Comparative Election Administration: Can We Learn Anything from the Australian Electoral Commission?

Kenneth R Mayer

Available at: https://works.bepress.com/mayer/17/
Comparative Election Administration: Can We Learn Anything From the Australian Electoral Commission?

Kenneth R. Mayer
Department of Political Science
University of Wisconsin-Madison

Prepared for delivery at the 2007 Annual Meeting of the American Political Science Association, August 30-September 2, Chicago, IL
The motivation for this paper is a series of lectures I gave in Australia during the last half of 2006. When I described electoral practices in the U.S., these international audiences were genuinely stunned about the voting process here, finding it difficult to believe that we leave the administrative machinery largely in the hands of thousands of openly partisan state and local officials. Especially when compared to the Australian practice, in which national elections are administered by a single nonpartisan federal authority, using a standardized paper ballot, the U.S. system looks downright irrational. The last 7 years demonstrate that from the standpoint of international standards, or even common sense, election administration here appears to fall short of basic procedural fairness.

My goal is to assess the overall state of election administration in the U.S., identify the main characteristics of that process, and compare it to the systems in other industrialized democratic systems (chiefly Australia). Such a comparison can shed light on which aspects of the election process here compare favorably, which do not, and which features of the Australian process can reasonably be imported here. In particular, I am interested in the potential of more centralized, professionalized, and nonpartisan election administration, as an alternative to systems in place in most election jurisdictions. My conclusion is that election administration should be nonpartisan, but that we have not yet worked out an adequate mechanism that will hold administrators sufficiently accountable to the public. I also conclude that the common arguments against uniform national standards do not stand up to close scrutiny.

Elections administration is a classic case of the fuzzy boundary between politics and administration. Even ostensibly “neutral” changes to the voting process will almost certainly have effects that benefit one party over the others. Consider the controversy over photo-ID requirements. In several states (Indiana and Florida, with more legislation pending), voters are required to verify their identify by showing a government-issued photo-ID before receiving a ballot. The public generally favors such a requirement, often by huge margins (in a 2006 survey

---

1 These same audiences were also surprised by the lack of mandatory voting in the U.S.
conducted as part of a broader study of voting experiences, 75% of respondents said they favored an ID requirement, with only 17% opposing it; Ansolabehere 2007,4).

Proponents of the practice insist that it is a necessary and minimal intrusion that protects against vote fraud; critics argue that it imposes a special burden on poor and minority voters, who are least likely to have a state-issued ID. Daniel Tokaji (2007, 131), in assessing the state of research, notes that there is considerable evidence that photo-ID requirements would disproportionately affect the poor and elderly, balanced against a near total lack of evidence of voter impersonation (the type of fraud that ID requirements would prevent). What is especially surprising, given the vehemence of the rhetoric on both sides of this debate, is that in 2006 nearly half of voters reported that they had been asked to produce an ID, even in places where there was no such requirement (Ansolabehere 2007, 5-6).²

Some election administration problems, as Hall and Alvarez (2003) point out, are probably unsolvable. They note that elections are typically run on a single day (making it impossible to make adjustments once problems are identified); involve hundreds of thousands of one-time, underpaid, and poorly trained poll workers (making it nearly impossible to screen workers or monitor their performance); are conducted at facilities rarely controlled by election administrators (intensifying the monitoring problem); and require local officials to make millions of on-the-spot decisions about whether a particular voter is qualified to cast a ballot.³ And to cement the general problem’s intransigence, the system tends to break down precisely when it is most needed – when elections are decided by knife-edge margins.⁴

² Ansolabehere found that there were almost no instances of voters being denied a ballot over the ID question – only 0.1% out of sample of 22,252 people (2007, 11). But what stood out is the fact that poll worker behavior had no relationship at all to what the law actually was.

³ A 2005 report by the Wisconsin State Elections Board put the average age of poll workers nationwide at 72 (State Elections Board 2005, 5). In Wisconsin, only about 1% of poll workers receive more than 3 hours of training, and over half receive none. (State Elections Board 2005, 10). Wisconsin statutes require a certified election inspector at every polling place; these officials typically receive a single 3-hour training session.

⁴ This is a universal phenomenon. Writing in the Sydney Law Review, Australian legal scholars Graeme Orr and George Williams (2001, 92) defined ‘the first law of electoral disputes’: “it is not
To add to this list of problems, when something goes wrong it is impossible to “unwind” the process to restore the status quo ante and start over. The anonymity of the ballot, the legal structure of the election process, and the larger theoretical problem of rerunning an election when the result of the “redo” will surely be influenced by the information that emerges from the initial unsuccessful run, make it imperative to get it right the first time. Even if it were possible in some pragmatic sense to have a “do over,” it is not clear that the rerun would enjoy any more legitimacy than the original flawed election. The result of the new election would surely be influenced by the information that emerges from the initial unsuccessful run; voters might change their minds; turnout might be higher or lower.\(^5\)

Taken together, these characteristics comprise a unique monitoring problem with no easy solution.

I proceed as follows: sections I and II summarize the election administration procedures in the U.S. and Australia, respectively. Section III considers which elements of the Australian system – widely considered one of the most professionalized and efficient in the world – could be imported into the U.S. And in Section IV, I analyze the prospects for nonpartisan election administration, focusing on the problem of how best to balance neutrality with the need for accountability.

---

\(^5\) Judges have, however, ordered new elections in particularly egregious instances of fraud, intimidation, or an irresolvable ambiguity about which candidate had won (Issacharoff, Karlan and Pildes 2002, 1043-5). Posner describes the logistical nightmare and certain legitimacy crisis that would have accompanied a revote in Palm Beach County in the 2000 presidential election, which Lawrence Tribe (2000) had called for. “To have ordered a revote… would have created an enormously destabilizing precedent. In future elections any loser could press for a revote on the ground that the very ballot design he had sponsored or approved was confusing. And think of the mechanics of such a revote in a Presidential election. A new ballot would have to be designed and approved, printed, and distributed to the polling places, which would have to be reopened and restaffed. With Palm Beach County determining the presidency, frenzied campaigning and insanely energetic turnout efforts could be anticipated… And would the nation accept the idea of a vote in one county in the United States – a vote held after the outcome of the election in the rest of the country was known – to decide who would be President?” (2001, 203). There would be no way to insure that voters made the same choice, even if turnout could be limited to those who voted the first time around.
Election Administration in the U.S.

Prior to the 2000 election, only the most dedicated policy wonks and lawyers engaged in election litigation paid much attention to the mechanics of voting. Most thought and effort went into broad conceptions of equality and the nature of representation; the Supreme Court’s reapportionment revolution and the Voting Rights Act were the key developments. That election, as is well known, exposed the problems with the mundane elements of the electoral process. While the problems in Florida were critical because the presidency hung in the balance, it turned out that most of the difficulties had been with us all along; it was just that nobody had really cared, because previously there was not as much at stake.

When the electoral system was subjected to close scrutiny, the problems were manifest from one end to the other: eligible voters denied ballots; ineligible voters casting ballots; poor ballot design that failed to accurately record voter preferences; poor human engineering of obsolete voting systems, which failed to alert voters that their ballots were not properly filled out; disputes over recount procedures; disputes over the validity of absentee ballots; a state election official with a huge stake in the outcome; disagreement over the meaning of state law; inconsistent standards and methods used to manually recount ballots; a divisive judicial resolution, with sharp dissents and a Supreme Court accused with making a nakedly-self interested partisan decision.

---

6 On the other hand, Joseph Harris (1934) was advocating more professionalized election administration seventy years ago, but was unable to capture the attention of any administrative or academic communities (Saltman 2006, 126).

7 Saltman (2005, chapter 6) provides abundant evidence that the problems with punch-card systems were widely known well before the 2000 election, with examples of breakdowns that presaged – almost exactly – the Florida controversy.

8 The most thorough empirical work has established, to an unusually precise degree of statistical certainty, that Gore would have won the election if all voters had been able to record their preferences accurately. Characterizing the 2000 election as “the worst in American history,” Mebane (2004, 525) found that the Florida election system failed to record more than 50,000 intended votes. If these ballots – rejected because they either failed to register a preference for the presidential election (undervote), or registered more than 1 preference (overvote) – had
The Carter-Ford Commission on Electoral Reform concluded that this failure was not rooted in underlying structural problems with the electoral system, as previous crises were. Rather, “the ordinary institutions of election administration in the United States, and specifically Florida, simply could not cope with an extremely close election (Report of the National Commission on Electoral Reform 2002, 18). The Commission noted that the only reason that the problems did not occur in other states was the sheer luck that the election was not as close anywhere else. Some state election officials acknowledged that their own procedures were worse than those at the core of the Florida meltdown. Seven years after the 2000 meltdown and a multi-billion dollar effort to upgrade voting technology and make the process more reliable, it is still routine to find elections that fail to meet even basic standards of fairness and consistency.

The two main features of U.S. election administration are a radical degree of decentralization and the partisanship of election officials. To these features can be added a third: its largely privatized nature. Because of the complexity and decentralization, the machinery of elections – the voting systems and equipment used to complete and tabulate ballots – is driven by private contractors, who exercise considerable influence over the types of equipment available.

Despite the importance of elections to our conceptions of democratic legitimacy and national identity, the federal government is peripherally involved in the actual election process. There is, as yet, no “generalized constitutional interest in ensuring the ‘integrity of the electoral process’ or in ensuring ‘fundamental fairness’ in elections” (Issacharoff, Karlan, and Pildes 2002, 223). Elections are, instead, actually conducted by state and local governments – over 10,000 different jurisdictions (GAO 2001) – with enormous variation in the methods used from one place to another. Virtually every variable in the voting process – eligibility for ballot access; the accurately recorded voter preferences, Gore would have won by over 30,000 votes. It was, concludes Mebane, mostly a story of “defective election administration (2004, 525). Wand et al. (2001) conclude that the Palm Beach County ballot design caused at least 2,000 Gore voters to mistakenly cast their vote for Pat Buchanan. Bush’s official margin of victory was 537 votes. This is in contrast to the federal government’s role in protecting individual voting rights, through constitutional language and statutes that apply to state and local governments. The crucial examples are the 14th and 15th Amendments, and the Voting Rights Act.
structure and design of the ballot; registration requirements to establish voter eligibility; distribution of polling places; oversight mechanisms and authorities; the hours of voting; the physical process of marking and submitting a ballot; counting methods; definition of a valid vote; standards for recounts; methods of resolving disputes – varies depending on where you live, even for national elections.  

Even with the same state, there may be substantial differences in different counties or cities.

In presidential elections, there may be different candidates on the ballot from one state to another, depending typically on whether minor party candidates have fulfilled the requirements to obtain a spot. In their survey of ballots in the 2000 presidential election, Niemi and Herrnson found wide variation in even the most basic design question: how the major party candidates were identified. Vice President Dick Cheney appeared in at least 5 different guises in the 2000 election: Richard B. Cheney, Dick Cheney, “Dick” Cheney, Cheney, not listed at all, or, in Arkansas, Dick Chaney (Niemi and Herrnson 2003, 319). They found confusing and poorly written voting instructions, unnecessary information, and inconsistencies between sample and actual ballots. “The election for president and vice-president is far and away the most visible election in the United States, and it is the only one held throughout the nation with (more or less) the same candidates. If there is a case for uniform ballots, it is in this election” (Niemi and Herrnson 2003, 323).

Decentralization is a direct result of federal structure, although it is more of a historical consequence than a constitutional one. The states’ authority to regulate elections stems from Article I, section 2 (“Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”) and Article I, section 4 (“The Times, Places, and Manner of holding elections for Senators and Representatives shall be prescribed in

---

10 Consider, for example, the different ways that states react when the electronically stored totals in a DRE machine are different than the paper trails that the machines produce as part of the voter verified paper audit trail (VVPAT) process. Nevada considers the electronic totals official; in the same situation in California, the paper results are controlling. (Electionline.org 2007, 2)
each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators”). But that language has not posed much of a barrier to congressional involvement in how elections are run, either through direct imposition or the use of federal money as a carrot to induce states to comply with federal standards. Federal courts “have interpreted the [elections] clause as granting Congress authority both to regulate conduct at any state or local election that coincides with a federal contest and to punish state officials for violating state duties connected with federal elections” (Karlan and Ortiz, 2002, 235).

There is no centralized administrative electoral authority. The Federal Election Commission does not qualify, as it serves mostly to regulate the campaign finance system for federal elections. The Election Assistance Commission is aspirational, offering guidelines and suggestions; it has no authority to issue binding regulations.

This radical degree of decentralization is only one of the uniquely American characteristics of the electoral process. A second is the partisanship of most election administrators. In most states and counties, the official (or officials) who administers the election process belongs to one of the major political parties. Even states with a formally neutral administrative structure, like Wisconsin, typically have a bipartisan board with overall responsibility. To foreign observers, this is madness, no different than leaving sports officiating to an umpire who is a member of one of the teams.

The third characteristic of the election administration process is that it is, in crucial respects, privatized. While state and local authorities, to be sure, oversee and conduct the actual election, they do not create voting equipment; instead, they typically contract with private companies, who develop and produce the equipment used to cast and count ballots. This poses no problem with basic voting processes, as printing and counting hand ballots is not a complicated task. But when voting becomes more complex – even automated – then there can be questions about the fidelity of the equipment used to record and tabulate the results.
Barriers to uniform election administration include some that are insurmountable. It is difficult to see, for example, how the federal structure of the U.S., or the number of state and local elections typically held on the same day as national elections, could give way to a completely uniform system. The wide variation in population and degree of concentration mean that what works in a sparsely populated rural district (where manually counted paper ballots might be sufficient) would not be appropriate in a densely populated city.

Changes in Election Administration Since 2000

The 2000 election, as is well known, exposed some of the inadequacies of the election administration process, particularly the general lack of attention devoted to the voting process, the inefficiency of the voter registration and the weaknesses of the widely-used punch-card systems (the main benefit of which was that it was inexpensive). Within a year, Congress had responded with a major overhaul, the Help America Vote Act (PL 107-252)

Instead of mandating specific voting systems or procedures, Congress set standards for voting systems used in federal elections, and used the carrot of federal funding to induce states to implement a series of reforms. These included a set of grants to modernize voting equipment and replace punch card systems, create statewide voter registration lists, make polling places accessible to the disabled, train poll workers, and improve voter education programs. HAVA also established the Election Assistance Commission as a “national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections” (section 202), and a system of disseminating voluntary guidelines and best practices to states.

The standards for voting mandate the ability to vote in private, verify and correct ballots, and the use of systems that produce audit trails (although there was no requirement for an actual physical record of each vote, as produced with Voter Verified Paper Audit Trail systems).
In practice, the most noticeable effect of HAVA, at least to voters, was the widespread adoption of electronic voting systems (including DREs and optically scanned ballots). The percentage of registered voters in jurisdictions with DREs jumped from 12% in 2000 to 38% in 2006; the percentage of voters using scanned ballots increased from 30% to 49% over the same period (Election Data Services 2006, 4).

In other ways, HAVA has created as much controversy as it has resolved. The increasing use of DRE’s has prompted concern that the systems are far from secure and prone to their own unrecoverable errors. In the 2006 congressional election in Florida’s 13th district, 18,000 votes appear to have been, put simply, lost; the remaining question is whether this was the result of fraud, poor ballot design, or a failure of the DREs to store the results (Mebane and Dill 2007; Frisina et al, 2007)). Efforts to create statewide voter registration lists have hit significant problems. (Tokaji 2006). Hasen (2005, 944) summed up the progress:

One would hope that improvements in light of the 2000 debacle would improve both the reality and the perception of fairness of U.S. election administration. The bad news from Election 2004, however, is that things likely will not improve sufficiently by 2008. Indeed, many of the steps taken in light of the Florida 2000 debacle have, at least in the short term that includes Election 2004, made things worse.

Election Administration in Australia

The Australian electoral system is very different from the U.S., both in its representational structure and the administrative processes used to conduct elections. Australia

11 A key problem is the difficulty in obtaining exact matches between the data on voter registration forms and other data – such as drivers license lists – used to verify voter identity. Trivial differences in name spelling, case mismatches, and nicknames can all produce false rejections of registration, in which eligible voters are mistakenly purged from lists. Moreover, in larger states there can be substantial overlap among people who share the same name and birth date, making the matching process difficult. See Levitt et al. (2006). The Government Accounting Office reached a more sanguine conclusion, finding that the process helped states improve the accuracy of their registration lists (GAO 2006).

12 There is, however, concern among Australian observers that the campaign environment is becoming “Americanized,” with an increasing emphasis on high-cost, media-driven campaign strategies, professionalized campaign staffs, and the decline of traditional grass-roots campaigning. See Young (2004) and Hughes and Costar (2006).
is a federal parliamentary system, with a House of Representatives chosen from single-member districts, and Senators chosen at the state level. The House has 151 members elected in single-member districts; the Senate has 76, with 12 elected from each state and two each from the Northern Territory and the Australian Capital Territory. The majority party in the House creates an executive government, with a cabinet made up of legislators from both chambers and a Prime Minister as head of government. Party discipline is extremely strong; parliamentarians rarely vote against their leaders, and it is nearly impossible to challenge a sitting member in the Australian version of a primary election.\(^\text{13}\)

Federal parliamentary elections are conducted under the *Commonwealth Electoral Act*, first enacted in 1918 and amended many times since then.\(^\text{14}\) The main characteristic of the statute is its uniform and unitary nature: it applies to every federal election, implements identical procedures in each legislative district (called a division), and covers every element of the electoral process: voter registration, party nominations, rules for ballot access, election administration, the voting process, campaign finance, redistricting, and the process for resolving disputed elections. Elections are administered at the division level, each of which has roughly equal populations. In a national election, electors cast votes in at most two legislative elections – one for the House of Representatives, the other for the Senate – and possibly a constitutional referendum. Voters use paper ballots, which they fill out manually.\(^\text{15}\) The form of the ballot – or ballot paper, as it is known there – is standard across the country and defined in the statute.

\(^{13}\) A Parliamentary Library study of “floor crossing” in the Australian Parliament found that between 1950 and 2004, 97% of all parliamentary votes (called divisions) involved unanimous party blocs. Half of the non-unanimous votes involved only a single member crossing. Crossings affected the outcome only 53 times out of 14,243 divisions, or 0.37% of the time (McKeown, Lundie, and Baker, 2006).

\(^{14}\) Further references cite the Act as *CEA*. State elections are run by separate electoral commissions created by each state government, although these usually resemble the national structure.

\(^{15}\) Australia has approached electronic voting with caution. In 2002, the AEC suggested that electronic voting might be useful for overseas voters, those in remote areas of the country, and for the disabled. At the same time, the Commission noted that though the country had long been known for its electoral innovation, “Australians need to be aware that other jurisdictions are now
The voting process is complex. House elections use approval voting, in which voters must rank every candidate on the ballot in order to have their vote counted. If no candidate receives a majority of the first-ranked votes, the bottom candidate is tossed out. The eliminated ballots then have the second-ranked votes distributed to candidates, with the process repeated until someone receives a majority. The Senate uses the even more complicated single transferable vote (STV) method, and requires voters to either manually rank as many candidates as there are seats, or cast a vote “above the line,” using a preference ranking order that the parties themselves have filed with the national election authority (the AEC).\textsuperscript{16} Often, the parties hand out “how to vote” cards outside the polling place, which provide instructions on how to rank candidates according to party preferences.

A single, independent, national administrative agency, the Australian Electoral Commission (AEC), is responsible for all federal electoral functions.\textsuperscript{17} The AEC is governed by a 3-member commission, made up of a federal judge, active or retired, who serves as chair, the head of the AEC, and a third member who must hold some administrative position in government taking the lead on the electoral issue (Australian Electoral Commission 2002, 20). The Joint Standing Committee on Electoral Matters urged similar reforms in its review of the 2004 election (Parliament of Australia 2005a, 257). The next parliamentary election, which will occur in late 2007, will introduce electronic voting for blind and low-vision voters, and for military personnel serving overseas (http://www.aec.gov.au/Voting/e_voting/index.htm).

The Australian Capital Territory, the seat of the national government, uses DREs for early voting and in a small number of polling places on election day. The system uses PCs running open source software, linked to a central server in each polling place (“Electronic Voting and Counting”, http://www.elections.act.gov.au/Elecvote.html)

\textsuperscript{16} Under the STV method, a quota is calculated as the number of votes divided by 1+ (the number of Senators to be elected). With six seats, for example, the quota is 14.28% of the vote. Candidates who reach the quota on the first preference are elected. Their surplus votes are then transferred to the 2\textsuperscript{nd} preference candidate, after being discounted by a factor equal to the number of surplus votes divided by the total votes received by the 1\textsuperscript{st} preference candidate. The process is continued until all seats are filled. It is a complicated method that can take weeks to complete. The choice of voting rule can obviously have significant political effects. When Australia adopted the STV method for Senate elections, one consequence was an increase in the number of third parties winning seats, and a more proportional relationship between a party’s vote share and the number of seats it wins. Consequently, the majority party in the House – and the party that forms the government, under the parliamentary tradition of responsible government – often does not have a Senate majority.

\textsuperscript{17} The AEC is also responsible for redistricting (called redistribution in Australia), and conducting workplace elections for unions.
(in practice, this has always been filled by the Australian Statistician, who is the equivalent of the U.S. Census Bureau head). Commission members are appointed by the Governor-General, an office with no equivalent in the U.S.\textsuperscript{18} Separate AEC offices in each parliamentary constituency are responsible for administering the election in that division.

A crucial difference in Australia, of course, is that voting is mandatory; voters who do not show up at the polling place face nominal fines.\textsuperscript{19} Australia adopted compulsory voting for federal elections in 1925, after turnout dropped significantly in the 1922 parliamentary elections (every state has adopted compulsory voting for their own elections, as well). Mandatory voting is a central feature of how Australians construct their democratic identity (Orr, Mecurio, and Williams 2003). Enrolled electors who do not cast a ballot (they do not have to actually complete it) face fines of up to A$50, unless they provide a “valid and sufficient reason for the failure,” and may face jail time if they refuse to pay the fine.\textsuperscript{20} Turnout is consistently around 95%. Lijphart (1997) defends compulsory voting as a way of promoting broader interest in politics, reducing the costs of campaigns (because mobilization becomes the responsibility of the government), and possibly raising the level of campaign discourse, because candidates will have no reason to try to depress turnout through negative campaigning (see also Hill 2006).

The AEC is aggressively nonpartisan, and is very protective of its reputation as independent and neutral. There has never been a “credible [instance] of bias on the part of AEC

\textsuperscript{18} Formally, the Governor-General is the Queen’s Representative in Australia and Head of State. The position is a holdover from the British constitutional monarchy. In practice, the Governor-General has little independent authority, and in almost all cases makes decisions with the approval of the Prime Minister and Cabinet. There are exceptions to this practice, however. Proponents of keeping the Governor General argue that the position’s independent and nonpartisan tradition serves as an important check on government behavior.

\textsuperscript{19} \textit{CEA} s. 245, added in 1924, specifies that “it shall be the duty of every elector to vote at each election.” There is a loophole in the mandatory voting scheme, in that it applies only to enrolled (registered) voters, and the Electoral Commission rarely penalizes individuals who do not enroll. Consequently, “[f]ailing to enroll generally results in . . . “liberation” from the compulsory voting requirement (since for all practical purposes, unenrolled citizens are invisible to the Commission” (Brent and Jackman 2007, 12).

\textsuperscript{20} After the 1993 election, “at least 43 nonvoters who had failed to pay their fine received sentences of one or two days in [jail]” (Parliament of Australia 2005b, 7).
administrators” (Mercurio and Williams 2004, 382). Election disputes are hardly unknown, but they are uncommon and usually adjudicated quickly (Orr and Williams 2001).

Most criticism of the Australian electoral system involves broader questions about equality and representation, not the narrower (but still substantive) administrative details. From the American perspective, compulsory voting would face enormous opposition as an infringement of individual liberties. The nonproportional Senate gives representational advantages to the smaller states, though the inequalities are smaller than they are in the U.S. Australian law takes a much more limited view of free speech rights, even in the context of political campaigns. Despite recent High Court decisions finding an “implied right of political communication” in the Constitution, the breadth of this right is vastly narrower than what is provided by the First Amendment.

In the 1980s and 1990s, Australian Albert Langer urged voters to deny the major parties any preferences, by ranking third party candidates first and refusing to rank the major party candidates at all. He argued that voters who ranked their preferences, say 1,2,3,3 instead of 1,2,3,4 would still be casting a valid (formal) ballot. Under normal circumstances, a voter casting a ballot for a minor party candidate would eventually have his or her preferences given to one of the major party candidates. Langer continued to advocate his system even after an injunction, issued by the Victoria Supreme Court, that he was violating the CEA by encouraging voters to use an invalid voting method. He was jailed for contempt of court (Field 1996). Before 1998, a so-called “Langer” vote was counted, but is now defined as informal.

21 Defenders of compulsory voting note that other more onerous forms of participation, including paying taxes and serving on juries, are mandatory.
22 The most populous state, New South Wales, has about 14 times the population of the least populous, Tasmania. In the U.S., California has 61 times the population of Wyoming.
23 The implied right to political communication was grounded in two decisions: Nationwide News Pty. Ltd v Wills (1992) 177 CLR 1, and Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106. See Rosenberg and Williams (1997) for a comparison of Australian and U.S. conceptions of freedom of speech.
24 Because voters must rank every candidate on the ballot in order for their vote to count.
Hughes and Costar criticize recent changes to electoral practices, particularly the 2006 law that closed voter registration on the day that an election is called. Echoing the debate here over photo ID, they argue that the change was motivated by partisanship and wildly exaggerated claims about the extent of voter fraud (2006). They also express alarm at what they see as a convergence in election practices, in which Australia is becoming more like the U.S.

As Australian political parties and interest groups have increasingly adopted American election campaign methods – negative advertising, excessive expenditure, direct mail, electronic databases and push polling – so too have some of their members developed an enthusiasm for elements of U.S. electoral law. We argue that this is a most undesirable development which, in the interest of Australian representative democracy, needs to be resisted (2006, 7).

In an important respect, federal control of the electoral system in Australia is the inverse of the regulatory structure in the U.S. In Australia, federal elections are tightly regulated by the national government, with uniform standards and unitary administration. In contrast, campaign finance is, for all practical purposes, deregulated. The scope of permissible campaign finance practices in Australia would astonish most U.S. observers; indeed, many common campaign finance practices would be felonies here. Political parties in Australia can accept unlimited contributions from any source (union, corporate, individual, foreign); contributors routinely and legally disguise their identities by passing contributions through intermediaries and shell corporations; parties do not need to disclose contributions under A$10,000, and contributions to national and start parties count separately under this threshold; and there is no itemized disclosure of expenditures.

In addition, Australian political parties receive public funding at the rate of A$2.05 per vote nationwide, as long as they receive at least 4% of the first preference vote in at least 1 division. No other conditions apply; parties do not even have to show that they spent the money on campaigning. In 2004, the One Australia political party received A$200,000 in public funding, even though it reported spending only about A$35,000 during the campaign. The Australian Labor Party accused Pauline Hanson, the One Australia party leader, of simply
keeping the money. The disclosure rules are sufficiently lax that parliamentary investigation was unable to establish whether the charges of “profiteering” were true. Nevertheless, the investigators concluded, even if the charges were true the practice was not illegal (Parliament of Australia 2005a, 325-327). In the U.S., although the comparison is not exact, this pattern is reversed. Campaign finance for federal elections is tightly controlled and regulated, while the election administration process is far more decentralized. There are no uniform national administrative standards, and most decisions remain in the hands of state and local authorities.

**Comparing Two Cases: What Can (or Should) be Imported**

In many respects the Australian system compares favorably with the U.S. Election administration is taken seriously as a crucial element of democratic legitimacy, and elections do not appear to have generated anywhere near the level of controversy and litigation that has become commonplace here (this is despite public opinion suggesting that Australians do not like their politicians any more than we do ours).25

One cannot point to another country’s system and simply assume that it (or its admirable features) can be imported directly. The relative electoral efficiency of, say, Australia or Great Britain is the result of a complex web of political factors, not all of which would find favor in the United States. The efficiency of the voting process in Australia, for example, is at least partly a function of compulsory voting, on the theory that voters would not put up with a mandatory system that was also difficult: “It has long been accepted that the ‘compulsory voting’ provision of the [CEA] requires that polling arrangements be made as simple as possible” (Parliament of Australia 2005b, 6).

There are several dimensions on which Australia compares less well, or where the accountability mechanisms differ from what is feasible here. First, the Australia residual vote

25 Since 1968, public approval of the Prime Minister has routinely dropped below 40%; approval of the opposition leader has almost always been below 50%. (McAllister 2003).
rate is high, at least compared to what would be considered tolerable in the United States where the Carter-Ford Commission identified anything over 3% as “unacceptable” (National Commission on Federal Election Reform 2002, 55). In recent parliamentary elections to the House, the overall “informal vote” has increased from 3% in 1993 to 5.2% in 2004 (Australian Electoral Commission 2005a, 71). In the 2004 elections, the informal rate was at least 6% in thirty one House divisions.

Critics of compulsory voting see the increase in informal voting as a form of protest, in which voters intentionally leave the ballot blank or fill it out incorrectly, out of dissatisfaction with politics generally or with being forced to vote (Dodson 2005). There are certainly some protest votes – about 30% of informal votes in the 2001 election seemed to fall into this category, as they were blank, “Langer Style,” had marks and scribbles on the ballot, or had slogans instead of numbers in the ranking boxes (Australian Electoral Commission 2005b, 10). However, the most common reason for informal ballots was incorrect or incomplete numbering, or tic marks instead of numbers. The best predictors of informal rates in a division were the number of candidates on the ballot, and the percentage of population not fluent in English (Australian Electoral Commission 2005b, 16-19). This suggests that the majority of residual votes are the result of ballot complexity or difficulty in following voting instructions.

Australia is not the only country to show this pattern. Ballot complexity also undoubtedly contributed to problems in the May 2007 Scottish elections. In that contest, four

---

26 Some voters also cast formal, but ultimately meaningless, votes by numbering all of the boxes sequentially from top to bottom; this is known as “donkey voting.” While the frequency of intentional donkey voting has never been firmly established – the best guesses from the 1960s, when candidates were listed alphabetically and without party affiliations, put it at between 1.5-3.5% (Orr 2002, 575) – the belief persists that parties tried to take advantage of it by selecting candidates with names that guaranteed them high spots on the ballot. The problem is now addressed by randomizing and rotating the order of candidate names, and providing party affiliations.

27 In a notorious 1999 upper house election in New South Wales, voters were confronted with a ballot 40 inches x 28 inches, with 264 candidates in 81 columns: the ‘tablecloth’ ballot. Only 30 of the candidates were nominated by the major parties; the rest were independent candidates, seeking to take advantage of the complex preference structures inherent in the STV system,
different elections were held, each with a different voting rule. Voters elected a member of UK Parliament under the first past the post rule; a member of the Scottish Parliament under an additional member system; local offices under a single-transferable vote; and a European Parliament seat under a closed-list election. Voters received two separate ballots, one for the parliamentary and EU races, and another for local elections. The election resulted in an unusually large number of spoiled ballots – 142,000 out of 4 million cast, or nearly 4%. While the UK government is forming a commission to study the results, the most common view is that the complicated ballot design, combined with the multiple elections on the same day, was the major cause (Scottish Parliament Information Centre 2007). An initial study found that the strongest predictor of the spoilage rate was the number of parties on the ballot. Legal limits on the design of ballot papers forced administrators in some constituencies to squeeze 23 parties onto one page.

In some cases, there was not enough room to print the voting instructions:

> It appears that as the number of parties on the regional lists increased, the ballot papers became pressed for space as they were limited to one side of a single sheet of paper for both the list and constituency votes. Given the practical limit on the size of the ballot papers in those regions with a large number of parties on the regional list, the instruction format on the ballots was altered. [In one instance] the instructions on the ballot were truncated, removing the arrows designed to identify the two different ‘votes’ that each elector could cast (Carman and Mitchell 2006, 6).

Second, the relative scarcity of election litigation in Australia is not only a result of efficiency, or even the infrequency of disputes. It is mostly the result of a general judicial reluctance to intervene in political disputes, and the absence of constitutional protections of individual rights (there is no general right to vote in the Australian constitution, no concept of substantive due process, and no formal protections akin to the 14th and 15th amendments in the especially when so many parties are involved. With 21 legislators to be selected, a candidate needed only 4.5% of the vote to win a seat. Some of the parties were manifestly unserious – there was a “What’s Doing? Party” and a “Three Day Weekend Party”. A candidate from the “Outdoor Recreation Party” won a seat despite receiving only 0.2% of the first preference vote. See Bennett and Newman (1999)

28 There were slightly more than 2 million voters, who cast a total of 4.1 million ballots. Of these, 85,644 ballots for local elections were spoiled, and 56,247 for regional offices.
When the courts do get involved in election disputes, moreover, they are more concerned with finality rather than fairness:

The narrowness of and severe limitations upon judicial review show that too high a premium has been placed upon the need for finality. This has occurred at the expense of the related and equally important goal that justice be seen to be done. The constraints imposed upon judicial review do not adequately account for the fact that important objectives at the heart of electoral law will be undermined if the final result is not seen as a just and fair determination of the dispute. There is a danger that judicial review of the electoral process will itself be brought into disrepute and public confidence lost if in a particular case serious allegations are not heard or are heard only in part, especially if the case might lead to a change in government (Orr and Williams 2001, 93)

Finally, the independence and professionalization of the Australian Electoral Commission may not be transferable here, as they depend on accountability structures with no direct equivalent in a separation of powers system. Orr et al. (2003) note that the accountability of the strongly independent AEC is enforced by a convention of ministerial responsibility, in which the minister responsible for overseeing the AEC is held responsible for its conduct, and consistent parliamentary oversight by a legislative committee (called the Joint Standing Committee on Electoral Matters). Ministerial responsibility is itself closely tied to neutral administration, and the 19th century concepts of the politics-administration dichotomy were in part based on admiration for the broad Westminster model (Overeem 2005, 317).

**Neutral Administration**

A key reform to our own process, but one that would fundamentally alter the administrative structure for conducting elections, would be a move to nonpartisan and professionalized oversight along the lines of the AEC. This has become a frequent reform proposal, and both the 2001 and 2005 Commissions on Federal Election Reform recommended it. It is such a “common-sense suggestion” (Hasen 2005, 974) that objecting to it seems silly.

---

29 Watt (2005, 153) criticizes the election dispute process in the U.K. along similar lines, arguing that it “operates, at best, in favour of the electoral bureaucracy, and, at worst, to protect incumbents even where the fairness of their election may be seriously doubted.”
Would we lose anything by moving away from the current system of hyper-federalism and open partisanship?

The justification for relying on partisan election officials, who are usually chosen in elections where their affiliations are listed, is that they are more accountable to voters. Even nonpartisan officials can still be biased, and their formal neutrality might obscure the fact that they are favoring one party or the other. Fairness, in this line of thought, is better protected by open partisanship (or, in the case of state election commissions, bipartisanship), and close monitoring by opposition parties who have an incentive to be especially watchful. This is the position of the National Association of Secretaries of State, which has strongly opposed congressional efforts to prohibit election officials from serving on political campaigns, as well as broader efforts to impose national standards. The NASS favors the dissolution of the Election Assistance Administration, and insists that the current partisan model is the best way to insure accountability.

There are, however, at least two problems with the argument that partisan election officials (or bipartisan boards) are an effective model for election administration, or that mutual vigilance among partisans best protects the public interest. The first is that it is not true. There are simply too many cases of Democratic or Republican administrators making transparently biased decisions designed to benefit their parties, to have much confidence in the results of this partisan process. The examples are legion. Alvarez and Hall (2005) cited examples from just a few election cycles: Florida Secretary of State Katherine Harris (R), overseeing the Florida presidential election recount in 2000 while she was honorary Chair of George Bush’s state campaign organization; Ohio Secretary of State Kenneth Blackwell (R) ruling on the validity of voter registration forms, provisional vote procedures, and polling place challenges, while serving as co-chair of President Bush’s Ohio organization; California Secretary of State Kevin Shelley (D) allegedly diverting federal funding provided to upgrade California’s balloting process, for partisan purposes. Hasen (2005) cites Republican Party complaints about the New Mexico
Secretary of State (Democrat Rebecca Virgil-Giron) in the run up to the 2004 presidential election.

It might be possible to dismiss these anecdotes as unrepresentative of the broader professionalism of most chief election administrators. There is, however, evidence that the behavior of local election officials nationwide is influenced by their own partisanship, even on the most mundane issues. Since 2004, HAVA has required states to allow voters who claim to be registered, but who are not on the rolls, to cast “provisional” ballots, with the question of ultimate qualification determined after the election. If the voter was an eligible registered voter, her ballot would count. If not, it would be discarded. It was “meant to deal with a serious problem that emerged in the 2000 election – eligible voters being turned away at the polls because their names were wrongly omitted from the voting rolls” (Tokaji 2004a).

As state election officials began implementing the mandate, a controversy emerged over how to deal with voters who show up in the wrong precinct. These voters would not show up on the precinct voter lists (since they are in the wrong place). Should they be given a provisional ballot, or directed to the correct precinct? And if it turns out that they were registered but simply voted at the wrong place, should their provisional vote be counted? HAVA does not resolve this issue, as it states that voters must be allowed to vote provisionally if they declare they are eligible in the “jurisdiction,” but does not define what jurisdiction means: states have adopted varying interpretations, and litigants are fighting over whether it should mean precinct, or county.

Daniel Tokaji (2004b) concludes that HAVA’s legislative history supports the narrower definition. Federal judges have issued decisions on both side of the question.

---

30 Or, perhaps, by arguing that even formally non- or bi-partisan officials are just as likely to be biased.
31 In the unofficial recount of 2000 Florida ballots conducted by the National Opinion Research Center, Democratic coders were more likely to count an ambiguous ballot for Gore, Republicans more likely to count them for Bush, “even though there was nothing else on the line and the only task of these coders was to accurately record the condition of each ballot” (Hasen 2005, 287).
32 A federal district court in Missouri found that the state did not have to count provisional ballots cast in the wrong precinct if the voter was directed to the correct precinct but refused to go,
Whatever one’s view of the issue, there is clear evidence that the implementation of provisional balloting rules depended, at least in part, on the partisanship of local election officials, and those officials’ estimate of what rule would help their party: “provisional votes were less likely to be cast and counted in strongly Democratic jurisdictions if the local election official was a Republican. Similarly, in heavily Republican jurisdictions provisional votes were less likely to be cast and accepted if the local election official was a Democrat” (Kimball, Kropf, and Battles 2006, 448).  

Mutual and bipartisan vigilance fares no better. In addition to the inefficiencies of multimember boards compared to single administrators, bipartisanship is no guarantee of perceived fairness. The formal bipartisanship of the State Elections Board in Wisconsin has not insulated the agency from charges that is, in fact, partisan, and members of the board have been criticized for contributing money to partisan candidates (Walters 2006). In theory, the EAC is independent and bipartisan, supervised by a 4-member board made up, in practice, of 2 Democrats and 2 Republicans. This structure has not erased concerns that the commission is behaving in a partisan manner (Goldfarb 2007). In 2006, the EAC issued a report on voter fraud, conducted by researchers at Rutgers and Ohio State. Although the draft report concluded there was little evidence of widespread fraud – voter impersonation; ballots cast in the name of the dead, ineligible voters registering and casting ballots – when the EAC released the report in the final version of the report’s executive summary, the text was changed to suggest that the empirical question was still open to “a great deal of debate” (Urbina 2007a).


_Ansolabehere (2007) found that Blacks and Hispanics were more likely than Whites to be asked to produce photo ID at the polls. While not specifically a partisan issue, the disparity shows that election officials do not seem to be using their discretion in a neutral manner._
The second problem is that even if it were true that partisans do the best job of monitoring each other and preventing bias, the unique character of elections makes it extremely difficult to conduct effective monitoring. The partisan model requires that officials watch each other carefully, looking for evidence of unfair procedures and decisions as election administrators use their discretionary authority. But this is difficult to do in advance of elections, when it might not be clear what the effects might be of any particular decision, or when it might be too late to do anything about it. Partisan challenges to voting procedures and administration most likely do nothing to enhance public confidence in the process. The result is often a tangle of lawsuits that convinces the public that both sides are trying to manipulate the process to advance their own interests.

In the partisan model of election administration, accountability is, in theory, enforced through elections. Voters prefer this mechanism, even as they simultaneously want nonpartisanship. In their 2005 national survey, Alvarez and Hall (2005) found public support for two seemingly contradictory impulses. By a huge margin – 66%-20% -- the public supports nonpartisan election administration. At the same time, by an even larger margin – 74%-21% -- the public wants election administrators to be elected rather than appointed. The insistence on elected overseers reflects, no doubt, a desire for a strong, direct, form of accountability. How to reconcile these values, which will often be in tension with each other, is less clear. “Additional research is needed in order to ascertain if the public’s choice for an elected, non-partisan election boards corresponds with the electoral governance structure which is best able to prevent electoral fraud and to instill confidence in voters that the process is fair” (Alvarez, Hall and Llewellyn 2006, 25)

Elections are an imperfect method, if only because holding administrators accountable usually means that voters are reacting to some past scandal or administrative failure. And even then, the links are often vague, with partisan election administrators as likely to be rewarded for their behavior as punished, especially if their decisions work in favor of the majority party.
Theresa LePore, the Palm Beach County election official who designed the infamous butterfly ballot, occupied an elected position. Ultimately, she did lose a bid for another term in 2004, but by a narrow margin (52-48) in an election that saw 26% turnout (McLachlin, Daugherty and Schwed 2004). Katherine Harris moved from Secretary of State to the U.S. House, in an election that the *Almanac of American Politics* (2005, 419) described as “mostly treated as a coronation.” The election of a Secretary of State or County Clerk will almost always be a low-salience affair, and voters will not have much to go on to evaluate candidates prospectively. Most will have little information about candidate competence, or even their names.

Given the manifest failure of the partisan administrative model, the benefits of neutral administration and independence “are so obvious that one would think that almost anyone could agree as to its virtues” (Gerken 2007, 186).

But what appears simple in theory may turn out to be difficult in practice. In most conceptions, nonpartisan election administration involves an administrative head (the Chief Election Officer, commonly abbreviated to CELO) who is formally unconnected to any political party, or who has a reputation for fairness and administrative competence. A common model would give governors the authority to appoint the CELO to a long term, with no possibility of reappointment, and a requirement for supermajority legislative confirmation, usually two-thirds or three-fourths, to insure that any proposed candidate has bipartisan support (Hasen 2005, 984).

The Center for Democracy and Election Management (CDEM) at American University has drafted model legislation that establishes strong standards for neutrality. Under its proposal, CELOs would be barred from

- participating in any political campaigns or partisan activity
- serving as an officer of a political party or partisan organization
- taking public positions supporting any candidate for public office, any ballot measure, or in connection with any political organization
- making speeches on behalf of any candidate or political organization, or attending political events
- contributing to, or soliciting funds for, any political candidate or partisan organization
The CDEM model also requires confirmation by three-fourth votes in both houses of the state legislature, and bars the nomination of anyone who over the previous four years was a candidate, officeholder, partisan official, or an attorney or employee of a candidate, officeholder, or party official.\footnote{Draft legislation for State Independent Election Commissions, Center for Democracy and Electoral Management, http://www.american.edu/ia/cdem/pdfs/legislation_npml.pdf}

The result, assuming that are enough potential nominees given the long list of exclusions, should be a professional administration, devoted to a fair process rather than favoring a particular outcome.\footnote{Even with all of the restrictions, the CDEM rules do not address the potential problem of ties between election officials and election equipment manufacturers. Urbina (2007b) reported that an increasing number of election administrations had left government to take jobs in the industry, leading to legislation in several states that prohibited this type of move.} In fact, the idealized nonpartisan election official – a professional who is insulated from partisan forces, and who is committed to an abstract notion of fairness that lies above politics – looks very much like a judge. Yet, the norms of judicial independence and neutrality did not insulate either the U.S. Supreme Court or the Florida Supreme Court from charges that the two panels engaged in patently self-interested political behavior in their consideration of \textit{Bush v. Gore} (Hasen 2005, 987).

But the desire for neutrality poses a problem for accountability. To use the CDEM model legislation as an example, it delegates substantial discretionary authority to the chief elections officer and relies almost entirely on \textit{ex ante} protections against abuse.\footnote{I am assuming that the CELO would be subject to the same impeachment and removal mechanism that applies to other top state executive branch officials.} I noted above the problems of relying on elections as the accountability mechanism, given the lack of information that voters will usually have about the candidates. Requiring nonpartisan elections will not help, as the lack of party affiliation denies voters the most important informational shortcut about a candidate, reduces turnout, and provides even greater incumbency advantages (Shaffner, Streb, and Wright 2001). The persistent controversy over judicial elections holds out little promise that
nonpartisan campaigns for election administrations – surely a close cousin – will provide much in
the way of accountability or substance. One review of the literature put it this way:

Many studies over the years demonstrate one commonality: no matter what form of judicial elections, most voters in most elections are largely uninformed about the persons running for these offices, or about the issues raised in campaigns for those offices. Voters respond by relying heavily on partisan affiliation, familiar names, incumbency, or similar cues, or simply do not vote at all for judges on the ballot (Solimine 2002, 562).

If election administrators are expected to be truly independent, then they must be insulated from the political pressures and criticisms that will inevitably come from all sides. That, in turn, ultimately requires some sort of job security that permits them to make independent decisions without fear of losing their jobs. At the same time, there must be a mechanism to remove officials who are incompetent, partisan, or who violate the conditions of their appointment. Balancing this tension between independence and responsiveness is one of the central problems of public administration, and there is nothing unique about election administration.

The political science literature has grown thick with articles pointing out that “neutrality” is a complex concept, especially when it involves a substantive power delegated to administrators who are insulated from political pressure (Moe 1989; West 2005; Epstein and O’Halloran 1999). Mozaffar and Shedler (2002, 15) make this argument explicit in the development of electoral institutions around the world, noting that “[a]n independent electoral commission with a permanent administrative apparatus raises questions about intra-organizational processes, especially with respect to patterns and effectiveness of control and accountability.”

One potential response is that “neutral” and “nonpartisan” are two different concepts, and that eliminating the most obvious conflicts of interest and biases would by itself improve the process, and could hardly make it worse. Nonpartisan election officials are unlikely to be more biased than their partisan counterparts, and outside interested observers are unlikely to abandon
their efforts to monitor the process even in the face of assurances that the system really is fair. This may be a case in which perfection is the enemy of good enough.

Congress, in any event, is unlikely to go nearly as far as the CDEM might wish. In May 2007, Senator Dianne Feinstein (D-CA) introduced S. 1487, the “Ballot Integrity Act.” Although the bill covers a broad range of issues -- among other things, it establishes more uniform standards for voting equipment and counting rules, insures equitable distribution of machines across districts and wards, and requires voter-verified paper trails for DRE equipment – it also addresses the partisanship of state election officials.

Section 205 of the act would prohibit chief election administrators from taking “an active part in political management or in a political campaign” for any federal office. This is defined as serving as an official on a candidate committee, soliciting contributions for a candidate, or selectively providing information about recounts or audits of any election. The prohibitions are waived if the official is a candidate for federal office, and do not bar an election official from serving as a delegate to any nominating convention, or from attending any campaign event.

The provisions would resolve the only the problem of election administrators openly working for or supporting a candidate. Election officials would remain free to contribute money to candidates, play an active role in party organizations, or run for another office.

**National Standards**

There are some alternative accountability mechanisms, however. One possibility is the development of firm national standards about how federal elections must be conducted. Given the National Association of Secretaries of State’s position on the weak Election Assistance Commission, this is undoubtedly an uphill fight. Particularly when rules and outcomes are so closely linked, or when the stakeholders believe that they are linked, centralizing the process would not resolve the fight over the rules, but rather concentrate them because the stakes would simply be higher.
How persuasive are the arguments in favor of the radical decentralization? The main threads are similar to the arguments in favor of partisan election administration. Local and dispersed control is said to enhance the accountability of officials to local constituencies, and make it more difficult to rig outcomes.

The dispersal of responsibility for election administration has made it impossible for a single centrally controlled authority to dictate how elections will be run, and thereby be able to control the outcome. This leaves the power and responsibility for running elections where it should be, in the hands of the citizens of this country. Local control has the further added benefit of allowing for flexibility, so that local authorities can tailor their procedures to meet the demands of disparate and unique communities. Further, by leaving the responsibility for election administration in the hands of local authorities, if a problem arises, the citizens who live within their jurisdictions know whom to hold accountable. The local authorities who bear responsibility cannot now, and should not in the future be able to, point the finger of blame at some distant, unaccountable, centralized bureaucracy (U.S. Congress 2002, 32).

It is increasingly difficult to take this argument on its face, not only because there is little evidence that decentralization prevents any significant problems, but also because election administration has become increasingly nationalized in any case. The Voting Rights Act, the Supreme Court reapportionment cases from the 1960s, the National Voter Registration Act, and HAVA all imposed clear requirements on states, even for non-federal elections. Much of the shift came as “the Court, more than Congress, has intruded on state prerogatives beginning when it established the one person, one vote rule and ending most recently with the creation of the cause of action for a racial gerrymander and the decision in the 2000 presidential election (Hasen 2003, 135).

Congressionally mandated national standards are common, even though implementation remains with state and local authorities. Binding and uniform rules set by HAVA “included statewide registration databases, provisional voting, accurate voter registration records, uniform

37 If the Supreme Court can regulate the most “fundamental structure of democracy in nearly every state” (Issacharoff et al. 2002, citing Lucas v. the Forty-Forth General Assembly of the State of Colorado 377 U.S. 713 (1964)), the federal government surely has the constitutional power to impose common administrative rules and processes for federal elections.
standards that define what constitutes a vote, provisions for allowing absentee ballots for military personnel, allowing voters with disabilities to cast a secret ballot, and enabling voters to correct errors on their ballot” (Liebshutz and Palazzolo 2005, 504). The EAC has established a certification process for voting machines, using independent laboratories accredited by the National Institute of Standards and Technology. This has not allayed concerns that DRE’s remain fundamentally unsecure, or that the proprietary nature of DRE software makes it impossible to independently evaluate the machines.  

In August, California Secretary of State Debra Bowen restricted the use of most DRE’s to a single machine in each polling place, because of security concerns (Rau and Bercerra 2007). A detailed review of DRE source code, conducted as part of the Secretary of State’s review, found “significant security weaknesses,” including basic programming errors, poor security practices, and inadequate access control (Blaze et al. 2007, 5-6).

Feinstein’s Ballot Integrity Act would impose additional requirements. One key provision would permit the EAC to “issue and maintain a uniform benchmark for the residual error vote rate that States may not exceed.” The Carter-Ford Commission made a similar recommendation, and although it would have left it to each state to determine its own benchmarks in each election jurisdiction, it proposed a 2% cap for contests at the top of the ticket (2002, 54). Such a standard could provide objective evidence of maladministration.

38 “The programming software used for DREs is proprietary to the vendor, and therefore it is not publicly accessible. Companies argue that this is commercially necessary and reduces the potential for manipulation of the voting machines, and argument known as ‘security through obscurity’ among computer security professionals” (Moynihan 2004, 519). As of 2004, Moynihan also noted that the certification process usually does not analyze software line by line, but rather focuses on functionality (2004, 519), though the California Secretary of State’s 2007 did.

39 Blaze’s et al. review of the systems is a powerful indictment of the current state of the art of voting machine software security. They found weaknesses that “have the capacity to enable devastating security breaches that alter the results of elections,” arising from “pervasive structural weaknesses and engineering failures” in the software (2007, 23).

40 S. 1487, section 201(a)(2)(B)(i)(II)

41 One concern is that some residual votes, especially undervotes, might be intentional. This is especially likely if a top-ticket candidate is running unopposed, something that could happen in a
Like the distinction between nonpartisan and neutral administration, concerns over excessive nationalization may come down to the differences between national standards and uniform implementation. HAVA goes quite far in creating comprehensive uniform standards, while specifying that implementation is left to state discretion. For federal elections, at least, there is – or ought to be – a general nationwide interest in accurate and competent election administration, when a single state’s electoral college vote or the result in a few congressional districts can determine who controls the main branches of government.

Since the 2000 election, students of election administration have made significant progress in analyzing the practice and theory of electoral administration. The assumptions behind the decentralization and partisanship of our system, especially compared to the more neutral systems common throughout the world, require continued scrutiny. Even after considering the size of the U.S. and complexity of election process, our own system fails to match up to fundamental standards that are routine in other democratic systems. Although the accountability chains are different, the operation of the AEC provides a model of how elections should be conducted here.

gubernatorial or congressional election cycle. S. 1487 includes a congressional finding that some “distinct communities in certain geographic areas that have historically high rates of intentional undervoting,” and requires the EAC to adjust the benchmarks in these local jurisdictions. Critics allege that the EAC could manipulate these findings, to intentionally disenfranchise minority communities by setting high residual vote ceilings. This strikes me as unlikely. Alvarez, Sinclair, and Wilson (2004, 44-45) found that residual ballot rates with non-punchcard systems are not strongly correlated with a jurisdiction’s racial makeup, and that the undervote rate declined as the nonwhite population increased.
Bibliography


Liebschutz, Sarah F., and Daniel Palazzolo. 2005. “HAVA and the States.” *Publius* 35:497-514 (no. 4, Fall)


Buchanan in Palm Beach County.” *American Political Science Review* 95:793-810 (no. 4, December)


