Introduction: How We Vote: Electronic Voting and Other Voting Practices in the United States

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INTRODUCTION: HOW WE VOTE: ELECTRONIC VOTING AND OTHER VOTING PRACTICES IN THE UNITED STATES

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In recent years, election law has assumed a particularly prominent role in American political life.[1] For example, election-related litigation has sharply increased during the past decade, and the winner of a number of high-profile elections has been determined following litigation, including, most prominently, the presidential election of 2000 and the gubernatorial election in Washington in 2004.[2] This issue of the *William & Mary Bill of Rights Journal* is devoted to a consideration of various legal issues that arise out of the way in which we vote in the United States, with a particular focus on issues that arise out of the use of electronic voting technology. Because of the multi-disciplinary aspects of the question of how we vote, this symposium includes scholars from the fields of law, political science, and computer science.

One of the most interesting developments in election law in recent years has been the increasing use of electronic voting technologies. Although promoted for their vote-counting accuracy, electronic voting technologies have raised concerns in recent years about system failure, or worse, system fraud. As one contributor to this symposium, computer scientist Dan Wallach, has noted, "[a]ny voting system must be designed to resist a variety of failures, ranging from inadvertent misconfiguration to intentional tampering."[3] Several of the contributors to this symposium address questions that arise out of the use of electronic voting technology.

In his Article, "Voting System Risk Assessment Via Computational Complexity Analysis," Wallach examines the security risks posed by a variety of different voting technologies, and considers which technologies require "more attention to counter-measures and mitigation strategies" to avoid fraud.[4] Among the voting methodologies that Wallach considers are electronic voting (with and without paper trails), optical

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

[2] *See* Bush v. Gore, 531 U.S. 98 (2008); Wash. State Republican Party v. King County Div. of Records, 103 P.3d 725 (Wash. 2004).

[3] Dan S. Wallach, *Voting System Risk Assessment Via Computational Complexity Analysis*, 17 WM. & MARY BILL RTS. J. 325, 325 (2008).

[4] *Id.*

scanned paper ballots (either with in-precinct scanning devices, or off-site scanning devices), and Internet-based voting schemes. Wallach also explores future crypto-graphic techniques that might help prevent voter fraud. Wallach's work contributes to the growing literature addressing means of ensuring voting integrity in the wake of the use of increasingly sophisticated electronic voting technologies.

Three contributions to this symposium examine the use of electronic voting tech-nology in the context of specific elections. In their Article, "Voting Technology and the 2008 New Hampshire Primary," three political scientists, Michael Herron, Walter Mebane, and Jonathan Wand, explore claims that the vote counts in the 2008 presi-dential primaries in New Hampshire were affected by the type of vote-tabulating tech-nologies in use in various precincts across the state.[5] During that primary, Democratic candidate Hillary Clinton, compared to her chief competitor Barack Obama, fared considerably better in precincts using Accuvote optical scan vote-tabulating technology than she did in precincts using hand-counted paper ballots. Similarly, Republican candidate Mitt Romney, compared to his chief competitor John McCain, fared con-siderably better in precincts using Accuvote optical scan technology than he did in precincts using hand-counted paper ballots. The authors conclude that these tabula-tion discrepancies are *not* due to the type of tabulation method used, but rather can be explained by the demographic and political differences between precincts using optical scan technologies and those using hand-counted paper ballots that reflect different voter preferences. They specifically note that precincts using optical scan technologies were disproportionately from southeast New Hampshire and tended to be more densely populated and affluent than those precincts using paper ballots. Hence, demographic differences explain the variation in result, a conclusion supported by an examination of prior New Hampshire elections that produced similar divergent voting patterns. The work of Herron, Mebane, and Wand is important; further work of this type needs to be done as a way of monitoring the effect that divergent voting technologies might have on election outcomes.

Two contributions to this symposium examine the disputed 2006 congressional election in the 13th House District in Florida that resulted in extensive post-election challenges. That election was decided by 369 votes out of approximately a quarter of a million total votes cast.[6] The post-election controversy arose because in the home county of the losing candidate, a county where she enjoyed particularly strong sup-port, an unusually high number of voters did not cast a vote in the congressional election. Given the narrow margin, some observers argued that the election would have come out differently had all votes been properly tabulated. The precincts in question used paperless electronic touchscreen voting systems, and allegations were

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[5] Michael C. Herron, Walter R. Mebane, Jr. & Jonathan N. Wand, *Voting Technology and the 2008 New Hampshire Primary*, 17 WM. & MARY BILL RTS. J. 351 (2008).

[6] *See* Lloyd Dunkelberger, *Buchanan Declared Winner; Rival Jenning Sues*, SARASOTA HERALD-TRIB. (Fla.), Nov. 24, 2008, at A1.

made that the large number of undervotes was due to voting machine tabulation failure. In his Article for this symposium, "Machine Errors and Undervotes in Florida 2006 Revisited," political scientist Walter Mebane addresses one of the most common explanations for the undervotes: poor ballot design that caused many voters to fail to cast a vote in the congressional contest.[7] Mebane challenges the conclusion that poor ballot design was the cause of the large number of undervotes, noting that "recorded events involving power failures and problems with the Personalized Electronic Ballots used with the machines correlate significantly with undervote rates."[8] Mebane does not conclude that such failures definitively caused the undervotes. Rather, he concludes that "[t]he relationships between machine events and undervotes are sufficiently substantial and varied to make it unreasonable to discount the likelihood that mechanical failures contributed substantially to the high numbers of undervotes."[9] Mebane cautions that more extensive examination of the hardware and software used in the electronic voting machines, which was not permitted, would be necessary to draw more definitive conclusions about the cause of the Florida undervotes. Mebane's Article is significant, not simply because of what it might suggest about the validity of the recorded outcome in the 2006 Florida congressional race, but for what it might suggest more broadly about the possibility of machine failure when electronic voting technologies are deployed.

Jessica Ring Amunson and Sam Hirsch, both attorneys with the Jenner and Block law firm, represented the losing candidate in her unsuccessful post-election litigation in the disputed 2006 Florida congressional contest. In their Article, "The Case of the Disappearing Votes: Lessons from the *Jennings v. Buchanan* Congressional Election Contest," Amunson and Hirsch critically assess the procedures used during the post-election litigation.[10] In particular, they argue that the trial judge's failure to permit the plaintiffs' experts to examine the hardware, software, and source code of the questionable voting machines undermined the ability of the litigants to get to the bottom of the cause of the undervotes. Based on their post-election litigation experience in the Florida case, Amunson and Hirsch offer a list of proposals for reforming the process by which election results are challenged. Among their list of proposed reforms is the suggestion that courts should not use trade secret law to block judicial discovery that would permit an examination of the hardware, software, and source code of electronic voting machines. Without such discovery, they argue, litigants

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[7] Walter R. Mebane, Jr., *Machine Errors and Undervotes in Florida 2006 Revisited*, 17 WM. & MARY BILL RTS. J. 375 (2008).

[8] *Id.*

[9] *Id.*

[10] Jessica Ring Amunson & Sam Hirsch, *The Case of the Disappearing Votes: Lessons from the* Jennings v. Buchanan *Congressional Election Contest*, 17 WM. & MARY BILL RTS. J. 397 (2008).

are sharply constrained in their ability to determine whether some type of machine failure has in fact occurred.

Political scientist Paul Gronke, in his contribution to the symposium, "Early Voting Reforms and American Elections," examines another voting issue: voting prior to election day.[11] In fact, a substantial number of states now permit early voting (in addition to the traditional use of absentee ballots), a phenomenon that shows no signs of abating.[12] Among other issues, Gronke analyzes the impact of early voting on the way in which candidates must conduct their campaigns, and poses questions that researchers in the future might undertake with respect to early voting.

Legal scholar Dan Tokaji, in his Article, "Voter Registration and Election Reform," takes on a topic that has been under-analyzed by election-law scholars: voter registration laws.[13] Tokaji examines in considerable detail the legal apparatus that governs the voter registration process and sets forth a range of potential reforms, including registration portability (that would permit voters to transfer registration to a new address on election day), automatic voter registration when voters interface with the government, election-day registration, and compulsory or universal voter registration.

Finally, legal scholars Christopher Elmendorf and Edward Foley, in their Article, "Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court," consider the methodological approaches that various Justices on the United States Supreme Court use when adjudicating cases involving the constitutionality of state or federal regulations of the election process.[14] Elmendorf and Foley argue that in these cases, the Justices appear to engage in what they refer to as "methodological pluralism," pursuant to which the Justices follow no single interpretive approach when considering the constitutionality of election regulations.[15] As they argue of the Court's recent decision involving an Indiana photo

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[11] Paul Gronke, *Early Voting Reforms and American Elections*, 17 WM. & MARY BILL RTS. J. 423 (2008).

[12] *See, e.g.*, The Early Voting Information at Reed College, Absentee and Early Voting Laws, http://earlyvoting.net/blog (follow "State early voting laws" hyperlink) (last visited Dec. 3, 2008) (noting that thirty-two states permit no-excuse, in-person early voting, fourteen additional states permit excuse-required, in-person early voting, and one state does all voting by mail); Michael Luo, *In Florida and Elsewhere, Early Voting Breaks Records*, N.Y. TIMES, Nov. 3, 2008, http://thecaucus.blogs.nytimes.com/2008/11/03/in-fla-and-elsewhere-early-voting-breaks-records/?emc=etal (estimating that 37% of registered voters in Florida voted early in November 2008).

[13] Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453 (2008).

[14] Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507 (2008).

[15] *Id.*

identification requirement as a prerequisite for voting,[16] "the highly fragmented out-come in *Crawford*, and the intense methodological disagreement that accompanied it, only exacerbated the perception that the Court is literally lawless—without any law for it to follow—when deciding election cases."[17] This a significant charge, and one that the Court must be mindful of as it continues to take up election law cases.

The Articles in this symposium ask more questions than they answer, but the questions are important ones and are intended to help drive the scholarly inquiry into various issues that relate to how we vote.

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[16] Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008).

[17] Elmendorf & Foley, *supra* note 14, at 538.