



Martha Kropf & David C. Kimball

☐ Helping
☒ America
☐ Vote

The Limits of
Election Reform

ROUTLEDGE 

HELPING AMERICA VOTE

The Limits of Election Reform

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To John Szmer, Gwendolyn and Zachary Szmer
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To Laura Arnold, Carol Kimball, Andy, Will and Mary Kimball
David C. Kimball

LIST OF FIGURES AND TABLES

Figures

2.1 Use of Punch Cards, Lever Machines, and Paper Ballots, 2000–2010	30
2.2 Use of Central-Count and Precinct-Count Optical Scan Systems, 2000–2010	31
2.3 Use of Full-Face and Scrolling Touch-Screen Systems, 2000–2010	32
3.1 Changes in Residual Votes by Changes in Voting Technology, 2000–2004	39
3.2 Changes in Residual Votes by Changes in Voting Technology, 2000–2008	39
3.3 Residual Votes by Racial Composition of Counties, 2000–2008	48
3.4 Residual Votes by Median Household Income of Counties, 2000–2008	48
3.5 Residual Votes on New Jersey Ballot Measures by Voting Equipment, 2006–2010	51
3.6 Residual Votes on Louisiana Ballot Measures by Voting Equipment, 2008–2010	52
5.1 Residual Votes in Florida in 2000 Election by Voting Technology	72
5.2 Palm Beach County “Butterfly” Ballot Used in the 2000 Presidential Election	73
5.3 Residual Votes in Florida in 2000 Election by Ballot Design	74
6.1 Methods of Selecting Local Election Officials in 2004	99

6.2 Party Affiliation of Local Election Officials in 2004	100
6.3 Expected Number of Accepted Provisional Ballots in the 2004 General Election by Partisanship of Local Official and Jurisdiction's Voters	106

Tables

2.1 Voting Equipment Used in the United States Since 2000	29
3.1 Residual Vote Rates in Recent Presidential Elections	37
3.2 The Impact of Voting Equipment Changes on Residual Vote Rate, 2000 and 2004 Presidential Elections (Fixed Effects Regression)	42
3.3 The Impact of Voting Equipment Changes on Residual Vote Rate, 2000 and 2008 Presidential Elections (Fixed Effects Regression)	44
3.4 Racial and Economic Disparity in Residual Votes by Voting Technology, 2000 Presidential Election	47
4.1 Polling Place Consolidation, 2000–2008	66
4.2 The Impact of Polling Place Consolidation on Voter Turnout 2000 and 2008 Presidential Elections (Fixed Effects Regression)	68
5.1 Frequency of Desirable Ballot Features in Sample Counties, 2000 and 2004	81
5.2 Impact of Institutional Factors on Residual Votes: 2002 and 2004 General Elections	85
5.3 Impact of Institutional Factors on Overvotes and Undervotes: 2002 and 2004 General Elections	87
5.4 Ballot Initiatives and Referendums Examined in 2004	90
5.5 Predictors of Residual Votes on Ballot Measures in the 2004 Election	92

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CONTENTS

<i>List of Figures and Tables</i>	<i>viii</i>
<i>Acknowledgements</i>	<i>x</i>
1 Introduction: The Context of Election Reform	1
2 How Does Definition of the Problem Affect the Solution?	15
3 Did the Reforms Increase Accuracy?	34
4 At What Cost? The Unintended Consequences of Reform	55
5 We Mostly Eliminated the Butterfly Ballot...Isn't That Enough?	71
6 Defining the Problem in Human Terms: Who Implements Reform?	96
7 Conclusion: What Have Reforms Accomplished?	112
<i>Notes on the text</i>	<i>119</i>
<i>References</i>	<i>139</i>
<i>Index</i>	<i>151</i>

1

INTRODUCTION

The Context of Election Reform

Minnesota's 2008 senate race between incumbent Republican Senator Norm Coleman and Democratic candidate Al Franken was anything but a *Saturday Night Live* skit. The vote count was so close that the margin triggered an automatic recount and several months of wrangling. And, of course, in Alaska in 2008, we didn't know that Republican incumbent Ted Stevens had lost his seat in the U.S. Senate until two weeks after Election Day. Georgia's Senate race triggered a run-off election on December 2, 2008 between the top two candidates because no one won a majority of the votes. Such issues from the 2008 general election don't seem like a big deal—the Democrats got the majority in the Senate and probably were a bit ambivalent about the prospect of a filibuster-proof majority. The bottom line is that delays, recounts, run-offs, and even unlikely events (such as a candidate who never campaigned winning a primary in South Carolina in 2010) happen on almost every Election Day somewhere in this country.

Eventually, if close elections don't affect a lot of people, we tend to forget them. In 2006, there were several elections which went unsettled for weeks, including one marred by voting equipment errors in Florida. Moreover, in 2004, it took two recounts (one by machine, one by hand) to settle the race for governor in the state of Washington.¹ Individual events such as these do not cause the collective breath holding that took place in the aftermath of the 2000 election. There is nothing quite like *not* having a president-elect for 36 days, particularly in a society used to knowing who would be president before they go to bed on election night. And, if there is a scapegoat—like poor voting equipment—it makes it easy for policymakers to quickly propose solutions for such a crisis and claim credit for having done so. Of course, in the world of lawmaking, no law is ever passed easily, particularly when the legislation concerns a policy over which the U.S. federal government has traditionally had limited influence.

2 The Context of Election Reform

When the United States Congress passed the Help America Vote Act of 2002 (HAVA), everyone knew it was not perfect, but policymakers argued that events—especially in Florida—from the 2000 election seemed to demand a change in election procedure. The equipment used to cast ballots was at the center of criticism. Modernizing voting equipment became an important part of the federal legislation. Further, several states—such as Florida—embraced new electronic voting equipment well before the U.S. Congress could act.

Interestingly, despite what some called “historic” changes in Florida, just a few short years after the fateful election, Florida was at the center of another disputed election. In 2007, Florida’s state legislature decided to rid the state of the electronic voting equipment it so quickly embraced following the 2000 election. By 2012, the state even planned to get rid of equipment required by federal law for voters with disabilities.² The Help America Vote Act had required such accessible equipment. However, then-Governor Charlie Crist cited commonly discussed problems with electronic equipment such as potential vulnerability to computer hackers, potential unreliability, and voters’ lack of confidence in the machines.³

However, arguably the most important triggering event for the state change was the election for the state’s 13th congressional district under the nation’s spotlight in 2006. In that race, there were an estimated 13,000 ballots that contained no vote in the 13th district race, whose outcome was decided by fewer than 500 votes. Some scholars blamed ballot usability, but the larger problem looming—at least to policymakers—seemed the lack of accountability of the equipment.⁴ Voters could not check a ballot to ensure their intended vote was properly recorded by the equipment. The focus had shifted from worrying about whether the old voting equipment had properly recorded the intended votes to whether the new equipment did. Integrity of the elections emerged as a problem in both 2000 and 2007, but what motivated the switchback?

In the case of the equipment switch in Florida in 2007, and in other states, policymakers were responding to fears about the legitimacy of the electoral system. Simply put, Florida officials did not want “another Florida.” In the 2000 election, Florida became the scapegoat for a variety of election problems. We saw one of the closest, most controversial elections in our history play out in Florida. Given the advanced state of broadcast media and the Internet, citizens had the opportunity to follow each grimy detail of the election dispute. The public clearly saw that, especially in such a close election, the way in which an election is administered matters. If even one part of a complex system of measuring citizen preferences for government fails, the public can question the legitimacy of the system. Florida was the center of attention because the outcome of the election came down to Florida, where 537 votes separated two candidates. In that fateful election, multiple problems came to light including problems with voting equipment, ballot usability, lists of registered voters, and recount procedures. These multiple system failures caused federal and state policymakers to reconsider the

election system. Ultimately, President George W. Bush signed the Help America Vote Act into law in October 2002.

The signing and subsequent implementation of HAVA, along with a variety of state reforms, raises the question: Have we fixed the glitches? Could another Florida happen? Florida's reaction to electronic equipment in 2007 raises a related question: What are the unintended consequences of changes we set into motion with HAVA? Finally, is it possible for the federal government to fix the nuts and bolts of election administration in a relatively complete manner? Although it is just one example, that Florida banned electronic equipment in 2007 is an indication that there are doubts about whether we actually fixed the election system. What motivated the switchback in Florida is actually part of the answer about whether we have fixed the system. In our haste to address the election problem, our policymakers focused heavily on fixing the problem of voting equipment quickly. This book explores the positive, negative, and neutral consequences of being hell-bent on changing our voting equipment. Using the data we have gathered in more than ten years of studying election reform, this book explores these important questions. Exploring the questions ten years after the passage of HAVA gives us analytic leverage to determine whether there is the potential for "another Florida," even though many people are starting to take elections for granted again.

Why Should We Care? It's Legitimacy, Stupid...

It is important to note that the election system seemed to work in 2000, even with the complex system failures in the mechanics of the election. The fact is we inaugurated a new president in January 2001, who was even re-elected four years later. However, policymakers (especially Democrats) worried that the winning candidate did not "legitimately" win the election. Perhaps upon hearing the word "legitimacy" citizens may not understand it as political theorists might. For the typical citizen, legitimacy may have a lot to do with perceived authority of the government, as well as the confidence and trust citizens have in the government. In theorizing about elections, legitimacy is a key reason to hold democratic elections—the citizens decide who makes policy for them, but also accept the results in the case that their preferred candidates lose. Citizens of a democratic government accept the results because the process for political change is outlined in law in advance and is systematic.

Results of a Pew Center public opinion poll taken after the 2000 election indicated that the public did not initially accept the Bush win as legitimate. However, the analysis included with the poll conceded that as time passed, a majority of people believed that Bush legitimately won the election. But that also meant that about half did not accept the results.

No matter who wins the presidency, George W. Bush or Al Gore, many Americans think that the victor will come to office because of the way the

4 The Context of Election Reform

voting was conducted or counted rather than because he legitimately won the election in Florida.⁵

It would be going much too far to say that as a result of the 2000 election citizens were ready to revolt and place Al Gore in power (though there might have been a liberal Democrat or two who threatened to move to Canada). On a more micro level, political scientists emphasize legitimacy, trust in government and confidence in government because these concepts affect our willingness to participate in government and to accept its authority. In some ways, such concepts may even have more importance than voting decisions. In fact, in the past decade, confidence that one's ballot has been counted accurately has become a central measure of how well elections are managed.⁶

In considering what makes for a legitimate election, over time, our courts and policy now emphasize that every citizen should have a vote, but only one vote (hence, "one man, one vote").⁷ Every person should have a say, and citizens expect that when they cast a vote, the vote will count in a final tabulation deciding who holds a particular office. This access problem with elections has resulted in discussions of increasing the franchise and increasing voter turnout by making it easier to register or to vote.⁸ Over time, increasing the franchise has meant reforms such as allowing those without property to vote, allowing women to vote or most recently, instituting federal policies (the Voting Rights Act) to stop efforts to block African Americans from voting, and allowing those aged 18–21 to vote.⁹ From the perspective of easing registration burdens and making voting easier, election reforms have focused on solutions such as Election Day registration, pre-election day voting, and mail-only voting. Furthermore, a fundamental question of access has dealt with the question of how easy or hard it should be to register and to vote. Finally, when a voter attempts to vote, the ballot should be usable—that is, it should be clear where the voter registers his preference. Once the voter has cast a vote, the equipment should count it as the voter intended. Ironically, many of the preceding "access" reforms tend to exacerbate the existing socio-economic bias in the electorate,¹⁰ though the value of access is often touted as a Democratic value.

On the other hand, citizens also perceive a legitimate election as one in which the winning candidate did not cheat or maliciously alter the results. Furthermore, those that vote should be qualified to vote. That is to say, this country should have integrity in our elections. Every *citizen* gets to vote once and only once. Even if a citizen has economic interests in one jurisdiction, but lives in another, that citizen typically votes where he or she lives.¹¹ An important corollary is that dead people do not have the right to vote. Furthermore, vote tabulating equipment should correctly register the vote count. Moreover, when we recount the votes, as many states and jurisdictions do in the case of very close elections, we should be able to replicate the results. In other words, in a recount, the results returned the first time around should be the same as the results received the

second time around. Solutions for such problems have focused on implementing voter registration regimes, which were adopted in many states between the late 1800s and the First World War,¹² and requiring voters to show identification, which has become a popular call following Republican takeovers of several state legislatures following the 2010 election. Often, “integrity” reforms are touted as Republican ones.

Our country had been dealing with election problems framed in terms of access and integrity since the founding of the country, especially since the framers failed to give the federal government significantly more power than they did over elections and left to the states most decisions about voting rights.¹³ However, over time and especially recently, the debate of access and integrity has taken on a partisan and rather polemic cast, as if the two are opposites. In considering the access versus integrity debate, the accepted wisdom is that Democrats prefer to expand the electorate while Republicans do not. In strategic terms, this is because the demographic profile of non-voters is more similar to the Democratic Party’s constituency.¹⁴ Thus, conservatives and Republicans tend to be more interested in measures to prevent fraud,¹⁵ which may reduce voter turnout, while liberals and Democrats tend to be more concerned about removing barriers to voting and increasing turnout.¹⁶ The motives of either party may not be pure. Both want to win elections, but the polarized debate limits the type of election reforms that could realistically pass congressional muster. The high degree of partisan polemics in our country also affects the implementation—that is, the day-to-day operation—of election reforms, as noted in later chapters.

In this political environment, the close and contentious election of 2000 took place. There was significant question about who might become president all during the campaign—Democrat Al Gore had served as vice-president for eight years. Republican George W. Bush had served as governor of Texas; his father had served as president for four years. Public opinion polls were too close to call as Election Day approached and the candidates were fighting multiple battles in so-called “battleground states.” The election was not decided for 36 days, due in large part to multiple election system failures. The failures exposed weaknesses in our election system. Thus, the United States Congress felt compelled to act.

What Was the Triggering Event?

As we approach the 2012 election, and in the wake of electing our first African American president, students of elections start to forget the chaos of the 2000 election. Voting equipment selection was not uniform across the country, or even within states. Much voting equipment was selected by local election officials. Voter registration databases had various weaknesses, especially where it concerned official purges of (usually) ineligible voters. Among other election problems, the 2000 election revealed to the general public that they could not take vote tabulating equipment for granted. Before 2000, there were certainly

cases of questionable ballot counting, but most citizens took the administration elections for granted. The public simply did not know the magnitude of the problem. Not only that, but in Florida, there were charges that African Americans had been purged from registration lists for political reasons (due to a questionable felon purge) and many people worked desperately to establish that they were in fact eligible to vote. Combine that with charges of fraud and dead people voting, and the election was—well—a mess.

Political junkies watching the election returns in 2000 initially heard that Al Gore won the state of Florida, but it was not long before the television networks changed their call. As the night wore on, journalists and viewers realized that the results of the election hinged on Florida, even though the election was close in other battleground states as well. Due to the closeness of the election in Florida, there was an automatic recount, which when completed gave Bush a lead of only a bit more than 300 votes out of more than 6 million. But soon the question was: What ballots actually counted? More specifically, what counted as a vote on a punch card ballot? What about ballots with pregnant chads? Dimpled chads? Hanging chads? Party lawyers, interest group representatives, experts and journalists soon began highlighting the potential problems with punch card ballots.

A back-and-forth contest began in the courts and Bush lawyers and Gore lawyers argued about which counties to recount, how to count ballots and what deadlines should be met.¹⁷ By the end of November, Florida Secretary of State Katherine Harris (R) certified the election results, giving Bush a 537-vote lead. By December 9, the U.S. Supreme Court decided to halt all manual recounts and soon made a decision in *Bush v. Gore* that made Bush the election winner. On December 13, 2000, Al Gore conceded the election “for the sake of our unity of the people and the strength of our democracy...”¹⁸ Florida highlighted major administrative breakdowns in the election system: ballot counting issues and database issues.

It should be noted that there were multiple system failures in the 2000 election; Florida was simply the most high-profile case. Other states, such as Missouri, allegedly had fraud with dogs and dead people being registered to vote (there were other states and other problems after all). Georgia had high error with voting equipment just like Florida. But it was Florida’s punch card ballots that became the center of attention, because Florida’s results held up the country.

Punch Card Ballots

The most noticeable breakdown in the system seemed to be with vote tabulating equipment, especially in Florida. Indeed, the punch card ballots and visions of recounts with election officials closely examining ballots was an enduring vision that dominated the rhetoric following the election. As election night 2000 wore on, it became clear that not only was the race as close as a few thousand votes, there were also some peculiar election results in some counties in Florida. In Palm Beach County, conversation turned to butterfly ballots—in which the ten

presidential candidates were presented in two columns.¹⁹ Some argued the ballot caused a large number of votes for third-party candidates such as Pat Buchanan. Right after the election, *Miami Herald* reporter Peter Whoriskey noted that:

[i]f the Palm Beach County election results can be believed, the Lakes of Delray is a hotbed of support for Patrick Buchanan. More people there cast votes for Buchanan than any other precinct in the county. Trouble is, no one in the predominantly liberal, predominantly Jewish retirement condo community seems to believe that's possible.²⁰

Also, in Palm Beach, as well as other counties, large numbers of “spoiled” ballots or ballots for which no vote was registered were highlighted. What was very disturbing about the situation was that the results of the election depended on the assumptions made about types of counting rules adopted as well as which counties were actually recounted.²¹

The conversation soon turned less on ballot usability and more on voting equipment, which had a certain irony to those in the election reform community before all this took place. Roy Saltman had studied voting technology for years as a computer scientist in the Institute for Computer Sciences and Technology in the National Bureau of Standards (now NIST). For 30 years, he noted that punch card voting was inferior equipment, “destined to show its defects in public”—something that Saltman argued most election officials recognized:

Some election officials, inured to the mistakes made by voters as an expected human condition, thought the system adequate. Others hesitated to speak out because they feared to propose significant expenditures to the local political leadership, and the remainder quietly prayed that the elections that they personally administered would not be close. There was no chorus of election officials demanding change.²²

There may have been other motivations for the lack of change in equipment, used by about one-third of Americans in the 1998 election.²³ Indeed, until the 2000 election, punch cards for the most part provided quick results the media and the public demanded. Furthermore, most vote tabulating equipment is not perfect. There are trade-offs among the different types of technology.²⁴

However, at that point, failing to recognize the punch card problems (both in computerized tabulation and the inherent weaknesses of having to punch out chads) meant that the defects in the vote tabulating equipment might cause unpredictable problems. Even the Supreme Court in its *Bush v. Gore* opinion seemed to agree that policymakers would have to address punch cards. The *per curiam* opinion of the Court read:

This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete

way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.²⁵

A close election could (and did) cause a triggering event to change public policy.

The Florida election rhetoric was framed in terms of voting equipment, but voting equipment was framed in the more traditional sense of access to the franchise. Access to the franchise demanded that we modernize voting equipment; and many charged that poor and minority voters were most likely to use such voting equipment,²⁶ even though it was not clear that was the case nationwide.²⁷

However, there did appear to be scholarly agreement that in election jurisdictions with more minorities—particularly African Americans—there were higher levels of what some called “error” or “lost votes.”²⁸ Scholars started calling the “lost votes” by another name: residual ballots—simply the difference between the number of ballots cast in a given location and the number of votes cast for the presidency. Scholars had recognized that just because a vote was not recorded for an office did not mean that the voter intended it that way.²⁹ Scholars began to talk more in terms of overvotes and undervotes, rather than simply residual ballots even though much research—including our own—analyzes residual votes. However one analyzes the accuracy of the equipment, the close and controversial nature of the 2000 election and the real struggle for power it represented touched a sore point that had to do with remaining inequities in the system for selecting government. Given the inequities, the public seemed to demand that something be done. Thus, many policymakers defined the problem of elections as one of voting equipment, but also in equal protection terms as access to proper vote counting technology.

Database Errors

Election Day 2000 revealed another set of problems—this set of problems was with the voter registration databases, on which each precinct relied to determine who could vote and who could not. As the day wore on, large numbers of voters noted they were turned away from the polls, especially in Florida. But it was not just Florida. The United States Commission on Civil Rights contended that this happened nationwide, that potentially two to three million people had lost their right to vote due to “clerical and administrative errors.”³⁰ This type of problem could always happen due to human error (potential voters and election administrators), but the problem was exacerbated in Florida because of a purge of voters prior to Election Day. The U.S. Commission on Civil Rights released a report in June 2001 called, “Voting Irregularities in Florida During the 2000 Presidential Election.” They noted that as a result of a fraudulent mayor’s election in 1997 where apparently dead people voted, Florida’s legislature decided to contract with

a private company to conduct voter registration list purges.³¹ The list, especially of felons³²—included people who were not felons.³³ While officials pared the list somewhat, the U.S. Commission on Civil Rights reported that most of the reportedly ineligible voters were African American. This too, was an important image from the 2000 election, raising questions about access to the franchise.

The Other Florida? A Platform for Integrity

While punch cards provided some of the most enduring images guiding election reform, a different aspect of the integrity problem definition was more clearly highlighted in other states, such as Missouri, particularly in St. Louis City. “In 2000, Missouri came in second only to Florida in the number of allegations made about both voter fraud and vote suppression,” noted Tova Wang from the Century Foundation.³⁴ Republicans believed that many people improperly voted and continued to push the point for several months after the election. In June 2001, Republican Senator Christopher (“Kit”) Bond from Missouri—who became an important spokesperson for the integrity side of the election problem definition—wrote an editorial in the *Washington Post*:

Though dead for 10 years, St. Louis Alderman Albert “Red” Villa actually registered to vote this spring in the city’s mayoral primary. Ritzy Mekler, a mixed breed dog, was also registered to vote in St. Louis. And a recent canvass found that hundreds of city voters apparently are mailing in absentee ballots from abandoned buildings and vacant lots.³⁵

Then Secretary of State Matt Blunt issued a report alleging that at least 1,200 people were allowed to vote improperly.³⁶ Democrats went to court on Election Day because they charged that up to 33,000 voters had been “improperly thrown off the rolls, causing hours of delays to prove they were eligible to vote.”³⁷ Senator Bond called for a federal investigation of the irregularities occurring on Election Day. Through all this, the *St. Louis Post-Dispatch* reported that about 400 people had been allowed to vote anyway, despite being ineligible. Ultimately, a federal lawsuit compelled the St. Louis City Election Board to clean up the voting rolls, but the question still remained as to what to do in such situations. Had Missouri’s election been as close as Florida’s, then the rhetoric resulting from these lawsuits might have taken center stage and we would be talking about fraud far more than we are today.³⁸ As it was, concerns about voter fraud formed the basis of an integrity frame in terms of ensuring that only those who are eligible to vote do vote.

The Result: Some State Legislation, Federal Legislation

Consequently, Florida “moved quickly after the 2000 election to enact comprehensive reforms, including funding to replace voting equipment.”³⁹ Florida also