but also must be confident that the system will protect anonymous voting while allowing an accurate accounting of the outcome.

B. Voter Anonymity

Although it was not always the case, anonymity of voting is a fundamental principle of American democracy today.¹⁴⁷ Indeed, in some states, secret voting is protected in the state constitution.¹⁴⁸ Anonymity protects against fraud, coercion, bribery, and other forms of corruption that might otherwise occur through vote selling.¹⁴⁹

Anonymity does, however, come with its own price: it makes auditing election returns much more difficult, complicating the exclusion of improper votes and the inclusion of improperly excluded votes. Indeed,

¹⁴⁵ 531 U.S. 98, 110 (2000).

¹⁴⁶ See Edward B. Foley, *The Future of Bush v. Gore*, 68 OHIO ST. L.J. (forthcoming 2007).

¹⁴⁷ Secret ballots became the norm in the United States after the Populists made them part of their platform in the late nineteenth century. See, e.g., *In re Hearst*, 76 N.E. 28, 29–30 (N.Y. 1905) (describing New York legislature's adoption of secret ballot); see also Fortier & Ornstein, *supra* note 35, at 487–92 (describing the origins of the “Australian” or secret ballot and its adoption in the U.S.).

¹⁴⁸ See, e.g., ARIZ. CONST. art. VII, § 1; CAL. CONST., art. 2, § 7; NEB. CONST. art. VI, § 6; UTAH CONST. art. 4, § 8; WASH. CONST., art VI, § 6; WIS. CONST. art. III, § 3.

¹⁴⁹ See Fortier & Ornstein, *supra* note 35, at 489–90.

courts on occasion have concluded that resolving the outcome of an election required stripping some voters of their ordinary anonymity.¹⁵⁰ In most cases, however, courts have taken this step only with respect to voters who themselves engaged in fraudulent voting behavior.¹⁵¹ Some states prohibit disclosure of voter identity entirely.¹⁵² In contrast, until it was repealed in 2002, a provision in the Arkansas Constitution required each ballot to be numbered in such a way as to permit tracing of an individual ballot to an individual voter.¹⁵³ Judgments about the need for ballot secrecy thus critically affect the remedies available for election failures.

C. Accuracy and Transparency

Because democratic legitimacy depends on a system in which votes determine political representatives and policy choices, any healthy democracy must have a mechanism for accurate and reliable voting.¹⁵⁴ Similarly, the core function of a system of remedies for election failures is to restore accuracy and reliability where it has been compromised. But other concerns, including ballot secrecy and the need for a prompt, final resolution of election outcomes, may limit the effective restoration of reliability to a failed election.

As a corollary, when allegations of irregularities have raised doubts about the reliability of an election, the public must be able to observe and partake in the remedial process by which those irregularities are investigated and resolved. Transparency of process, therefore, can become even more important in a failed election than in a routine one. When a court or other tribunal acts to remedy an election irregularity, the public must be

¹⁵⁰ See, e.g., *In re* General Election for Dist. Justice, 670 A.2d 629, 638–39 (Pa. 1966) (allowing five voters whose valid ballots had been tampered with to reveal their votes voluntarily).

¹⁵¹ See, e.g., *Mahaffey v. Barnhill*, 855 P.2d 847, 850 (Colo. 1993) (reaffirming the principle that citizens who had cast invalid votes could be compelled to testify as to how they had voted, but only if they had not voted in good faith); see also TEX. ELEC. CODE ANN. § 221.009 (Vernon 2003) (providing that voters who cast invalid votes can be compelled to disclose their votes, but also providing that the tribunal need not compel such disclosure, even if the number of invalid votes is sufficient to create doubt about the outcome).

¹⁵² See, e.g., *McCavitt v. Registrars of Voters*, 434 N.E.2d 620, 630 (Mass. 1982).

¹⁵³ See ARK. CONST. amend. L, § 3 (repealed 2002); see also *Womack v. Foster*, 8 S.W.3d 854, 868 (Ark. 2000) (observing that framers of this constitutional provision “chose to continue to subordinate the secrecy of the ballot to the purity of the election”). Similarly, in Britain votes are recorded with unique identifiers precisely to permit tracing in the event of a dispute about the legality of a particular vote. See ELECTORAL COMMISSION, BALLOT SECRECY FACTSHEET (Dec. 29, 2006), <http://www.electoralcommission.org.uk/templates/search/document.cfm/6127>. Another report claims that the use of touch screen voting can create a similar tracing capability. See MARK MILLER, SECRET BALLOT COMPROMISED IN GEORGIA!, http://www.countthevote.org/no_secret_ballot.htm (last visited Feb. 21, 2007).

¹⁵⁴ A variety of research has discussed the importance of accurate vote tabulation and the relative accuracy of different voting mechanisms. See, e.g., Tokaji, *supra* note 20, at 1717–41.

able both to understand why the election failed and to accept how it will be fixed. The public must also have confidence that it will be fixed fairly and not arbitrarily.¹⁵⁵

These concerns may make proportional adjustments less desirable,¹⁵⁶ particularly where the demographic or statistical analyses underlying them are relatively inaccessible to the public, or where the primary message such adjustments convey to the public is uncertainty regarding the election's true outcome. On the other hand, when in fact an election's true outcome is indeterminable, the electoral process should acknowledge that reality and the associated trade-offs between holding a new election versus finding some neutral way of picking a winner.

Election irregularities that do not call into question the ultimate outcome present a more mundane issue. Should the public still be entitled to an accurate accounting of its preferences? That is, might more than just the ultimate outcome of the election, such as the strength of the voters' preference (or the size of a victor's mandate), also be worthy of an accurate tally? Yet while people may often speak of "counting every vote," the public is primarily concerned with simply counting enough votes to be confident in the outcome. As a practical matter, remedying election failures that do not alter the outcome is a luxury that society cannot afford, either in time or expense.¹⁵⁷

D. Promptness and Finality

In addition to expecting fair elections with accurate results, the public also appropriately expects to have these election results shortly before the office becomes vacant, rather than long before (or after) the vacancy. Were temporal proximity not a priority, elections could be held well ahead of time (much as in a monarchy the heir apparent may be selected well in advance), which would provide ample opportunity for recounts, contests, revotes, and the careful resolution of any issues that arise in an election. Yet because the issues facing politicians are constantly evolving, and because politicians may frequently change their stripes, holding elections roughly contemporaneously with when the victors will take office increases political accountability.

For these reasons, as well as because of the administrative difficulties of leaving an office vacant, American elections generally are scheduled to occur as close to the commencement of the term of office as is practical.¹⁵⁸ It therefore can become problematic if election outcomes are con-

¹⁵⁵ See *supra* Part II.A.

¹⁵⁶ See *supra* notes 100–104 and accompanying text.

¹⁵⁷ However, acts of fraud that do not call the outcome of an election into question should still be addressed through imposition of civil liability or criminal prosecution to discourage similar acts that may affect the outcome of future elections.

¹⁵⁸ See Foley, *supra* note 33, at 104.

tested for months or years after election day. Instead, election processes generally, and remedial options in particular, should be designed to promote the prompt resolution of election outcomes.

In an important sense, a speedy determination of an election protects the integrity of the process.¹⁵⁹ In the aftermath of the 2000 election, a number of scholars and public officials agreed that the country would be ill-served by a protracted legal battle over the presidential election.¹⁶⁰ In extreme cases, protracted election disputes have become moot when the terms of office have expired before the litigation has concluded.¹⁶¹

In addition, it is important that representatives serve with full authority and respect, rather than with unresolved questions about their legitimacy. It is therefore preferable that an election contest be final before the term of service begins. Accordingly, as a practical matter, it may be more important for a contested election to be resolved conclusively than that it be resolved perfectly. With unlimited time, we might investigate an election problem more thoroughly and also be more willing to rerun it. But usually we must move on, knowing that the next election will shortly supersede whatever imperfections occurred in the most recent election.

These interests in promptness and finality suggest that we may choose to sacrifice some absolute certainty about an election outcome for the expediency of the result. They also suggest that the remedy of ordering a new election ought to be disfavored compared to conclusively determining the winner of a completed election, whenever this approach can produce a fair and acceptable outcome.

E. Efficiency and Cost

A reality of the American system of election administration is that it is run on a shoestring budget,¹⁶² particularly compared to the scale of the undertaking and the financial resources otherwise involved in our elections.¹⁶³ For instance, we minimize costs by relying on millions of essen-

¹⁵⁹ See *In re 2003 Election for Jackson Twp. Supervisor*, 840 A.2d 1044, 1046 (Pa. Commw. Ct. 2003) (“The integrity of the election process requires immediate resolution of disputes”); *Smith v. King*, 716 N.E.2d 963, 969–70 (Ind. Ct. App. 1999) (“[E]lection contest procedures . . . manifest a clear legislative intent that election contests be resolved expeditiously.”).

¹⁶⁰ See R. W. Apple, Jr., *Bush Sues to Halt Recount in Florida: The Limits of Patience*, N.Y. TIMES, Nov. 12, 2000, at A1 (reporting results of interviews with a variety of scholars and public officials).

¹⁶¹ See, e.g., *Gunaji v. Macias*, 31 P.3d 1008, 1011 (N.M. 2001) (noting terms of office had expired by time court resolved underlying remedial issue).

¹⁶² See NAT. COMM’N ON FED. ELECTION REFORM (THE CARTER-FORD COMM’N), TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 68 (2001).

¹⁶³ In addition, it may be that part of the price we pay for our First Amendment freedoms, especially as interpreted to permit unlimited political expenditures, is a frenzied, no holds barred election atmosphere. This atmosphere may further unsettle election outcomes, as losing candidates in close races (and their supporters) may be more likely to challenge election procedures after having spent so much on their campaigns.

tially volunteer laborers to run polling place operations.¹⁶⁴ Although these public-spirited poll workers typically receive a tiny payment for their service and generally are required to (but in fact may not always) participate in a brief training program, they nevertheless frequently lack the experience or background knowledge to respond appropriately and consistently to issues that arise during the election.¹⁶⁵ In addition, they may themselves commit errors that taint an election. A substantial number of mistakes that give rise to election contests therefore might be prevented if we restructured the manner in which we administer elections. We might also be able to prevent more instances of fraud if we invested more money in the security of our election processes.

Cost considerations also play a role in our selection of voting technology. We accept a certain degree of inaccuracy and unreliability, knowing that more accurate, more reliable methods could be developed, but perhaps at a heavy financial cost. Where the accuracy or reliability of a particular election outcome is unsatisfactory, an election contest holds the promise of relief.

Election contests, however, exact their own cost, both in public (and private) dollars and in democratic legitimacy. These costs must be evaluated in relation to the costs of the rest of the election process. In a sense, the decision is between paying for prevention and paying for a cure. But the possibility that states could invest substantially more in preventative measures does not mean that the existing system is inefficient. In the grand scheme, the number of election contests that could be prevented by substantial increases in election administration funding may be comparatively small, resulting in relatively insignificant savings in the costs of election contests.

Furthermore, it is worth noting that both the speed and the accuracy with which we resolve election failures are themselves dependent on the resources that we devote to our remedial processes. For instance, relying on ordinary courts to adjudicate election contests may be more efficient than using election courts with special expertise, yet may produce less accurate or less timely results.

¹⁶⁴ See Jim Drinkard, *Scarcity of Poll Workers Persists*, USA TODAY, Oct. 26, 2004, available at http://www.usatoday.com/news/politics/elections/nation/president/2004-10-26-poll-workers_x.htm?csp=19_wxia.

¹⁶⁵ See ADVANCEMENT PROJECT, *PLIGHT OF THE POLL WORKER: EFFORTS TO IMPROVE TRAINING AND SUPPORT FOR POLL WORKERS IN OHIO, PENNSYLVANIA, MARYLAND, FLORIDA, AND MICHIGAN 1, 1–2* (2006), available at www.projectvote.org/fileadmin/ProjectVote/Publications/Plight_of_the_Poll_Worker-Advancement_Project.pdf.

F. Separation of Powers

As previously noted,¹⁶⁶ absent statutorily conferred authority to adjudicate an election contest, courts traditionally have treated allegations that a particular election outcome was invalid as a nonjusticiable political question.¹⁶⁷ Courts are justifiably wary of interfering in the outcome of the political process, both to protect themselves and to protect the democratically elected branches.¹⁶⁸ To the maximum extent possible, the people, not the courts, should choose their representatives. Accordingly, in those instances in which an election outcome remains unreliable even after a recount, the least intrusive remedy that a court could order would simply be a new election. This remedy would spare the court the difficult burden of identifying the winning candidate and instead would return to the voters the responsibility of determining the election outcome.

Yet rerunning an election imposes significant burdens on other components of our democracy.¹⁶⁹ Conducting elections is hugely expensive, and rerunning an election duplicates this expense, not only for the public treasury and the election officials involved, but to a large extent for the candidates and their campaigns as well. Candidates may have exhausted their resources and be unable to produce an effective second campaign. Rerunning elections may systematically favor certain types of candidates, such as incumbents or established candidates with greater financial resources, who may be in a better position to continue campaigning than challengers or political newcomers. Furthermore, a new election can never be run on a clean slate, but will always be colored by the perceived outcome of the election it superseded. New elections may also be an inconvenience for the voters, and almost certainly will mean that a different set of voters, with different information, will be deciding the election. Moreover, there can be no guarantee that the new election will itself be free from additional problems, including fraud. In the long term, rerunning elections might lead to disillusionment or apathy, even if in the short term

¹⁶⁶ See *supra* note 26 and accompanying text.

¹⁶⁷ At the same time, courts have historically adjudicated voters' damage actions alleging that they had been deprived of their personal rights to vote. See, e.g., *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 312 n.14 (1986) (collecting cases). But while courts were comfortable deciding that a voter had in fact been disenfranchised (and awarding relief to the voter), they were not comfortable relying on the same facts to examine the validity of the underlying election outcome, absent an election contest brought under a statutory cause of action. See, e.g., *Johnson v. Stevenson*, 170 F.2d 108, 111 (5th Cir. 1948) (distinguishing voters' individual rights, protected under principles of federal law, from candidates' right to political nomination, protected exclusively under state statute); cf. *United States v. Bathgate*, 246 U.S. 220, 226–27 (1918) (distinguishing personal right to vote from political, nonjusticiable, public right to fair election).

¹⁶⁸ See, e.g., *Hutchinson v. Miller*, 797 F.2d 1279, 1280 (4th Cir. 1986) (“The legitimacy of democratic politics would be compromised if the results of elections were regularly to be rehearsed in federal court.”).

¹⁶⁹ See *Huggins v. Superior Court in and for County of Navajo*, 788 P.2d 81, 84 (Ariz. 1990) (identifying a range of problems in ordering a new election).

they excite interest in the particular contest. Frequent new elections also would undercut democratic stability by calling into question the security and efficiency of the voting mechanics.

Thus, new elections are generally used only as a last resort, notwithstanding their attractiveness as a means of keeping courts out of the business of selecting election winners.¹⁷⁰ Instead, the preferred remedy in an election contest is a judicial determination of which candidate won. Yet this approach inevitably entangles the courts in the political process and thereby creates uncomfortable pressures on the judicial branch. It therefore is advisable to limit the judiciary's discretionary judgments in election contests as much as possible.

Alternatively, states could remove these issues entirely from the judicial branch. Many states repose the authority to judge the outcome of some of their elections in legislative or administrative bodies.¹⁷¹ But those bodies often are not politically neutral or free from self-interest, and in many instances may reach outcomes through votes that fall closely along party lines. Nevertheless, as discussed below,¹⁷² this may sometimes be an acceptable, even preferable, approach.

III. REMEDIAL VALUES APPLIED: SOME RECENT EXAMPLES

The values discussed in Part II should limit and guide the selection of an appropriate remedy for an election failure. Yet largely unsettled is how we should prioritize these values when they conflict. As the beginnings of an effort both to prioritize these interrelated but sometimes conflicting values and to establish a framework for resolving election contests, this Part applies these values to several prominent examples of recent election problems.

A. *Inaccurate Voting Because of Ballot Design Problems*

A number of recent election controversies have involved problems in ballot design, including the 2001 mayoral race in Compton, California;¹⁷³ the 2000 presidential election in Palm Beach County, Florida;¹⁷⁴ and the 2006 race for Florida's 13th congressional seat in Sarasota County.¹⁷⁵ Even though these design flaws arguably impeded each election's ability to

¹⁷⁰ However, in some states the only available remedies are either to validate the entire election or to find it void, in which case a new election is required to fill the seat. *See, e.g.*, *Becker v. Pfeifer*, 588 N.W.2d 913, 918 (S.D. 1999) (explaining that a court adjudicating an election contest must either uphold the entire election or declare it void).

¹⁷¹ *See* IOWA CONST. art. 4 § 5; COLO. REV. STAT. ANN. §§ 1-11-205, 1-11-208 (West 2007); MASS. CODE ANN. § 23-15-923 (West 2007).

¹⁷² *See infra* notes 292–295 and accompanying text.

¹⁷³ *See infra* notes 176–181 and accompanying text.

¹⁷⁴ *See supra* notes 47–48 and accompanying text.

¹⁷⁵ *See supra* note 46 and accompanying text.

determine voters' true preferences, the value of both finality and judicial restraint—and the impact of both of these factors on the public's acceptance of election outcomes—caution against permitting these and similar problems to give rise to court adjustments or invalidations of election results.

It was inappropriate, for example, for the trial court to reverse the outcome of the 2001 Compton mayoral race on the basis of a flaw in the ballot layout.¹⁷⁶ There, the incumbent alleged that an error in determining where his name was positioned on the ballot had cost him the election.¹⁷⁷ The court relied on an expert witness's statistical analysis concerning the "primacy effect," a theory that the candidate listed first on the ballot is thereby at an advantage.¹⁷⁸ In this case, the expert claimed that the primacy effect caused the first-listed candidate, on average, to receive 3.32% more votes than candidates further down the ballot.¹⁷⁹ On this basis, the trial court switched 306 votes from the apparently victorious challenger, who had been listed first on the ballot, to the incumbent.¹⁸⁰ With only a 281 vote margin, the switch of these 306 votes reversed the outcome.¹⁸¹

Of course, nothing about any one of these 306 votes suggested that it was cast in error or contrary to a voter's true preference. Further, even if the primacy effect (assuming that the primacy effect accurately described what happened in this election, which itself is an uncertain proposition¹⁸²) means that an election outcome may turn on a random choice about which candidate is listed first, there is no basis in law for disenfranchising those voters whose sole reason for preferring one candidate might happen to be the candidate's position on the ballot. The trial court's action, however, caused this very disenfranchisement. A court might just as well have decided that bad weather on election day kept a disproportionate number of Democratic voters from the polls (as some studies have suggested typically occurs),¹⁸³ and on that basis reversed a Republican candidate's narrow victory.

Because such problematic design flaws are too vague and standardless to permit objective evaluation, this level of judicial refereeing of elec-

¹⁷⁶ See *Bradley v. Perrodin*, 131 Cal. Rptr. 2d 402, 405 (Cal. Ct. App. 2003).

¹⁷⁷ See *id.* at 406.

¹⁷⁸ For a thorough review of the primacy or "ballot order" effect, see Alvarez et al., *supra* note 18.

¹⁷⁹ *Bradley*, 131 Cal. Rptr. 2d at 406 n.2.

¹⁸⁰ *Id.* at 406.

¹⁸¹ *Id.*

¹⁸² See Alvarez et al., *supra* note 18, at 46–52 (presenting statistical analyses that discount the primacy effect hypothesis).

¹⁸³ See, e.g., Brad T. Gomez, Thomas G. Hansford, & George A. Krause, *The Republicans Should Pray for Rain: Weather Turnout and Voting in U.S. Presidential Elections* 69 J. POL. (forthcoming 2007), available *sub nom.* *The Effect of Bad Weather on Voter Turnout and Partisan Vote Share in U.S. Presidential Elections, 1948–2000*, available at http://people.cas.sc.edu/gomezbt/WeatherPaper_v2.pdf (concluding that rain reduces turnout by one percent per inch of rain).

tions after they have occurred can only lead to increased public cynicism about the legitimacy of those elections. Instead, we must either tolerate these structural or design flaws as part of what will always be an imperfect process (just as close election outcomes may sometimes turn on the weather, at least as long as voting remains limited to one day and must ordinarily occur in person), or else identify and correct them before voting begins. For instance, to the extent that the primacy effect is a real factor in election outcomes, the proper remedy is to defeat or randomize this advantage before the election by requiring ballot order rotation across precincts (as a number of states already do),¹⁸⁴ or to recognize and accept that whatever method is used to determine ballot order (such as listing incumbents first or allowing the Secretary of State to decide which party's candidates to list first) may thereby confer an advantage.

Similarly, Palm Beach County's infamous butterfly ballot in the 2000 presidential election did not justify judicial correction after the fact. Even though this design flaw, in contrast to the primacy effect, may well have led some voters to mark their ballots for one candidate when in fact they meant to pick another candidate, nothing about this flawed ballot design necessarily precluded or prevented any voter from accurately registering the voter's true preference.¹⁸⁵ It therefore is impossible to know just how many voters in fact miscast their ballots. Furthermore, all candidates and the public had an opportunity to critique the ballot design before the election took place.¹⁸⁶ In these circumstances, any statistical adjustment of the votes would lack transparency and objectivity,¹⁸⁷ and therefore would lead inevitably to accusations of judicial favoritism. Throwing out the election entirely would be a more neutral remedy than adjusting the returns, and therefore preferable in this regard. But requiring the extraordinary remedy of a new election to fix a flaw that could have been fixed *ex ante*, and did not necessarily preclude any voter from casting a true vote, is simply asking too much of our system.

The same analysis applies to the flawed touch screen layout of the Sarasota County ballot in 2006, the design of which seems the most likely explanation for the astonishingly high number of undervotes in the race for Florida's 13th congressional district.¹⁸⁸ Although it appears that the placement of this congressional race at the top of a second ballot screen,

¹⁸⁴ See, e.g., ARIZ. REV. STAT. ANN. § 16-464 (2007); KAN. STAT. ANN. § 25-2115 (2007); MONT. CODE ANN. § 13-12-205 (West 2007); WYO. STAT. ANN. § 22-6-122 (2007).

¹⁸⁵ In other words, every voter using the butterfly ballot had an opportunity to overcome whatever potential confusion existed in the ballot design and to cast a ballot that accurately registered the voter's preference.

¹⁸⁶ See *NewsHour with Jim Lehrer: Florida Recount* (PBS television broadcast Nov. 28, 2000), available at http://www.pbs.org/newshour/bb/election/july-dec00/f1_11-28.html.

¹⁸⁷ Transparency and objectivity would almost certainly be lacking in the sense that the public would have difficulty understanding how a contest tribunal neutrally settled upon how many votes to adjust. See *supra* Part II.C.

¹⁸⁸ See *supra* note 46.

which featured additional contests more prominently below it, may have led some voters to overlook this race, nothing about this placement precluded any voter from casting a vote in the congressional race.¹⁸⁹ In addition, this design flaw also could have been identified and fixed *ex ante*.¹⁹⁰

In short, courts simply should not void elections or reverse validly cast votes because of imperfections in the way that a ballot was designed, as long as the imperfections have not precluded any voters from communicating their true preferences.¹⁹¹ Otherwise, public cynicism about the legitimacy of an election would only increase as a result. Instead, the onus should be on candidates and election administrators to identify and fix ballot design flaws ahead of time.

B. Lost Votes Because of Balloting Failures

In contrast to the problems of poor ballot design, other kinds of voting problems necessarily preclude voters from meaningfully registering their preferences. Such failures include ballots that omit particular candidates or races;¹⁹² the loss or destruction of some subset of marked ballots or voting machine memory cards;¹⁹³ and the failure to timely mail absentee ballots to voters who have properly requested them.¹⁹⁴ Each of these failures precludes some voters from communicating their choice, resulting in the loss or exclusion of their votes from the official tally. When the number of lost votes exceeds the margin of victory in a contested race, this type of failure thus often merits a judicial response.

Ordinarily, some form of new election will be the most appropriate solution for lost votes that could have determined the election, despite the burdens of this remedy. This approach obviously promotes accuracy and legitimacy and minimizes separation of powers concerns, but sacrifices promptness, efficiency, and lower costs. Fortunately, in many cases such

¹⁸⁹ A design that makes it more likely that some subset of voters will overlook the race is categorically different from a ballot design that omits a race entirely, for instance, thereby precluding or making it impossible for voters using that ballot to register their preference.

¹⁹⁰ For instance, Florida, like most states, allows candidates and the public to inspect ballots and to observe the testing of voting equipment prior to the election. *See* FLA. STAT. § 101.5612 (2006).

¹⁹¹ Accordingly, calling for a new election because the ballot paper was too thin to permit secret voting, *see* *Hester v. Kamykowski*, 150 N.E.2d 196, 200-01 (Ill. 1958), would be overreaching without some additional showing that the thin paper in fact altered some voters' ability to register their vote fairly.

¹⁹² *See, e.g.*, *Gunaji v. Macias*, 31 P.3d 1008, 1010 (N.M. 2001).

¹⁹³ *See More than 4500 North Carolina Votes Lost Because of Mistake in Voting Machine Capacity*, USA TODAY, Nov. 4, 2004, available at http://www.usatoday.com/news/politics/elections/vote2004/2004-11-04-votes-lost_x.htm.

¹⁹⁴ *Cf.* Lisa Abraham, *Ballot Postage Problem Licked; Post Office Will Deliver Absentee Votes Anyway*, AKRON BEACON J., Oct. 31, 2006, at A1 (describing potential problem of insufficient postage compounded by lack of time to repost, attributed in part to tardy mailing of absentee ballots).

inefficiencies and costs could be reduced by limiting the new election to just those voters whose votes are known to have been lost.¹⁹⁵

It also would be sensible to identify some statistical threshold beyond which a new election would not be in order because the probability that the lost votes would overcome the margin of victory is too remote. For instance, if 100 votes have been lost from a precinct whose voters are historically split roughly evenly between the two major parties, but the margin of victory is currently 90 votes, then barring some unusual demographic features of the lost 100 votes, there may simply be too little likelihood that more than 90 of these lost votes would have been for the trailing candidate, despite the hypothetical possibility of such an outcome. The problem of identifying a threshold to trigger a new election is discussed in more depth below,¹⁹⁶ but until legislatures provide specific guidelines, it is sufficient for now to note that courts may need to employ their discretionary authority in deciding when the mathematical possibility of a different outcome is truly a realistic possibility as well.

The line between defects that wholly preclude a voter from casting a meaningful vote, and defects that merely increase the chances that some voters may fail to cast a vote as intended, may not always be clear. Nevertheless, this distinction is helpful in analyzing the appropriateness of remedies for election defects. For instance, consider the difficulty of characterizing the defects of punch card voting systems, which are problematic insofar as votes may be lost or go uncounted if voters have not punched the chad cleanly out of the punch cards. To some, this may be a problem of insufficiently vigilant voters, who are not necessarily precluded from casting accurate votes (especially if voters are reliably instructed to fully detach their punched-out chad). Others may view it as a systemic defect that will inevitably result in the loss of some portion of votes, and which could be avoided through an alternative voting system. Indeed, this latter view may explain why in the run-up to the 2003 California gubernatorial recall election, a Ninth Circuit panel ordered the election postponed until California could replace its punch card equipment.¹⁹⁷

Of course, a decision to enjoin an impending election because of concerns about a design flaw is entirely different from a decision to void or adjust the outcome of a completed election. However, once courts have decided ahead of time that a voting system or ballot is appropriate notwithstanding its known design flaws (as the Ninth Circuit did in its en banc rehearing of *Shelley*),¹⁹⁸ that determination should preclude any post-election contest over previously approved election processes. The alternative would be too destabilizing.

¹⁹⁵ See *infra* notes 233–234 and accompanying text.

¹⁹⁶ See *infra* Part IV.B.4.

¹⁹⁷ See *SW. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, *rev'd after reh'g en banc*, 344 F.3d 914 (9th Cir. 2003).

¹⁹⁸ See *SW. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003).

C. Discouraged Votes Because of Long Lines or Late Poll Openings

Votes can also effectively be lost if voters are discouraged from getting to the voting booth in the first place, as when lines at polling places are long,¹⁹⁹ or when polling places do not open on schedule.²⁰⁰ Although both of these kinds of election failures have occurred repeatedly in recent years, unfortunately no good method exists for recovering this sort of lost vote after the fact. It generally would be a practical impossibility to identify accurately those voters who would otherwise have voted absent these difficulties, or to make any other after-the-fact determination to “add” lost votes to the tallies. At the same time, in most circumstances it would unduly compromise the values of finality and efficiency to void the entire election on the basis that voting was not sufficiently convenient for some voters. Such a response might be appropriate only in the most egregious circumstances, perhaps if an alarming portion of voters has been affected or if there is compelling evidence that these burdens have deliberately been imposed on only certain types of voters.

Instead, even the more extreme occurrences of these problems should ordinarily give rise only to injunctive relief on election day, to maximize the possibility that inconvenienced voters can find an alternative way to cast their ballots that day. As previously discussed,²⁰¹ injunctive relief can include extending polling place hours or making paper ballots available as an alternative to voting machines. Of course, problems of this sort call for greater pre-election preparations as well, and some less serious instances may already be manageable through such existing arrangements as the typical state requirement that all voters who are in line at the official poll closing time be allowed to vote.²⁰²

D. Accidental Inclusions of Unlawful Votes

The converse of omitting lost votes in election tallies is including improper votes. Election officials often do not realize that invalid votes have been included until after these votes are commingled with valid votes and it is no longer possible to isolate and exclude only the invalid votes. Under these circumstances, the appropriate remedy depends in part on whether the invalid votes have been included accidentally, as discussed in this subsection, or fraudulently, as discussed in the next subsection.²⁰³

¹⁹⁹ See George Merritt & Katy Human, *Voting Problems Overwhelm City*, DENVER POST, Nov. 7, 2006, available at http://www.denverpost.com/economy/ci_4620304; *Waiting Was the Hardest Part*, COLUMBUS DISPATCH, Nov. 3, 2004, at 1A.

²⁰⁰ See *supra* note 126.

²⁰¹ See *supra* Part I.B.5.

²⁰² See *supra* note 126.

²⁰³ See *infra* Part III.E.

The 2004 Washington governor's race provides a recent example of accidental inclusion of improper votes. At the conclusion of the recount process, the final margin was 129 votes, out of almost three million votes cast.²⁰⁴ In the subsequent judicial contest proceedings, the trial court found that almost 1700 unlawful votes were included in the returns.²⁰⁵ The vast majority of these were votes cast by ineligible felons, although almost 200 were provisional votes that should not have been counted.²⁰⁶ The court also found other scattered types of illegal voting, including a few cases in which voting apparently had occurred on behalf of deceased persons, as well as the apparent loss of some valid absentee ballots.²⁰⁷ However, the court found no evidence of fraud by or on behalf of the candidates.²⁰⁸

The court rejected petitioners' requested remedy of proportional deduction, which would have entailed the deduction of a portion of the 1700 unlawful votes from the candidates' respective totals according to the proportions of the vote in the precincts in which the illegal votes were cast.²⁰⁹ Instead, the court ultimately upheld the election results notwithstanding the presence of the unlawful votes.²¹⁰ Guiding the court was a provision in Washington's election code that permits a court to invalidate an election result on the basis of illegal votes only if the illegal votes can be proven to be outcome-determinative.²¹¹ Because only a tiny handful of the illegal votes were affirmatively shown to have favored a particular candidate, and the rest could not be shown to have disproportionately favored either candidate, the election outcome withstood challenge despite the illegal votes.²¹²

As discussed further below,²¹³ some statistical adjustments of vote totals may yet hold promise in correcting for unlawful votes. But without both substantial refinements of the demographic analyses required for such methods, and public acceptance of the application of these methods to election errors, such adjustments will continue to lack sufficient transparency to be perceived as fair and to insulate courts from accusations of political interference. Accordingly, if adjusting the vote totals is an unattractive option, the primary remedial choice, when improper votes are known to be included in the tallies but cannot be ascribed to a particular candidate's total, is whether to order a new election or to permit the flawed election to stand undisturbed.

Even if the election is close, as in Washington 2004, this choice should turn primarily on whether the amount of illegal voting is *de minimis*,

²⁰⁴ See Borders Transcript, *supra* note 103, at 5.

²⁰⁵ See *id.* at 19.

²⁰⁶ See *id.*

²⁰⁷ See *id.* at 13.

²⁰⁸ See *id.* at 14.

²⁰⁹ See *id.* at 16–17; see also *supra* note 85 and accompanying text.

²¹⁰ See Borders Transcript, *supra* note 103, at 24.

²¹¹ See WASH. REV. CODE ANN. §29A.68.110 (West 2007).

²¹² See Borders Transcript, *supra* note 103, at 9, 21–24.

²¹³ See *infra* Part IV.B.4.

or instead is aberrational. When the errors are of a *de minimis* sort, a new election offers no advantage—as similar errors are likely to recur—while bringing the drawbacks of delay, inefficiency, and cost. In contrast, when the errors are more extensive than the “background noise” that may be inevitable in most elections,²¹⁴ concerns for fairness and accuracy will justify a new election.

Of course, determining whether the errors are typical or acceptable may be problematic without some widespread agreement about the degree of tolerable imperfections. Nonetheless, courts ought to be capable of comprehending the practical difficulties of conducting flawless elections, even as election administrators continue to strive to reduce voting errors. Accordingly, one way of thinking about whether voting irregularities merit a new election is in terms of identifying an acceptable margin of election error, recognizing that we cannot and should not expect perfection in our election processes.²¹⁵ In essence, this reflects the inherent trade-off between the values of promptness and cost, on the one hand, and the value of accuracy, on the other. This may in turn require some public discussion and awareness, which ideally should occur independently of a particular election contest.

In addition to the 2004 Washington governor’s race, another example of an accidental inclusion of improper votes is the 2004 local Ohio school levy in which two voters innocently voted twice.²¹⁶ These voters, husband and wife, voted first by absentee ballot, and then in person when they were told, incorrectly, that their absentee ballots had not arrived.²¹⁷ Given that the levy failed by one vote, their improper second votes were potentially determinative.

In the minds of some, this circumstance called for breaching the secrecy of the ballot and requiring the two voters to disclose how they voted.²¹⁸ This is a common approach taken when particular voters are shown to have voted fraudulently, on the theory that by their fraud they have forfeited their rights to ballot secrecy.²¹⁹ However, it is problematic to sacrifice the ballot secrecy of voters who have not engaged in any wrongdoing.²²⁰ At the same time, requiring a new election in this circumstance seems grossly inefficient when simply questioning the two voters who voted twice could obviate the enormous expense, as well as the delay, of rerunning the election.

Instead, perhaps it is worth thinking of an election this close as a functional tie, and therefore being satisfied with a coin toss or the drawing of

²¹⁴ See Foley, *supra* note 33, at 109–10.

²¹⁵ See *id.*

²¹⁶ See Zachariah, *supra* note 41, at D8.

²¹⁷ See *id.*

²¹⁸ See *id.*

²¹⁹ See *supra* note 151 and accompanying text.

²²⁰ See *supra* Part II.B.

lots as a fair, prompt means of settling a contest over a few improper ballots, just as most election systems call for some such resolution in the event of a mathematical tie.²²¹ No election system presently makes provision for such a resolution merely in the event of a “close” election, but we might be willing to accept such a remedy if the outcome is so close as to already be within that narrow margin of error that we should realistically be prepared to tolerate in any election, and no votes (or only a number smaller than the margin of error) are disputed.²²²

Of course, one alternative to drawing lots in these circumstances of a functional tie is instead to let the precontest result stand, and use it as the equivalent of a tie-breaking mechanism. Arguably, this is one way of interpreting the Washington statute that governed the 2004 governor’s contest.²²³ Thus, when the election is a functional tie, just as when the impact of a “typical” de minimis number of illegal votes cannot be identified, it may not be worth the cost, delay, and other trouble of rerunning the election. On the other hand, when the number of disputed votes is larger than this acceptable margin of error, it may be necessary to invalidate the election and rerun it for the sake of legitimacy and accuracy.

E. Absentee Ballot Fraud

Election tallies may also include unlawful votes, not through error or inadvertence, but as a result of deliberate fraud. Indeed, the potential for election fraud remains high on the list of public concerns about our election system. In recent years, the most frequent locus of fraudulent voting has been the absentee ballot.

For instance, in the 1997 Miami mayoral race, widespread absentee ballot fraud rendered the outcome uncertain.²²⁴ Moreover, the fraud was shown to have advantaged a particular candidate, even though the candidate was not linked to the fraud.²²⁵ Although one remedial option in these circumstances would be to void the entire election, a preferable approach, where possible, is to void only those portions of the election shown to be tainted by the fraud. Following this approach, the candidate who did not benefit from the fraud may often end up the victor, assuming the race was

²²¹ See, e.g., ME. REV. STAT. ANN. tit. 21, § 732 (2007); MONT. CODE ANN. § 13-16-501 (2007); N.H. REV. STAT. ANN. § 669:36 (2007).

²²² The practical difficulty is that the candidate with the greater number of absolute votes will claim to be the outright “winner,” even if the margin is too close to justify bestowing that label on one candidate with any greater confidence than on the other. We are likely to be able to treat very close races as functional ties only if candidates and the public recognize that within some narrow margin, we in fact cannot say with any confidence which candidate was truly the voters’ preferred choice.

²²³ See *supra* notes 209–211 and accompanying text.

²²⁴ See *In re* Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for Miami, 707 So. 2d 1170, 1172 (Fla. Dist. Ct. App. 1998).

²²⁵ See *id.*

close prior to the exclusion of the fraudulent category of votes. By avoiding a new election, this remedy favors promptness over accuracy, and more important, it also protects the fairness and integrity of the election process by depriving those who have engaged in fraud of a second chance to win the election outright.²²⁶ Although this remedy does involve the judiciary in determining the winner, the judiciary's reasoning in such cases typically should be quite transparent and acceptable.

* * *

The preceding examples—from problems of ballot design, to outright balloting failures, to polling place operations that either discourage lawful voting or permit unlawful voting, to voter fraud—begin to suggest how the fundamental values of democratic elections should shape the choice of remedy for election problems. In short, these values should be applied in light of the fact that elections are imperfect. In addition, the judiciary's role in the contest phase of an election ought to be to remedy only those failures that could not have been reasonably identified *ex ante*, or those that necessarily precluded voters from being able to express their true preferences.

IV. POTENTIAL REFORMS TO ELECTION REMEDIES

It is hard to imagine that values such as fairness, legitimacy, promptness, finality, voter anonymity, accuracy, transparency, efficiency, cost, or separation of powers will become irrelevant to election policy in the near future. Among these values, the most obvious candidate for some readjustment is cost. In particular, if the public became sufficiently dissatisfied with the existing system, we might substantially increase the amount of public money that we were willing to spend to conduct our elections. But no such popular uprising seems imminent.

Even without a public uproar about the trustworthiness of our democratic processes, the integrity of our election systems is worthy of increased financial support. Yet not even substantial additional expenditures will eliminate all the potential for election failures.²²⁷ Accordingly, the relatively marginal funding increases that are much more likely to occur will certainly not themselves produce dramatic reductions in the incidence of election problems.

The task therefore is to improve our methods for remedying election failures while taking current values as the touchstones for success. Using the sometimes conflicting values of fairness, promptness, secrecy, accuracy, and separation of powers as primary constraints, several key catego-

²²⁶ See *supra* notes 92–93 and accompanying text.

²²⁷ Cf. Borders Transcript, *supra* note 103, at 3 (opining that fixing the deficiencies in the state's election processes will “require more than just constructing new buildings and hiring new staff”).

ries of potential reform deserve exploration. These reforms include: greater ex ante consideration of when to call new elections, model standards for election contest provisions, increased use of nonjudicial alternatives for resolving failed elections, and refining public expectations about the degree of perfection achievable in the democratic election processes of a large and complex society.

A. *Ex Ante Consideration of When (and When Not) To Call
New Elections*

As suggested in Part III, many states' election contest processes often require courts to choose between conflicting values. Moreover, these election contests often put courts in the position of "kingmaker" without giving them clear, objective standards that might insulate them from charges of political meddling. In such circumstances, courts understandably may be reluctant to alter or invalidate official election results. It therefore is fundamentally important, both for courts and for the strength of our elections, that our political communities establish clearer and more objective standards for when and how courts should void or adjust a flawed election.

Just as many state election codes have a provision calling for an automatic recount when the margin of victory is within a specified range, the contest provisions of state codes similarly could specify circumstances in which courts must require a new election.²²⁸ For instance, a code could specify that new elections would be mandatory whenever: (1) the voting process is shown to have necessarily excluded legal votes sufficient in number to create reasonable uncertainty about the reliability of the outcome; or (2) the official results are shown to include illegal votes sufficient in number to create reasonable uncertainty about the reliability of outcome, provided that the beneficiary of these illegal votes cannot be specifically identified²²⁹ (in which case the official results should be adjusted accordingly), and provided that the victorious candidate did not aid or participate in acts of voting fraud giving rise to the illegal votes (in which case the runner-up should be declared the winner).

More generally, election contest statutes could specify in advance the authorized remedy for each of the circumstances most likely to arise in an election contest. The beginnings of one such framework are spelled out in Table 1, which associates a remedy with each of several categories of election contests. As Table 1 suggests, election contest provisions also might identify ex ante the circumstances in which a new election is *not* authorized, and in which instead the required remedy is either to adjust

²²⁸ Most election contest provisions do comparatively little to constrain a court's choice of remedy once a court is satisfied that irregularities render the outcome unreliable. See *supra* notes 65–66 and accompanying text.

²²⁹ Protecting ballot secrecy means that in most cases the specific beneficiary will not be known. See *supra* notes 150–153 and accompanying text.

the vote totals, to award the election to the runner-up, or to affirm the official results. Contest provisions further might specify only a narrow range of circumstances when a new election would be permitted (but not required) at the discretion of a court or other tribunal, perhaps in light of considerations of fundamental fairness and the egregiousness of the illegal voting.

TABLE 1

<i>Contest Circumstance</i> ²³⁰	<i>Remedy</i> ²³¹
Legal votes necessarily excluded— # of excluded votes creates reasonable uncertainty:	Call new election
Illegal votes included, beneficiary of specific votes known— Non-fraudulent illegal voting: Fraudulent voting with victor participation:	Adjust totals accordingly Discretion to adjust totals accordingly or reverse outcome
Illegal votes included, beneficiary of specific votes not known— Non-fraudulent illegal voting— # of illegal votes creates reasonable uncertainty: # of illegal votes does not create reasonable uncertainty:	Call new election Uphold election

²³⁰ “Reasonable uncertainty” is shorthand for a circumstance in which the number of errant votes is sufficient to create reasonable uncertainty about the validity of the election outcome. As applied to illegal votes resulting from mistake, rather than fraud, it is flexible enough to allow some degree of proportionality in assessing the likely impact (though not necessarily in implementing a remedy). In contrast, when fraudulent voting favoring one candidate is proven, the presumption may be that all the illegal votes accrued to that candidate, in which case the standard is expressed in terms of whether the number of illegal votes favoring the victorious candidate is “proven to exceed” the margin of victory, or if not so proven, whether the number of fraudulent votes “could reasonably exceed” this margin.

²³¹ “Reverse outcome” is shorthand for deducting sufficient votes from the victor to award the election to the runner-up. In some hypothetically extreme cases, it is possible that the runner-up may have received so few votes as to render becoming the victor problematic.

Illegal votes included, beneficiary of specific votes not known— Fraudulent voting with victor participation— # of illegal votes proven to exceed margin: # of illegal votes could reasonably exceed margin: # of illegal votes not likely to exceed margin:	Reverse outcome Reverse outcome Discretion to uphold, reverse, or call new election
Illegal votes included, beneficiary of specific votes not known— Fraudulent voting without victor participation— # of illegal votes proven to exceed margin: # of illegal votes could reasonably exceed margin: # of illegal votes not likely to exceed margin:	Reverse outcome Discretion to reverse or call new election Discretion to uphold or call new election
Act of God:	Discretion to uphold or call new election

The set of remedies proposed in Table 1 may not necessarily be the ideal method for cabining judicial discretion, and some might object to the table's "cookbook" approach. The table is intended merely as an example, to serve as a starting point for a discussion about how some systematic ex ante attention to typical election contest scenarios could liberate courts from making hard policy choices that resolve tight political contests. Furthermore, the circumstances listed in the table are not intended to be comprehensive, as several other scenarios might also merit inclusion in such a framework.²³²

Three other observations about this sample framework merit brief comment. First, this framework could be modified to permit a limited new election for only some subset of the original voters, if that would be sufficient to remedy a voting defect (as when an election failure has tainted only the votes of one precinct or county). Indeed, in response to a contested election that highlighted the benefits of such an approach,²³³ the

²³² For instance, an election might have a combination of problems, such as voting fraud compounded by mistake, or fraud by both of the top two finishers in the election.

²³³ See *Gunaji v. Macias*, 31 P.3d 1008 (N.M. 2001) (creating an equitable remedy of

New Mexico legislature recently revised its contest provisions to permit just such a partial new election in some circumstances.²³⁴

Second, states should consider what the desired remedy should be whenever the number of nonfraudulent illegal votes (or the number of excluded legal votes), although mathematically sufficient to have potentially affected the outcome, is not reasonably likely in fact to have had such an impact. We may be expecting an unreasonable degree of perfection from our elections if we insist on rerunning such an election. One alternative would be to determine the statistical probability that the errant votes would in fact alter the outcome.²³⁵ If the probability were below some statistical threshold, a contest statute could require the reviewing court to dismiss the contest and uphold the election.²³⁶

Third, awarding an election to the runner-up because of fraudulent conduct by or on behalf of the victor can be problematic if the runner-up does not have broad electoral support. It therefore is hypothetically possible that in some instances the more democratically sound remedy for voting fraud is to hold a new election. Yet because it is impossible to guarantee that the new election will itself be free from fraud, and because merely voiding the election and rerunning it may be an insufficient political penalty for engaging in voting fraud, states might decide as a policy matter that the better approach is to award the race to the runner-up, even at the risk of installing a candidate without even strong plurality support.²³⁷

In addition to protecting the appropriate separation of powers by sparing courts from taking sides on a hard policy choice that will directly determine the outcome of a partisan battle, an *ex ante* framework also would

partial revote, in contrast to the then-existing code requirement of disregarding the entire precinct).

²³⁴ See N.M. STAT. § 1-12-37-1 (2003) (allowing court to order county clerk to send new ballots to the voters identified as having voted with a defective ballot). Courts in other states have rejected such a remedy absent statutory authority. See, e.g., *Howell v. Fears*, 571 S.E.2d 392, 393 (Ga. 2002) (concluding that the Georgia contest statute does not authorize limiting a new election to an isolated precinct with defective ballots).

²³⁵ More than a generation ago, two mathematicians proposed a model that would estimate the probability that a specified number of irregular votes would have altered the outcome of the election had they not been irregular. See Michael O. Finkstein & Herbert E. Robbins, *Mathematical Probability in Election Challenges*, 73 COLUM. L. REV. 241 (1973). Unfortunately, there has been little consideration of matters relating to the implementation of this model, such as considering which statistical tools to use and who would be charged with administering them.

²³⁶ For instance, a contest statute could require convincing the court that at least a ten percent probability exists that the irregular votes would alter the outcome before allowing the court to require a new election. Regardless of the exact magnitude of the threshold, it would provide the benefit of an objective standard.

²³⁷ Of course, it is hard to worry too much about this result when turnout rates for many local elections hover around twenty percent. See Donald P. Green, Alan S. Gerber, & David W. Nickerson, *Getting Out the Vote in Local Elections: Results from Six Door-to-Door Canvassing Experiments*, 65 J. POL. 1083, 1083 (2003). The result is that even a landslide victor often cannot claim much of a true mandate.

further several other values. Most significantly, by insulating courts from deciding an election outcome and instead specifying the appropriate remedy in advance (when by definition the candidate who will benefit from the rule is not known), an *ex ante* framework also promotes the ideal of fairness in election administration. Furthermore, to the extent that it eases the burden on the reviewing tribunal, such a framework also permits a quicker disposition of election contests and promotes the interest of promptness. Also, the policy judgments that go into deciding when a new election is in order will in turn reflect a balance between the interests in an accurate tally and the need for a prompt, final result at an affordable cost. Accordingly, as a first step in improving our remedies for failed elections, each state's election code should clearly specify the circumstances in which particular remedies are appropriate.

B. *Toward a Model Code for Election Contests*

In most states, "contesting an election is purely statutory, and a strict observance of statutory requirements is essential to the exercise of jurisdiction by the court, as it is desirable that election results have a degree of stability and finality."²³⁸ Keeping in mind the fact that election contests are statutory proceedings, is it practical to develop a comprehensive model for a statutory framework governing an election contest? The answer, given the rich variety in state government structures, electoral mechanisms, and judicial institutions, is probably not.²³⁹ Reasonable people may differ about how a particular state should strike the balance between finality and certainty, for instance, in structuring an election contest procedure. Nevertheless, each state legislature should make explicit where it has set this balance, so that courts are freed from the need to resolve these policy questions after the fact.

Accordingly, with the continuing aim of developing a more systematic way of reducing the discretionary judgments that courts need to make about election remedies, this section identifies a few uniformly de-

²³⁸ *Republican Party of Garland County v. Johnson*, 193 S.W.3d 248, 252 (Ark. 2004); see also *Ex parte Vines*, 456 So. 2d 26, 28 (Ala. 1984) (describing election contests as "strictly statutory"); *Collin v. Knoblock*, 25 La. Ann. 263 (La. 1873) (stating that courts have no jurisdiction over elections absent delegated authority).

²³⁹ For similar reasons, prospects for successfully federalizing our election processes are slim. Even where nationalization of some aspects of our election processes (perhaps through Congress's authority to make or alter the regulation of the times, places, and manner of conducting congressional elections, see U.S. CONST. art. I, § 4, cl. 1, or through making federal funding contingent on states' satisfying specific requirements) might ease the problems of post-election litigation, American elections likely will continue to be administered primarily at the local level, with a wide range of personnel and processes. Nonetheless, the issue of nationalization has not gone undiscussed. See, e.g., Paul Herrnsch, *Improving Election Technology and Administration: Toward a Larger Federal Role in Elections?*, 13 STAN. L. & POL'Y REV. 147 (2002); Richard L. Hasen, *Beyond the Margin of Litigation*, *supra* note 14, at 964–73.

sirable features of election contest statutes. These include clearly defining procedural matters such as: (1) who can be a contestant; (2) what standard of evidence to require; and (3) how to expedite contests. This section also identifies several fundamental issues that any such statute should address, in addition to specifying the acceptable reasons or grounds for a contest. These include: (1) whether and in what circumstances to permit proportional or statistical adjustment of election results; (2) how readily to permit new elections to occur; and (3) whether races for different kinds of offices deserve different approaches to these and other issues. Another crucial matter is the extent to which primary elections ought (or need) to receive different treatment from general elections.

Although each jurisdiction may reach its own conclusion about each of these matters in light of its own unique election ecosystem and political culture, as well as its decision about how to balance fundamental values that may sometimes conflict, the following suggestions may serve as a starting point for election remedy reform.

I. Contestants

The issue of who can bring a contest action is a threshold question that all election contest statutes should address definitively. At present, the law on this issue varies from state to state. Some states allow only defeated candidates to commence an election contest,²⁴⁰ while others permit any qualified voter, or even any taxpayer, to initiate a challenge.²⁴¹ In between these extremes, some states permit (or at one time permitted) government officers or groups of at least a specific number of electors to contest an election outcome.²⁴²

Understandably, states would not want just any voter to be able to commence an election contest if doing so were cost-free to the voter. Otherwise, dissatisfied voters might frequently contest elections simply to vent their pique at the outcome, rather than out of a genuine grievance about the process. The effect, in addition to burdening the judiciary, might be increased cynicism about both the reliability and finality of our elections.

On the other hand, because the injury occasioned by an election failure is a public injury, some might argue that any citizen should be able to

²⁴⁰ See, e.g., ARK. CODE ANN. § 7-5-801 (2000); IOWA CODE ANN. § 57.1(1)(a) (West 1999); TENN. CODE ANN. § 2-17-101(b) (2003).

²⁴¹ See, e.g., CONN. GEN. STAT. ANN. § 9-328 (West 2002); FLA. STAT. ANN. § 102-168 (West 2006); N.J. STAT. ANN. 19:29-1 (1999); OHIO REV. CODE ANN. § 3515.08 (West 1994).

²⁴² See, e.g., ALASKA STAT. § 15.20.540 (2006) (allowing ten voters to commence certain types of election contests); N.D. CENT. CODE § 16.1-16-02 (2004) (permitting ten qualified electors to contest election); OR. REV. STAT. ANN. § 258.016 (1991) (authorizing county clerk to bring election contest); Phillips v. Ericson, 80 N.W.2d 513, 523 (Minn. 1957) (describing former statute permitting twenty-five voters to commence election contest); State *ex rel.* Farnsworth v. McCabe, 35 N.E.2d 474, 476 (Ohio 1940) (describing former statute permitting any five voters to demand recount).

seek relief for it. Meanwhile, permitting citizens to bring election contests has the further advantage of letting candidates avoid appearing to be sore losers. Unless a candidate can foresee a strong chance of succeeding in a contest, political calculations about the potential reputational harm of appearing to be a sore loser may on occasion dissuade the candidate from commencing an election contest, even where genuine grounds for a contest exist.²⁴³ The presumptions in favor of sustaining election outcomes presumably pressure candidates to forgo contests as a matter of “political accommodation,” in order to preserve their viability in a subsequent election.²⁴⁴

An election contest statute therefore should not limit contestants to just defeated candidates. Even where the chances for success may not appear strong at the outset, a valid ground for a contest may still exist. Moreover, even when such contests are not ultimately successful in altering election outcomes, they may nonetheless help to purify and identify problems in our election systems, and also contribute to a deeper jurisprudence of election contests.

Accordingly, both candidates and groups of voters, perhaps groups with a minimum of 50 or 100 voters collectively, should be able to contest the election.²⁴⁵ This type of numerical requirement would help guard against meritless actions by a rogue voter²⁴⁶ and other abuses, and also would serve the interests of fairness and transparency by allowing the public to vindicate its right to a sound election. Meanwhile, to further protect against contests being filed in anger or disappointment without sufficient cause, states should assess some of the costs of the contest action on the contestant (unless the outcome of the contest voids the election or alters its result), and should require contestants to post a bond as a prerequisite to the contest.²⁴⁷

²⁴³ *But see* Kyle Whitmore, *War on Dumb: No More Gracious Losers*, Birmingham Weekly Online, Aug. 3, 2006, available at http://www.bhamweekly.com/archived/pages/20060803_war%20on%20dumb.php (describing ugly and unwarranted primary contest as an example that “the era of the gracious loser died with the 2000 presidential election”); *supra* note 163 (describing possibility that high campaign costs may make some candidates unwilling to concede defeat easily).

²⁴⁴ Voters, too, could in theory be discouraged from contesting an election by a concern for political accommodation, recognizing both that contests are quite stressful to democratic processes and that the prospect of a future election mitigates the inevitable imperfections of any particular election. *See generally* Foley, *supra* note 33. Indeed, such political realism may partially explain the strong presumption that election results are reliable. *See infra* note 254 and accompanying text.

²⁴⁵ Alternatively, a numerical requirement could be structured in terms of a petition process, in which the complaint in an election contest must be supported by a petition signed by some number of voters. Illinois employs this approach, requiring a petition signed by the same number of voters as must sign a petition to nominate a candidate for the office in question. *See* 10 ILL. COMP. STAT. § 5/23-1.2a (2004).

²⁴⁶ An individual voter aggrieved by an election failure might still seek to bring a civil rights action for damages or prospective injunctive relief rather than a contest action to invalidate the election outcome. *See supra* notes 121–131 and accompanying text.

²⁴⁷ Most contest statutes that permit voters to contest elections have these provisions. *See* 26 AM. JUR. 2D *Elections* § 460 (1996).

2. Standard of Evidence

One recurrent ambiguity in the law of election contests involves the standard of evidence.²⁴⁸ Many election contest statutes say nothing about the standard of evidence,²⁴⁹ although they may recite that the ordinary civil rules should apply.²⁵⁰ As a result, many states appear to rely on the simple “preponderance of the evidence” test of ordinary civil litigation.²⁵¹ Meanwhile, a few courts appear to have applied a “beyond a reasonable doubt” (or similar) standard to at least some elements of election contests.²⁵²

The most suitable test, however, and one presently employed in a number of states, is to require clear and convincing evidence of an election failure.²⁵³ A clear and convincing standard is appropriate because our election processes, though imperfect, have earned a strong presumption of correctness.²⁵⁴ To rebut this presumption, and thereby void or alter an official result, should require not just a fifty-one percent probability, but some higher confidence or likelihood that the official certification is not trustworthy.

If a mere preponderance of evidence could invalidate an election result, principles of both finality and efficiency would be sacrificed, as elections would have to be rerun more often. More important, principles of fundamental fairness could be compromised because of the destabilizing impact that a preponderance standard would produce. That is, provided that we continue to conduct elections in a manner in which they are ordinarily entitled to a presumption of correctness (as we must strive to do, for purposes of democratic legitimacy), then we should not create a circum-

²⁴⁸ A set of related questions asks whether election contests should be heard by judges or by juries, whether appellate review should be available, and whether factual questions should be tried *de novo* on appeal. At least one court has answered in the affirmative to this last question. See *Big Spring v. Jore*, 109 P.3d 219, 222 (Mont. 2005).

²⁴⁹ See, e.g., NEV. REV. STAT. § 293.417 (2005) (providing only that a court shall alter an election outcome if it “finds from the evidence” that the outcome is incorrect); UTAH CODE ANN. § 20A-4-404 (2003) (providing only that a court shall alter an election outcome if it “determines” that the outcome is incorrect).

²⁵⁰ See, e.g., KAN. STAT. ANN. § 25-1446 (2000) (providing that election contests be tried as civil actions under applicable provisions of code of civil procedure); N.J. STAT. ANN. § 19:29-5 (West 1999) (“[Contest] proceedings shall be similar to those in a civil action.”); N.D. CENT. CODE § 16.1-16-06 (2003) (providing that election contests “be tried as civil actions”).

²⁵¹ See, e.g., *Maynard v. Hammond*, 79 S.E.2d 295, 299 (W.Va. 1953); *Pierce v. Harrod*, 138 Cal.App.3d 415, 428 (Cal. Ct. App. 1982); *In re Gen. Election of Nov. 5, 1991 for Office of Twp. Comm. of Maplewood*, 605 A.2d 1164, 1170 (N.J. Super. Ct. Law Div. 1992).

²⁵² See, e.g., *Rogers v. Holder*, 636 So. 2d 645, 650 (Miss. 1994) (using “beyond a reasonable certainty” standard).

²⁵³ See, e.g., MD. CODE ANN. [ELEC. LAW] § 12-204(d) (LexisNexis 2003); *Wilks v. Mouton*, 722 P.2d 187, 190 (Cal. 1986); *Bazydlo v. Volant*, 647 N.E.2d 273, 276 (Ill. 1995); *In re Election of Nov. 6, 1990 for the Office of Att’y Gen. of Ohio*, 569 N.E.2d 447, 450 (Ohio 1991); *Quinn v. Tulsa*, 777 P.2d 1331, 1341 (Okla. 1989); *Concerned Citizens for Better Educ., Inc. v. Woodley*, 623 S.W.2d 488, 491 (Tex. 1981).

²⁵⁴ See 26 AM. JUR. 2D *Elections* § 439 (1996).

stance in which every close election turns into a question of which side has that scintilla of additional evidence that will determine whether the results stand. Instead we should treat the question as whether we can clearly see that the outcome is not reliable.

The clear and convincing test should be the standard for two discrete components of the contest: proof that some irregularity occurred in the election, and proof that this irregularity altered the outcome or at least rendered it uncertain.²⁵⁵ In contrast, some states use what is termed a “direct evidence” requirement that in effect requires proof beyond a reasonable doubt that the irregularity altered the outcome,²⁵⁶ in which case the remedy is to reverse the result. Requiring proof beyond a reasonable doubt that the outcome would have been different has the virtue of simplifying the question of the appropriate remedy (because mere uncertainty about a result’s validity is insufficient to disturb the result), but has the disadvantage of leaving many election failures unremedied. In contrast, accepting clear and convincing evidence that the result is not reliable is likely to correct more election defects without destabilizing the system, but in turn calls for greater guidance about what remedy to impose.²⁵⁷

A related issue requiring attention is what showing to require in order to determine that a provisional ballot should be counted. Since at stake is a particular individual’s right to vote, a simple preponderance test might suffice, especially since this decision ought to be made prior to an election contest as part of the ordinary canvass process. If questions about the eligibility of specific provisional ballots then become part of a contest proceeding, the same standard used in the initial determination of a provisional ballot’s validity should continue to apply. In any event, this is an issue that has already received a fair amount of academic commentary.²⁵⁸ Most important, states must establish the standard in advance, so that courts have clear guidance when the inevitable post-election litigation occurs.

3. Contest Timetables and Expedition

A third crucial element of a contest action is its timing. Election contests need to be both commenced and concluded as expeditiously as possi-

²⁵⁵ See, e.g., *Taft v. Cuyahoga Cty. Bd. of Elections*, 854 N.E.2d 472, 476 (Ohio 2006) (stating that in Ohio election contests, the clear and convincing standard applies to both proof of irregularity and proof that irregularity altered outcome).

²⁵⁶ See *State ex rel. Wahl v. Richards*, 64 A.2d 400, 407 (Del. 1949); *Jaycox v. Varnum*, 226 P. 285, 289 (Idaho 1924); *Brown v. Grzeskowiak*, 101 N.E.2d 639, 656 (Ind. 1951); *Wilkinson v. McGill*, 64 A.2d 266, 274 (Md. 1949), *State ex rel. Brogan v. Boehner*, 119 N.W. 2d 147, 151–53 (Neb. 1963).

²⁵⁷ Greater guidance is required given that the tribunal now must choose between a wider range of possible remedies—from ordering a full new election, to ordering a partial new election, to making some corrections or adjustments to the vote totals. See *supra* Part I.B.2&3.

²⁵⁸ See *supra* note 143.

ble. However, it is difficult to specify a precise timetable suitable for all contest actions, because the ideal schedule will depend both on how soon after the election the victor is to assume office, and on whether the decision of the tribunal hearing the contest is conclusive or is subject to appeal.

One way to increase the speed with which election contests are concluded would be to try the contest action before a panel of judges whose decision is final and unappealable. Especially if some election contests receive *de novo* review in appellate courts anyway,²⁵⁹ it might be both more efficient and most expeditious to combine the trial and the appeal into a single event.²⁶⁰

In any event, a contest should commence within days of certification of the election, in order to preserve the best evidence and expedite the final determination of the election,²⁶¹ and the contest statute should make clear what this period is. In addition, a strong contest statute should include other provisions designed to expedite resolution of the contest. These could include provisions permitting summary or informal pleadings,²⁶² as well as provisions requiring the court to give the contest action priority over other actions.²⁶³

Another procedural matter affecting the timing of election contests concerns the expedition of the discovery process. A prolonged period of discovery, while obviously conducive to a more accurate determination of election outcomes, is antithetical to the need for a prompt and final determination. Accordingly, courts must limit discovery and require parties to expedite the creation of the evidentiary record underlying the contest action.

Special timing considerations come into play with respect to federal elections, for which Congress is the ultimate judge of the outcome.²⁶⁴ With respect to congressional elections, it is well settled that state courts may resolve issues arising in election contests, even though Congress will have the final word concerning the outcome.²⁶⁵ But for state proceedings to be

²⁵⁹ See *supra* note 248.

²⁶⁰ A few states already grant jurisdiction over election contests to special panels of judges drawn from throughout the judiciary. See MISS. CODE ANN. § 23-15-935 (2001); VA. CODE ANN. § 24.2-801 (2006).

²⁶¹ The contest statute also should be structured to permit the contest to begin before administrative recounts are completed, in order to expedite the final determination of the outcome. The recount still may provide the official result that is the subject of the contest action, but in many cases the preliminary steps of a contest could begin before the recount has generated the final tally.

²⁶² See, e.g., NEB. REV. STAT. § 32-1110 (2004) (directing court to hear contest in “summary manner without any formal pleading”).

²⁶³ See, e.g., CAL. ELEC. CODE § 16003 (2003); TEX. ELEC. CODE ANN. § 231.009 (2003); VT. STAT. ANN. tit. 17 § 2603 (2006).

²⁶⁴ Some similar issues may arise with respect to those state elections whose outcomes are adjudicated in the state legislature, although more typically it may be that the matter is heard exclusively in the legislature without any court assistance.

²⁶⁵ See *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (“A [state’s] recount proceeding does not prevent the Senate from independently evaluating the election any more than the

of assistance to Congress's review of the election, the state proceedings must be concluded before Congress takes up the matter. Similarly, state efforts to clear up uncertainties in the election of presidential electors need to be concluded no later than before the electors cast their ballots, and preferably by the "safe harbor" deadline Congress has established, which is five weeks after election day.²⁶⁶ Unfortunately, very few states appear to have structured their recount or contest provisions with this federal safe harbor deadline in mind, and in most states post-election remedial processes may not be up to meeting this deadline if the controversy is difficult.²⁶⁷

Finally, courts hearing election contests should be prohibited from entertaining claims that could have been litigated prior to the election.²⁶⁸ In large part this is because post-election litigation is so inherently destabilizing to the democratic process that it should be avoided whenever possible.²⁶⁹ In addition, candidates and their supporters are otherwise invited to game the system, waiting to see whether they win at the polls before deciding whether to try to win in court.

4. Alternatives to Proportional Adjustments

Given the range of potential election miscues that can preclude an accurate determination of the true will of the voters, and given the high social costs of resolving these failures through a new election, some sustained attention also should be given to the potential contributions of statistical and demographic analyses. Such analyses could identify the probability that an election outcome is not a reliable reflection of the voters' good-faith efforts to express their will. Although it is too early to predict whether professional consensus could be achieved in this area, and whether the public would accept it, in any event it would be preferable for states to undertake their own deliberate consideration of the potential value of sta-

[state's] initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount.").

²⁶⁶ One aspect of the presidential election process that the 2000 election highlighted is that to prevent Congress from rejecting a state's slate of presidential electors, states must have their results finalized by the second week of December in a presidential election year. See 3 U.S.C.A. § 5 (2000). If a state misses this safe harbor deadline, Congress is no longer statutorily obligated to accept that state's certification of its electors. See 3 U.S.C.A. § 15 (2000). Florida's effort to meet this deadline persuaded the U.S. Supreme Court to conclude that Florida would not be willing to continue any recount after the safe harbor date. See *Bush v. Gore*, 531 U.S. 98, 113 (2000).

²⁶⁷ See Foley, *supra* note 33, at 103–04; Steven F. Huefner, *Reforming the Timetable for the Electoral College Process*, ELECTION LAW @ MORITZ WEEKLY COMMENT, Nov. 30, 2004, <http://moritzlaw.osu.edu/electionlaw/comments/2004/041130.php>.

²⁶⁸ For further discussion of this proposal, see Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193, 1203–04 & n.69 (2005).

²⁶⁹ See *Ross v. State Bd. of Elections*, 876 A.2d 692, 705–06 (Md. 2005) (concluding that laches barred an election lawsuit brought after the election that could have been brought before the election).

tistical analysis, rather than to leave such consideration to a court in the course of deciding a specific contest.

For instance, imagine a two-candidate race with a margin of victory of 3000 votes out of 50,000 cast. Further imagine that some 4000 of the 50,000 votes cast have been irretrievably lost, without ever being counted, so that Candidate A has received 24,500 votes, in apparent victory, and Candidate B has received 21,500. Some would argue that because the number of lost ballots is substantially (33%) greater than A's margin of victory, the election outcome is unreliable and a new election must be held. But suppose that statisticians could determine, after taking into account the circumstances of the lost votes, that the chances are ten thousand to one that more than 3500 of the lost 4000 votes would go to Candidate B, as would be necessary to alter the outcome. Given the small probability that the lost votes could alter the election, it might be more likely that some new error would occur in a new election. In that circumstance, it would make no sense to hold a new election.²⁷⁰

Although some courts have already recognized this,²⁷¹ others seem to be awaiting a statutory change that clarifies the propriety of this mode of analysis. Such a statute would need to specify the threshold probability that is sufficient to require a new election: Is it only five percent? Might it be as high as twenty percent? This is a policy question that courts are not well-suited to decide, but one which the legislature could easily (even if arbitrarily) set in advance.

5. *Presumption Against New Elections*

As previously noted, ordering new elections whenever an election is in doubt could minimize the judiciary's entanglement in the political process.²⁷² New elections may be desirable for other reasons as well. Sometimes they may provide the only opportunity to rectify an election prob-

²⁷⁰ In certain circumstances, a similar approach could be used to handle a group of invalid (rather than missing or lost) votes. Rather than deducting the votes from candidates in proportion to the vote distribution of some representative class from which the invalid votes are drawn, as in traditional proportional deduction, the analysis would seek to ascertain the probability that these votes would be distributed in such a way as to change the outcome. This analysis also could include more sophisticated predictors of the likely beneficiaries of the invalid votes, to avoid the "ecological fallacy" that the trial court in the Washington gubernatorial race found fatal to proportional deduction, *see supra* note 103 and accompanying text, but would not purport to identify the specific number of invalid votes cast for each candidate because of the impossibility of knowing the precise number when voting is by secret ballot.

²⁷¹ *See, e.g.*, *Boyes v. Allen*, 32 A.D.2d 990, 991 (N.Y. App. Div. 1969) (finding no reasonable probability that twelve-vote margin of victory would be altered by eliminating thirteen disputed votes); *Badillo v. Santangelo*, 15 A.D.2d 341 (N.Y. App. Div. 1962) (refusing to overturn election because it was "highly unlikely" that eighty-three of ninety invalid votes were cast for victor, as would be necessary to overcome seventy-five-vote margin of victory).

²⁷² *See supra* Part II.F.

lem, given the anonymity of ballots. For instance, in some elections tainted by fraud, both the source and the impact of the fraud may be impossible to determine, and a clean election will be the only opportunity to remove the taint.

Florida's butterfly ballot was a classic case in which only a new election could have satisfactorily remedied the problem.²⁷³ Almost certainly, thousands of voters had marked their ballots in a way that would register a vote for a candidate other than the candidate whom the voter meant to choose.²⁷⁴ But which specific ballots were marked in error could not be identified, let alone which voters had cast those ballots. Only bringing all voters who had used the butterfly ballot back to the polls with a new ballot could undo the distorting effect of the flawed ballot design.

However, as previously discussed, holding a new election imposes huge costs.²⁷⁵ New elections therefore should be the last resort, even though this places a greater burden on courts to determine the winner in some cases. Although courts justifiably should be reluctant to assume the responsibility of determining the victorious candidate, in some instances courts can legitimately declare a new winner, rather than order a new election, if they can be satisfied (under a clear and convincing evidence standard) that a plurality of voters freely and independently casting valid votes in fact intended to vote for this candidate.

In other instances, remedying an election failure may simply be too costly. For instance, the flawed design of the butterfly ballot did not necessarily prevent any particular voter from casting a valid vote that accurately reflected that voter's will.²⁷⁶ Thus, although the balloting was undeniably less than ideal, whatever errant balloting in fact occurred might be attributed at least partly to voter error. Furthermore, the specific impact of this election failure on the vote totals was uncertain. And even though in hindsight it seems almost certain that the ballot design resulted in miscredited voter preferences, it would be asking too much of our election system to insist on a new election on account of every small distortion in the process that speculatively may have meant the difference in a tight race.²⁷⁷ A new election should be conducted only when voters have been completely prevented from accurately registering their intended preference in numbers sufficient to affect the outcome.

²⁷³ See *supra* notes 184–187 and accompanying text.

²⁷⁴ See Wand et al., *supra* note 47, at 799–801.

²⁷⁵ See *supra* Part II.F.

²⁷⁶ See *supra* note 185 and accompanying text.

²⁷⁷ For instance, many states now require that the order in which candidates are listed on the ballot be rotated, to prevent giving the candidate listed first a systematic advantage. See *supra* note 184. But it would be problematic for courts to require a new election for every close race conducted without a requirement of ballot order rotation. See *Bradley v. Perrodin*, 106 Cal. App. 4th 1153 (Cal. Ct. App. 2003) (overturning lower court vote reallocation based on testimony about the “primacy effect” of first ballot position).

In sum, new elections should occur only when three conditions are satisfied: (1) fraud, mistake, or an “act of God” has necessarily precluded the certified vote total from correctly aggregating all voters’ independent, uncoerced, and unprocured preferences; (2) as a result of this irregularity the official outcome cannot be trusted to accurately reflect the will of the voters; and (3) a reliable outcome cannot be determined in a manner other than holding a new election.

6. *Different Offices*

One reason that it is difficult to develop a model election contest statute is that each state’s election code must cover a complex mix of federal, state, and local elected offices in both the executive and legislative branches, and often in the judicial branch as well. The precise mix of elected offices covered in any particular state’s code may affect the way in which that code could best address the issue of how to remedy a failed election. For instance, for elections to some of these offices, the state may already have decided that its legislature is to be the final judge.²⁷⁸ In that event, the courts may have no role at all, or may play only an initial or advisory role. The choice to let courts play an initial, rather than advisory, role—for instance, in creating the evidentiary record, but leaving the legislature to decide whether an election outcome is reliable—may shape the authority they are given.

7. *Primary Elections*

A further difficulty in developing a model election contest statute is the question of whether to treat primary elections in the same manner as general elections. The answer to this question depends on such factors as the type of primary election used in the state,²⁷⁹ the interval between the primary and the general election,²⁸⁰ and the state’s political traditions.²⁸¹

²⁷⁸ See *infra* notes 289–291 and accompanying text.

²⁷⁹ Several nominating methods are in use in the United States today, from party conventions (in which delegates choose the party’s nominees), to closed primaries (in which only registered party members may vote), to open primaries (in which any registered voter may vote, selecting in which party’s primary to vote in the privacy of the voting booth), and variations thereon. See JOHN F. BIBBY, *POLITICS, PARTIES, AND ELECTIONS IN AMERICA* 155–64 (2003).

²⁸⁰ This interval can range from as long as eight months, see OHIO REV. CODE ANN. § 3513.01 (West 2007) (mandating that primaries during years in which a presidential election is held occur on the first Tuesday after the first Monday in March), to as short as one to two months, see, e.g., HAW. REV. STAT. ANN. § 12-2 (LexisNexis 2006) (“The primary shall be held at the polling place for each precinct on the second to the last Saturday of September in every even numbered year; provided that in no case shall any primary election precede a general election by less than forty-five days.”); 10 ILL. COMP. STAT. ANN. 5/2A-1.1 (West 2006) (“In odd-numbered years, an election to be known as the consolidated election shall be held on the first Tuesday in April except as provided in Section 2A-1.1a of this Act; and an election to be known as the consolidated primary election shall

As a result, some states treat all elections the same, some have separate sets of rules, and still others leave the resolution of contested primaries to the political parties.²⁸² Perhaps the most critical factor in resolving primary elections is speed, as the victorious candidate needs to be identified in time to conduct a meaningful general election campaign. Some states' intervals between primary and general election are even shorter than the interval between the general election and the date that the winner takes office,²⁸³ dramatically heightening the importance of a prompt resolution of a primary election contest.

C. Non-Judicial Alternatives

Any systematic effort to reform how election failures are remedied also ought to consider alternatives to the judiciary. Traditional courts are not the only or even the ideal forum for resolving all election contests. Other forums that may play some role include legislative bodies, administrative tribunals, and special election courts.

For instance, where elections to federal offices are concerned, Congress has the final say over who is the winner. In particular, the office of President of the United States, the only nationwide federal elected office, is filled when presidential electors cast their votes pursuant to federal constitutional and statutory authority²⁸⁴ (including the "safe harbor" deadline for each state's selection of its slate of electors²⁸⁵). These provisions also confer on Congress the ultimate power to resolve a contested presidential election.²⁸⁶

be held on the last Tuesday in February.").

²⁸¹ A state's political traditions can influence such factors as the amount of competition at the primary stage, or the ability of party leaders to unify defeated candidates behind the party's nominee.

²⁸² See, e.g., ALA. CODE §§ 17-13-70 to 17-13-89 and 17-16-40 to 17-16-76 (2006) (delineating separate rules governing primary and general elections); ALASKA STAT. § 15.25.090 (2006) (treating primary and general elections the same); ARIZ. REV. STAT. ANN. § 16-671 (2006) (treating primary and general elections the same); MICH. COMP. LAWS ANN. §§ 168.574–168.588 and 168.641-168.799a (2007) (delineating separate rules governing primary and general elections); MISS. CODE. ANN. §§ 23-15-921, 23-15-923 (West 2006) (providing that party executive committee resolves primary election contests); WASH. REV. CODE. ANN. § 29A.52.121 (2007) (treating primary and general elections the same).

²⁸³ See *supra* note 280. Several states have advanced or are contemplating advancing their primary date to provide more time to resolve primary election contests. See IMPROVING ARIZONA'S RECOUNT AND ELECTION CONTEST LAWS 5–8 (2005), available at http://www.azsos.gov/election/Brewer_Voting_Action_Plan/Election_Law_Advisory_Committee/Committee_Report_12-30-2005.pdf.

²⁸⁴ See U.S. CONST. art. II, §1; U.S. CONST. amend. XII; 3 U.S.C. §§ 1–15 (2000) (prescribing process for selecting presidential electors, for voting by the electors, and for counting the elector's votes).

²⁸⁵ See *supra* note 266 and accompanying text.

²⁸⁶ See 3 U.S.C.A. § 15 (2000) (prescribing processes by which Congress counts electoral votes, including process for resolving objections to particular votes). However, as the 2000 election made clear, state and federal courts can play significant roles at earlier stages—roles that ultimately may obviate the need for Congress to settle an election controversy.

Similarly, with respect to elections for members of Congress, the U.S. Constitution provides that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members”²⁸⁷ In addition, the Constitution provides that while each state legislature may prescribe the “Times, Places, and Manner of holding elections for Senators and Representatives,” Congress may “make or alter such regulations.”²⁸⁸

In some states the state legislature has a power analogous to Congress’s Article I Section 5 power to judge the elections and qualifications of its own members.²⁸⁹ In fact, a few state legislatures even have the final authority to review the elections of state officers elected on a statewide basis. For instance, in Colorado, a joint session of the state General Assembly resolves all contests concerning elections for state officers.²⁹⁰ North Carolina has a similar process, under which the North Carolina General Assembly recently resolved a contest over the 2004 election of the Superintendent of Public Instruction.²⁹¹

Legislatures obviously will resolve contested elections without even a patina of political neutrality.²⁹² But letting majoritarian institutions resolve questions about the majority’s will in an election contest may be appropriate.²⁹³ Even these partisan institutions ought to protect a minority party’s candidate in the face of compelling evidence that an election result is unreliable,²⁹⁴ rather than face the political consequences of being perceived to have thrown an election.²⁹⁵ And when the election contest pre-

²⁸⁷ U.S. CONST. art. I, § 5, cl. 1.

²⁸⁸ *Id.* at art. I, § 4, cl. 1. However, when congressional elections are contested, Congress typically awaits the disposition of any state proceedings before making a final determination whether to accept the state’s choice of candidate. *See, e.g.,* *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972).

²⁸⁹ *See, e.g.,* ALA. CONST. art. II, § 12; KY. CONST. § 38; LA. CONST. art. III, § 7; MICH. CONST. art. IV, § 16; *see also* Steven F. Huefner, *Echoes of Bush v. Gore: Courts Are Not Always the Right Forum for Election Contests*, ELECTION LAW @ MORITZ WEEKLY COMMENT, Jan. 10, 2006, <http://moritzlaw.osu.edu/electionlaw/comments/2006/060110.php> (describing contested Kentucky state senate race that state supreme court resolved contrary to state senate’s resolution).

²⁹⁰ *See* COLO. REV. STAT. ANN. §§ 1-11-205, 207 (West 2000).

²⁹¹ *See* N.C. GEN. STAT. ANN. § 120-10.10 (West 2006); *see also* *Last Unresolved State Election is Settled*, N.Y. TIMES, Aug. 24, 2005, at A14.

²⁹² *Cf.* Richard Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 715–16 (2001) (describing *Bush v. Gore* majority as distrustful of legislatures resolving highly political elections).

²⁹³ *See* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 655 (2001) (discussing a “presumption . . . that vindication [of majority preference] lies in the political arena”). Because the political composition of a state legislature presumably approximates the political composition of the electorate of the state, it may be most appropriate to let the legislature resolve statewide election contests, as well as contests over its own membership, but not to task it with resolving local races.

²⁹⁴ For instance, a Republican U.S. Senate ultimately rejected a challenge to the very close 1996 election of Democratic Senator Mary Landrieu of Louisiana, although not until after conducting an investigation over the objection of Senate Democrats. *See* Lizette Alvarez, *Senate Election Inquiry Clears Democrat from Louisiana*, N.Y. TIMES, Oct. 2, 1997, at A17.

²⁹⁵ Because of their authority to judge the elections of their own members, legislatures

sents a close question, even a nakedly partisan outcome determined by a politically accountable branch may be as defensible as a judicial remedy under ambiguous statutory standards. Ambiguous statutes may leave courts relatively unmoored to resolve election contests, and with much less accountability than the legislative branch. Accordingly, this approach has the benefit of insulating courts from the political process.

Another alternative to judicial resolution of contested elections is an impartial administrative tribunal. The members of such a panel could be appointed in advance of each election on a neutral or bipartisan basis, ready to serve in the event of a contest. We might be comfortable giving these bodies more discretion than we are comfortable giving the legislature, or even judges (who may be partisan appointees, or who may themselves be subject to election), to craft a remedy that best recreates the will of the voters, as expressed in the election under review.²⁹⁶

A third option is a special election contest panel composed of members of the judicial branch. For instance, Kansas provides that a panel of three state district court judges will hear contests involving statewide elections,²⁹⁷ while Iowa provides that a panel of four state district court judges and one supreme court justice will review contests involving its presidential electors or its congressional delegation.²⁹⁸ A special panel also could be created akin to an arbitration panel, with the contestant picking one member, the contestee picking another member, and those two members jointly picking a third member.²⁹⁹ In these and other configurations, special panels can be structured to reduce the potential that the outcome reflects the partisan bias of a particular judge or court.

Not only should states give some care to identifying the institution best suited to resolve a particular type of election contest, they also should think about the specific powers that this tribunal should have. For instance, unless their contest authority expressly includes a power to direct the boards of elections to conduct a partial new election when they deem it the best remedy for a particular election failure, neither administrative nor legislative tribunals will have this remedial tool, and even courts may be reluctant to use their equitable powers to fashion such a remedy absent statutory authority.³⁰⁰ These decisions in turn may depend on other choices

of course are already fully capable of manipulating the outcomes of these elections, but this authority does not appear to have been frequently abused.

²⁹⁶ A similar option is to charge the state board of elections with hearing the full merits of an election contest action, and thereafter subject their decision to judicial review. *See* 10 ILL. COMP. STAT. ANN. 5/23-1.8b (West 2006). As long as the board of elections is a bipartisan panel, this has the advantage of insulating the court from allegations of partisan favoritism if the court is ultimately able to uphold the administrative decision.

²⁹⁷ *See* KAN. STAT. ANN. § 25-1443 (2000).

²⁹⁸ *See* IOWA CODE § 60.1 (2003).

²⁹⁹ *See* IOWA CODE § 57.7 (2003) (prescribing this method for contest of public measure).

³⁰⁰ In many instances, when a legislature voids an election, the technical result is that the disputed office is temporarily vacant. The vacancy is then filled according to statute,

that a state makes about its contest processes, including what remedies to favor (or allow) and in what circumstances.

E. Concluding Thoughts About Perfect Elections

Often implicit and occasionally explicit in the foregoing discussion is that when it comes to election perfection, our reach may exceed our grasp. Any system that preserves local control, guarantees anonymous voting, and seeks to determine a fair but final election outcome promptly will sacrifice some amount of accuracy or certainty.³⁰¹ In part, this is because such a system will inevitably allow greater possibilities for voting fraud. But even absent fraud, it is harder to remedy mistakes in a system that favors speed over certainty, anonymity over auditability, and local control over uniformity.³⁰²

Accordingly, one helpful reform in the area of election remedies would be to educate the general public about the realistic limits of our election system. As long as we have done as much as is reasonable to minimize the potential for error, while ensuring that the residual errors that do occur do not systematically favor one candidate or party,³⁰³ we should be content with the remaining imperfections in our elections.

It is probably a fiction to believe that in a very close election we can know with certainty which candidate was supported by the greatest number of eligible voters who attempted to vote.³⁰⁴ The expected error rates in the processing and tabulating of tens of thousands of ballots can often dwarf the declared margin of victory in close races. Instead, we should recognize that in extremely close races, what we have is a functional tie, and that unless we have a true mathematical tie (in which case most codes provide for a coin toss or drawing of lots to decide the winner), the contest process effectively functions as our tiebreaking mechanism.

which may call for a new election. In that sense, the legislature itself is not technically calling for a new election. If the legislature does not want to void the entire election, however, its remedial options may be limited because it lacks a mechanism for triggering only a partial new election.

³⁰¹ Cf. GOV'T ACCOUNTABILITY OFFICE, THE NATION'S EVOLVING ELECTION SYSTEM AS REFLECTED IN THE NOVEMBER 2004 GENERAL ELECTION 31 (2006) (concluding that "administration of election systems will never be error free or perfect").

³⁰² For a fuller discussion of the impossibility of holding perfect elections, see generally Foley, *The Legitimacy of Imperfect Elections*, *supra* note 33.

³⁰³ Cf. *Black v. McGuffage*, 209 F. Supp. 889, 891 (N.D. Ill. 2002) (describing equal treatment of voters, not perfect accuracy, as the goal of judicial supervision of elections); Foley, *supra* note 33, at 110 (stressing that voting system errors must be randomly distributed).

³⁰⁴ Cf. *Huggins v. Superior Court in and for County of Navajo*, 788 P.2d 81, 86 (Ariz. 1990) (observing that in conducting elections, "we lack the luxury of perfection"). Shortly after the 2000 election, mathematics professor John Allen Paulos noted that our effort to determine who was the true victor of the presidential race in Florida (and hence in the nation) was like trying to measure bacteria with a yardstick. See John Allen Paulos, Op-Ed., *We're Measuring Bacteria with a Yardstick*, N.Y. TIMES, Nov. 22, 2000 at A27.

Of course, we also have to live with the fact that the contest process itself cannot be perfect, and may not truly identify the candidate who has the majority's support. Our main solace then may be that a new election cycle will be upon us shortly, when we can see if the voters have developed a clearer preference.

CONCLUSION

Although society may not be eager to embrace the notion that elections are necessarily imperfect, acknowledging this fact might allow us to be more satisfied with our reform efforts, and also might enhance the overall legitimacy of our election system. For instance, for some categories of election failures we might then be more comfortable with carefully designed (and predetermined) methods of statistical adjustment (just as we may already acquiesce in using a coin toss for a literal tie). This would increase both the speed and efficiency of remedying these failures. We might also be more open to partial new elections in some circumstances, even though it would mean that only some voters (those participating in the partial revote) would have an additional opportunity to learn more about, and be further wooed by, the candidates.

In part, such an understanding will depend on explicitly acknowledging the fact that our election processes serve multiple and sometimes conflicting values. For instance, any perfectly accurate election system will be excessively time consuming or cost-prohibitive, while any perfectly expeditious or cost-efficient election system will not be perfectly accurate. Furthermore, in those instances when an election is demonstrably inaccurate, sometimes there may be no perfect solution, given the secrecy of the ballot and the system's inability to recreate a purified version of a tainted election. That is, even if the cost, inconvenience, and other burdens of holding a new election could be eliminated, rerunning an election simply would not generate an accurate or corrected accounting of the will of the voters from the original election, but would instead generate an accounting of a new, or substitute, will of the voters.

Nevertheless, it is important to develop satisfactory, rather than perfect, methods of dealing with inevitable election disputes. These methods can be substantially improved through a clearer legislative articulation of election contest standards and remedies. In particular, election codes should specify in detail which remedial options—such as new elections, statistical (or other) adjustments to vote totals, or reversing the outcome—are appropriate for which types of election problems. In other respects as well, contest provisions should minimize the discretionary judgments that courts otherwise would make in the heat of a pitched partisan election controversy, such as what standard of evidence to use, and should generally reflect careful judgments about when and how courts and other tribunals should resolve various types of post-election controversies.

For at least the short term, these efforts to clarify election contest processes must occur at the state level, taking as a given the variety of local conditions that exist in each state. This approach capitalizes on our federal system's flexibility, whether thought of in terms of the innovation spawned by Justice Brandeis's laboratories of democracy,³⁰⁵ or in terms of James Madison's solution to the tyranny of faction.³⁰⁶ However, notwithstanding important state differences and the benefits of varied state election contest processes, most states share the problem of excessive judicial discretion in their procedures for resolving election contests. Accordingly, every state ought to seriously consider how it might adopt—and adapt—certain model election provisions, to protect both the judicial and the representative branches.

To that end, this Article has offered a framework for inventorying typical types of election failures, as well as possible remedies. It also has offered a framework for linking election failures and remedies together in a way that will protect the legitimacy of our democratic processes, in light of several competing values and priorities. These are difficult issues, and much additional work remains to be done, both in identifying the strengths of various state approaches and in analyzing possible reforms. But there should be little doubt about the importance of this enterprise.

³⁰⁵ See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁰⁶ See *THE FEDERALIST* NO. 10 (James Madison).

