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## Essay

### Heads or Tails? A Modest Proposal for Deciding Close Elections

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#### I. INTRODUCTION

Elections are fundamentally imperfect.<sup>1</sup> Machines malfunction and lose and mis-record votes.<sup>2</sup> Candidates' names get omitted from the ballot.<sup>3</sup> Poor ballot design leads to voter confusion.<sup>4</sup> Validly registered voters get turned away<sup>5</sup> while ineligible voters get to register their political preferences.<sup>6</sup> Polling places lack adequate machinery.<sup>7</sup> Lines are long.<sup>8</sup>

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<sup>1</sup> Taylor v. Onorato, 428 F. Supp. 2d 384, 388 (W.D. Pa. 2006) (“No election system is perfect . . .”).

<sup>2</sup> E.g., Lynn Bonner, *Cartaret Calling the Shots*, NEWS & OBSERVER, Dec. 2, 2004, A1, available at LEXIS, News Library, NWSOBV File (describing how 4400 ballots were lost from a Cartaret County, North Carolina voting machine).

<sup>3</sup> E.g., Leslie Reed, *Recounts of Nebraska Races to Begin*, OMAHA WORLD-HERALD, Dec. 1, 2004, at 2b, available at LEXIS, News Library, OMWHLD (describing how candidate names were omitted from Nebraska ballots in Thurston, Cedar, and Wheeler Counties).

<sup>4</sup> See, e.g., George Bennett, *Ballot's Listings Baffle Some Voters*, PALM BEACH POST, Nov. 8, 2000, at 1A, available at LEXIS, News Library, PBPST File (describing the problem of the “butterfly ballot”).

<sup>5</sup> E.g., *Voter ID Problems in Florida*, N.Y. TIMES, Sept. 7, 2004, at A22, available at LEXIS, News Library, NYT File (describing how voters were incorrectly turned away by poll workers at a statewide primary election).

<sup>6</sup> E.g., *Federal Election Practices and Procedures: Hearing Before S. Comm. on Gov. Affairs*, 106th Cong. (2001) (statement of Dr. Larry J. Sabato, Director, University of Virginia Center for Governmental Studies), available at [http://www.senate.gov/~gov\\_affairs/050301\\_Sabato.htm](http://www.senate.gov/~gov_affairs/050301_Sabato.htm)

A few elections are incredibly close.<sup>9</sup> In a contest involving a small electorate, a margin of one or two votes might separate a winning candidate from a losing candidate.<sup>10</sup> With a larger electorate, it can come down to a difference of a few tenths of a percentage point.<sup>11</sup>

A far, far fewer number of elections result in a tie.<sup>12</sup> No winner, no loser. A dead-even draw. When this happens, a lot of states and localities resolve the election with some sort of game of chance. A hand of poker or the drawing of lots or of straws or of the high-card from a deck.<sup>13</sup> Or just a good old-fashioned toss of a coin.<sup>14</sup>

All right, you've been waiting for three (albeit short) paragraphs, so now we'll just get it out of the way—*Bush v. Gore*.<sup>15</sup> There. Happy now? The hotly disputed Presidential election of November 2000 represents the modern paradigm for a closely contested and imperfectly conducted

(describing how ineligible voters have cast ballots in Florida, Wisconsin, and elsewhere). *See also* Richard Locker, *Senators Give Ford Victory a Big 'No,'* THE COMMERCIAL APPEAL, Apr. 14, 2006, at A1, available at LEXIS, News Library, COMAPP File (describing how, at a 2005 State Senate election in Shelby County, Tennessee, two votes were “cast” by dead persons, seven were cast by felons, and three were cast by persons who did not reside in the Senate district).

<sup>7</sup> Letter from John Tanner, Chief of the Voting Section of the Civil Rights Division U.S. Department of Justice, to Nick A. Soulas, Jr., Assistant Prosecuting Attorney for Franklin County (June 29, 2005) (on file with Connecticut Law Review) (describing the “lack of sufficient machines” in Franklin County, Ohio).

<sup>8</sup> *E.g.*, Jim Schlosser, *Voters Clog Polling Places; Even Lightly Visited Precincts Saw High Turnout Through Early Voting*, NEWS & RECORD, Nov. 3, 2004, at B1, available at LEXIS, News Library, NWSREC File (describing long lines at polling places in Greensboro, North Carolina).

<sup>9</sup> *Board Makes GOP Win Official McDonnell Wins; Deeds Wants Recount; Both Need Extra Cash*, RICHMOND TIMES DISPATCH, Nov. 29, 2005, A1, available at LEXIS, News Library, RCHTMD File (describing how, with nearly two million votes cast, only 323 votes separated the candidates vying for Attorney General of Virginia).

<sup>10</sup> *See, e.g.*, ActiVote, *How Important is 1 Vote?*, [http://www.activoteamerica.com/Home2/How\\_Important\\_is\\_1\\_Vote/how\\_important\\_is\\_1\\_vote.html](http://www.activoteamerica.com/Home2/How_Important_is_1_Vote/how_important_is_1_vote.html) (last visited May 10, 2005) (describing a 1997 Vermont legislative contest that was decided by a single vote).

<sup>11</sup> SECRETARY OF STATE OF COLORADO, ABSTRACT OF VOTES CAST FOR THE 2001 COORDINATED, 2002 PRIMARY, 2002 GENERAL 99–100 (2002), available at [http://www.sos.state.co.us/pubs/election/2002\\_abstract.pdf](http://www.sos.state.co.us/pubs/election/2002_abstract.pdf) (showing that Bob Beauprez defeated Mike Feeley in a congressional election by a margin of 46.7% to 46.4%).

<sup>12</sup> *E.g.*, *Regional News Briefing*, ROCKY MOUNTAIN NEWS, Nov. 12, 1994, at 6A, available at LEXIS, News Library, RMTNEW File (describing how a Wyoming legislative contest ended in a tie).

<sup>13</sup> Associated Press, *Luck of the Draw Goes to Republican: Ping Pong Balls Drawn from Cowboy Hat Decide a Wyoming Legislative Race that Ended in a Tie*, ROCKY MOUNTAIN NEWS, Nov. 17, 1994, at 32A, available at LEXIS, News Library, RMTNEW File; Joseph Ax, *Odd Election Outcome Has 2 Village Races Tied*, THE JOURNAL NEWS, Mar. 22, 2005, at 1A, available at LEXIS, News Library, JNLNWS File (describing how a tied election in North Pelham, New York, was decided by drawing straws); Henry Brean, *Card Draw to Break Election Tie*, LAS VEGAS REV. J., Nov. 4, 2004, at 3B, available at LEXIS, News Library, LVRJNL File (describing how a tied election in White Pine County, Nevada was decided by whoever chose the high card from a deck).

<sup>14</sup> *Woodburn City Council Election Decided by Coin Toss*, BOWLING GREEN DAILY NEWS, Nov. 13, 2004, available at [http://www.bgdailynews.com/articles/stories/public/200411/13/0eyv\\_news.html](http://www.bgdailynews.com/articles/stories/public/200411/13/0eyv_news.html) (detailing how a city council race in Kentucky was decided by a coin flip); Secretary of State of Alaska, *Your Vote Counts* (2005), <http://www.gov.state.ak.us/ltgov/elections/votecnts.htm> (detailing how a tied school board election in Alaska was decided by a coin flip).

<sup>15</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

election. Since then, academic commentators have spent countless hours genuflecting at the high altar of election reform, using the 2000 election (as well as others) as a launching pad to propose sober, serious structural reforms that would serve to improve American democracy.<sup>16</sup>

But for purposes of this contribution to the literature, we shall leave to one side the structural, more generalized “good democracy” reforms. Why? Because no matter how many positive reforms we enact, there will always be a few incredibly close elections that lie “within the margin of litigation.”<sup>17</sup> There is just no way around it. So instead of focusing on structural reforms, we’ll focus on how to resolve elections won by thin margins. On this score, you presumably have read this Essay’s title and are savvy enough to know where we are headed. Forget election administrators. Forget recount after recount after recount. Forget lawyers and judges and litigation. Adopt my modest proposal. Just flip a coin.<sup>18</sup>

Ridiculous?<sup>19</sup> Perhaps, but here it goes anyway: elections are, by definition, imperfect; because elections are imperfect, a close election essentially amounts to a dead-even draw in that no candidate enjoys an unassailable claim to victory; having recount upon recount and court challenge upon court challenge causes the public to lose faith in Our Democracy—to believe, perhaps correctly, that the fix is in; inserting judges into these disputes is just as likely to lead to further erosion of public confidence in the judiciary’s ability to administer justice in a

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<sup>16</sup> Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Electoral Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 944–45 (2005); Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1712–13 (2005).

<sup>17</sup> John H. Fund, *Have You Registered to Sue?*, WALL ST. J., Nov. 6, 2002, at A22, available at LEXIS, News Library, WSJNL File.

<sup>18</sup> Just to be clear, to argue that close elections should be decided by a coin flip is not to argue that American democracy should not be improved. It should be. How it should be improved is, as they say, beyond the scope of this modest Essay.

<sup>19</sup> John Copeland Nagle, *How Not To Count Votes*, 104 COLUM. L. REV. 1732, 1750 (2004) (“It is baffling to imagine the presidency being determined by lot, yet state law sometimes provides for precisely that device for deciding tied elections for other offices today.”).

Because I imagine many persons will agree that the idea is ridiculous and because I do not want my colleagues to think I am completely loony, I have chosen to tackle the subject in a humorous light. However, I would note that at least one renowned election law scholar, Loyola (Los Angeles) Professor Rick Hasen, appears to support coin tosses as a way of deciding close elections. Of course, Professor Hasen advocated this in an oh-so-brief two sentence post on his blog, perhaps hoping his own colleagues wouldn’t notice. Election Law, [http://electionlawblog.org/archives/2005\\_11.html](http://electionlawblog.org/archives/2005_11.html) (Nov. 22, 2005, 06:24 EST) (“I have always been in favor of [coin tosses] when both sides agree or the law already provides, out of the belief that it is cheaper to do so when the margin of error exceeds the margin of victory.”). And, of course, using a coin toss to determine close elections seems far less radical than using a random lottery system to decide all elections: a notion that has been entertained by some very prominent legal scholars. See BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE, 285–88 (1980); Akhil Reed Amar, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283 (1984).

neutral, nonpartisan fashion;<sup>20</sup> and, in the end, deciding a close election with a coin flip would perhaps instill just as much confidence in the fairness of our political process as recounts, election administrators, litigation, lawyers, and judges do.<sup>21</sup>

## II. OUR IMPERFECT DEMOCRACY

The theoretical underpinning of the modest proposal rests on one fundamental premise: the reality of Our Democracy is that elections by their very nature are imperfect. Things go wrong. Sometimes horribly.<sup>22</sup>

Let's just take a very brief look at a few of the events that occurred during a couple of small-time, low-profile, relatively meaningless elections—the Presidential elections of November 2000 and 2004. More specifically, let's just focus on a few of the places in the middle of the country that nobody really cares about very much—states that, solely for purposes of this Essay, we'll describe as “battlegrounds.” New Mexico: 678 votes lost due to a programming error involving electronic voting machines in Rio Arriba County.<sup>23</sup> Ohio: the use of punch-card voting systems resulted in the loss of thousands of votes.<sup>24</sup> Pennsylvania: touch-screen voting machines in Mercer County malfunctioned.<sup>25</sup> Iowa: one hundred voters in Ames were turned away from a polling place.<sup>26</sup> Wisconsin: 200 felons voted illegally.<sup>27</sup> *Nota bene*: the word “Florida” doesn't even appear in the preceding five sentences.

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<sup>20</sup> Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT 335 (2001) (describing how “the Court's adjudication [of *Bush v. Gore*] was both unnecessary and unwise, creating a widely-based popular perception of partisanship by the Judicial Branch that carries the threat of diminishing the public's trust and confidence in the Justices and endangering the Court's institutional standing and overall effectiveness”).

<sup>21</sup> To the best of my knowledge, no one has engaged in a detailed theorization of the idea that close elections should be resolved by a coin flip. However, a few commentators ever so briefly suggested the possibility of resolving the 2000 Presidential election contest in this manner. Choper, *supra* note 20, at 340; Bill Haltom, *Gov. Dubya Versus 9,000 Dimpled Chads: No Way to Pick a President*, 37 TENN. B.J. 34 (2001); John Allen Paulos, *We're Measuring Bacteria With a Yardstick*, N.Y. TIMES, Nov. 22, 2000, at A27, available at LEXIS, News Library, NYT File.

<sup>22</sup> Vicki Haddock, *There's No Way to Ensure That Every Ballot Counts Every Time*, SAN FRANCISCO CHRON., Sept. 21, 2003, at D1, available at LEXIS, News Library, SFCHRN File (“The dirty little secret of democracy is that every single vote actually doesn't count . . . Sometimes voters make mistakes, sometimes poll workers make mistakes, sometimes machinery jams or computers experience glitches, and some ballots end up figuratively, if not literally, trashed.”).

<sup>23</sup> Dan Keating, *Lost Votes in N.M. a Cautionary Tale; As Election Day Nears, a Look at Problems in 2000 Shows Fallibility of Machines*, WASH. POST, Aug. 22, 2005, at A05, available at LEXIS, News Library, WPOST File.

<sup>24</sup> Equal Vote, *Back to Ohio: The Rolling Stone Piece*, <http://moritzlaw.osu.edu/blogs/tokaji/index.html> (June 2, 2006, 14:25 EST).

<sup>25</sup> Bill Toland, *Touch Screen Voting Flawed in Mercer County*, PITTSBURGH POST-GAZETTE, Feb. 16, 2005, available at <http://www.post-gazette.com/pg/05047/458149.stm>.

<sup>26</sup> Kristin Hoelscher, *Voters Turned Away at Ames Polling Site*, DES MOINES REG., Oct. 22, 2004, at 1B, available at LEXIS, News Library, DESREG File.

<sup>27</sup> Greg J. Borowski, *Inquiry Finds Evidence of Fraud in Election; Cast Ballots Outnumber*

Make no mistake, problems with the conduct of elections are not just some sort of recent phenomenon. Let's go "back to Ohio."<sup>28</sup> That is, Cuyahoga County, Ohio, at the Presidential primary election in May 1972:

the election process broke down completely. Ballots were not prepared correctly[.] Voting machines were not delivered to some precincts, while others were delivered without keys or the wrong keys; voting machines placed in buildings were unaccessable [sic] on election day. Many voting machine custodians as well as precinct officials had little training and were [sic] not instructed in election procedures. As a result of the massive election day confusion, precinct officials were unable to contact the board of elections office for advice. . . .

Difficulties at more than 100 of the county's precincts caused them to open late, some in mid-morning and others late in the afternoon. 35 precincts failed to function at all on election day. As it became obvious that there were many polling places which had not opened on time and that thousands of voters were being sent away, an appeal was made to the Secretary of State, asking that he extend voting hours. Since he noted that there was no legal basis for such action, he denied the request. Seeking relief, a Cuyahoga voter appealed to the U.S. District Court which issued a temporary injunction restraining the Board of Elections and Secretary of State from closing the polls at the prescribed time of 6:30 p.m. The chief judge ordered the polls to remain open until 11:59 and requested the Elections Board to distribute any paper ballots in its possession to all appropriate polling places for use by any qualified voter, whether or not the voting machines were operable.<sup>29</sup>

How's that for a little bit of déjà vu all over again?<sup>30</sup>

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*Voters by 4609*, MILWAUKEE J. SENTINEL, May 11, 2005, at A1, available at LEXIS, News Library, MILJNL File. In addition, "more than 100 people . . . voted twice, used fake names or false addresses or voted in the name of a dead person." *Id.*

<sup>28</sup> Pretenders, *My City Was Gone*, on LEARNING TO CRAWL (Sire 1984).

<sup>29</sup> OFFICE OF FEDERAL ELECTIONS UNITED STATES GENERAL ACCOUNTING OFFICE, A STUDY OF ELECTION DIFFICULTIES IN REPRESENTATIVE AMERICAN JURISDICTIONS at VI-12 (1973). See also Michael O'Malley, *Election Disaster was not 1st Time*, PLAIN DEALER, May 4, 2006, at A15, available at LEXIS, News Library, CLEVPD (describing a history of electoral snafus in Cuyahoga County, Ohio, including problems in 1972, 1992, 1996, 1999, 2000, and 2004).

<sup>30</sup> Among other things that happened on November 2, 2004, in the State of Ohio, a federal judge ordered the Secretary of State and local election officials in Ohio to hand out paper ballots and to keep the polls open for any voter standing in line at the close of the polls. *Ohio Democratic Party v. Blackwell*, Cause No. C2 04 1055 (S.D. Ohio filed Nov. 2, 2004) (ordering election officials "to provide paper ballots or another mechanism to provide an adequate opportunity to vote" and to "keep

Now, despite a personal affinity for conspiracy theories, most electoral mistakes appear to be obviously unintentional. After all, remember that it was a Democrat who designed the infamous Palm Beach County butterfly ballot that probably cost Al Gore the presidency.<sup>31</sup> Without question, the overwhelming majority of election officials, poll workers and voters try to do the right thing and most of the time the reason that, say, voting machines fail to operate properly is because well-meaning, somewhat absent-minded poll workers get confused and forget to do little, minor things like, for example, turn the machines on.<sup>32</sup> Truth be told, not only are most mistakes unintentional, some errors are built right into the system. For instance, standards promulgated by the Federal Election Commission actually allow voting machines to have a slight error rate.<sup>33</sup>

Granted, some electoral problems result from evil-doers who intentionally aim to subvert other citizens' fundamental right to vote. New York City's chief voting machine technician reports that political operatives sometimes break the city's voting machines to prevent citizens from voting for a rival candidate.<sup>34</sup> Political operatives have also resorted to dirty tricks to try and suppress voter turnout. Recently in Ohio, at least a few voters received phone calls from persons fraudulently impersonating an election official and these voters were told, falsely, that they had been moved to a new polling place.<sup>35</sup> Indeed, these sorts of shenanigans happen all over the country<sup>36</sup> and undoubtedly date back to the birth of politics itself.

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the polls open for voters waiting in line at 7:30 p.m.”).

<sup>31</sup> The Official Terry LePore Ballot Designer Fan Page, [http://www.geocities.com/francis\\_uy/palmbeachvote.html](http://www.geocities.com/francis_uy/palmbeachvote.html) (last visited May 4, 2006).

<sup>32</sup> George Bennett, *Reno, McBride Waiting . . . Waiting Chaos at the Polls Still Haunts Florida*, PALM BEACH POST, Sept. 11, 2002, at 1A, available at LEXIS, News File, PBPST File (“A precinct at a Jacksonville senior center opened 90 minutes late because poll workers didn’t realize they were supposed to turn on new touch screen machines. Dozens of voters left without casting ballots.”). See also Christopher D. Kirkpatrick, *Ballots Still Being Counted into Today*, TOLEDO BLADE, Nov. 9, 2005, available at <http://toledoblade.com/apps/pbcs.dll/article?AID=/20051109/NEWS09/51109017/-1/NEWS> (describing how some voters in Lucas County, Ohio, left polling places without voting because poll workers had not set up machines on time).

<sup>33</sup> FEDERAL ELECTION COMMISSION, VOTING SYSTEM STANDARDS, at 3-3 to 3-4 (2002), available at <http://vote.nist.gov/2002VSS.pdf>.

<sup>34</sup> James Fanelli, *Democracy’s Mr. Fix-It: City’s Voting Machine Technician Keeps Election Day Running Smoothly*, COLUM. JOURNALISM (2004), available at <http://www.jrn.columbia.edu/student/work/election/2004/voting-fanelli:01.asp>.

<sup>35</sup> Suzanne Hoholik, *Voters Report Fake Calls: Instructions to Change Polling Place Don’t Come from Board of Elections*, COLUMBUS DISPATCH, Oct. 22, 2004, at 1A, available at [http://www.dispatch.com/print\\_template.php?story=dispatch/2004/10/22/20041022-A1-00](http://www.dispatch.com/print_template.php?story=dispatch/2004/10/22/20041022-A1-00) (describing various scams used to suppress the vote).

<sup>36</sup> Bruce Alpert & Bill Walsh, *On the Hill: News From the Louisiana Delegation in the Nation’s Capital*, NEW ORLEANS TIMES-PICAYUNE, Mar. 9, 2003, at 6, available at LEXIS, News Library, NOTPIC File (detailing allegations that “misleading signs and other notices were used to try to suppress African-American turnout in Louisiana’s 2002 U.S. Senate race”); Lauren Markoe, *Some Fear Loss of Voting Act Provisions*, THE STATE, July 18, 2005, at B1 (on file with Connecticut Law Review) (detailing allegations that “in Charleston and Abbeville and other [South Carolina] counties, notices

Regardless of how electoral mistakes occur, the bottom line is this: at their core, elections today involve a blend of machinery with human input, and we do not need a citation to a fancy learned treatise to know the eminent fallibility of both elements of that concoction. As that great tome known as *The Farmer's Almanac* sagely advises: “To err is human, but to really foul things up requires a computer”<sup>37</sup>—with the plain fact of the matter being that errors happen all the time and even with the implementation of reforms designed to improve election administration, mistakes will continue to occur.

### III. THE MODEST PROPOSAL DETAILED

Mistakes happen. That said, in the overwhelming number of elections, mistakes make absolutely no difference. Having no empirical evidence of this, I'll just create some.<sup>38</sup> In 99% of the elections conducted in this country, mistakes made during the election have no bearing on the outcome. The vast majority of elections are not nail-biters and mistakes only matter to the final result when the margin of victory is quite small.<sup>39</sup>

But in these narrowly decided contests it is important to recognize that it is pretty much impossible to come up with a “true” winner. Yes, we can pretend that numbers, like ex-spouses, never lie. But they do. Despite the fancy numerology,<sup>40</sup> electoral jargon (“pregnant chads”)<sup>41</sup> and partisan argumentation, elections won by small margins pretty much amount to a draw. The Bush/Gore election in 2000 was too close to call. Still is. Always will be. *Q.E.D.* As Harvard's Charles Fried noted in the *New York Review of Books*:

[The 2000 Presidential] election, as any statistician will tell you, was in effect a tie. A difference of 0.5 percent in an

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were posted in black neighborhoods to intimidate residents into staying home on election day”).

<sup>37</sup> The Quotations Page, Quotations by Author, available at [http://www.quotationspage.com/quotes/Farmers%27\\_Almanac](http://www.quotationspage.com/quotes/Farmers%27_Almanac) (last visited May 4, 2006).

<sup>38</sup> See James Lindgren, *Fall From Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195, 2197 (2002) (describing how a history professor at Emory University created evidence to support his thesis).

<sup>39</sup> In truth, there actually is a bit of empirical support for this. The fact that “recounts are rare” lends support to the conclusion that most elections are not close. Stephen Ansolabehere & Andrew Reeves, *Using Recounts to Measure the Accuracy of Vote Tabulations: Evidence from New Hampshire Elections 1946–2002*, 1–8 (CalTech/MIT Voting Technology Project, Working Paper No. 11, 2004), available at [http://vote.caltech.edu/media/documents/wps/vtp\\_wpl1.pdf](http://vote.caltech.edu/media/documents/wps/vtp_wpl1.pdf).

<sup>40</sup> Gregory Roberts, *GOP Tries to Make Election Case*, SEATTLE POST-INTELLIGENCER, May 2, 2005, at B1, available at LEXIS, News Library, SEAPIN File (describing the “proportional reduction strategy” which involved an attempt to statistically reduce a candidate's vote count). See also Bradley v. Porroddin, 131 Cal. Rptr. 2d. 402, 406 (2003) (describing how a trial court reversed the outcome of an election based upon “primacy effect theory”).

<sup>41</sup> Kathy Sawyer & Serge F. Kovaleski, *Counters Try To Stay Calm as Storm Gathers*, WASH. POST, Nov. 20, 2000, at A1, available at LEXIS, News Library, WPOST File (describing the issue of “pregnant” or “dimpled” chads).

election in which a hundred million votes were cast—at various times, under diverse circumstances, by a wide variety of means—exceeds our present capacity for accurate tabulation.<sup>42</sup>

And as the Presidential election in 2000 goes, so goes the 2004 gubernatorial election in the State of Washington.<sup>43</sup> Does anyone really truly know who the majority of voters wanted to be their governor? Absolutely, as long as you have a partisan axe to grind. Otherwise, no.

At the end of the day, though, we need a winner. Americans love winners. It's so distinctive in the American character! Seriously, we have a winner-take-all election system.<sup>44</sup> Far less seriously, if we had one of those socialist proportional representation systems, we would just go sip a bit of Bordeaux, nibble on some brie, and, *mon ami*, have a good laugh about electoral malfunctions.<sup>45</sup> After all, who cares about a couple of hundred votes when you're going to get 12.6% of the seats in some parliament where you will spend several weeks dickering over who will join some sort of coalition government?<sup>46</sup>

Anyway, because when a very close election occurs we need to declare a winner, here's a modest proposal for determining one. You pass a statute in Congress or in the State Legislature or by citizen initiative. (Hey,

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<sup>42</sup> Charles Fried & Ronald Dworkin, 'A Badly Flawed Election': *An Exchange*, 48 NY REV. OF BOOKS (2001), available at <http://www.nybooks.com/articles/14004>. See also CampaignAudit.org, In the Margins: Political Victory in the Context of Technology Error, Residual Votes, and Incident Reports in 2004 (2004), <http://www.campaignaudit.org/articles/withinthemargins.pdf> ("Pollsters report the margin of error for their polls to help readers understand the validity of the sample. In elections, it is often Secretaries of State and legal institutions that validate the sample of opinion collected on voting day. However, elections still have a margin of error.")

<sup>43</sup> In the 2004 gubernatorial election in Washington, the original count showed Republican Dino Rossi ahead by 261 votes. WASHINGTON SECRETARY OF STATE, OFFICIAL NOVEMBER 2, 2004 GENERAL ELECTION REPORT, available at <http://vote.wa.gov/general/documents/2004GeneralElectionReport.pdf>. A subsequent manual recount showed Democrat Christine Gregoire ahead by 129 votes. *Id.*, available at <http://vote.wa.gov/general/> (follow "Manual Recount" hyperlink; then follow "Second Recount" hyperlink; then follow "Statewide" hyperlink; then follow "Governor" hyperlink).

<sup>44</sup> Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1417 (1991) (engaging in an extended discussion of winner-take-all election systems).

<sup>45</sup> Technically, France does not elect its National Assembly from what would be considered a "pure" proportional representation system.

<sup>46</sup> Actually, Sweden, which uses a proportional representation system to elect its parliament, known as the Riksdag, once had a very closely divided election between the socialist and non-socialist bloc of political parties. THE RIKSDAG: A HISTORY OF THE SWEDISH PARLIAMENT 279 (Michael F. Metcalf ed., 1987). Indeed, in the 1973 election, only 2988 votes separated the two blocs. *Id.* at 280. This resulted in an even split in the number of seats given to each bloc in the Riksdag. The only way to break the deadlock and to make decisions when the Riksdag was evenly divided was to draw lots (the equivalent of a coin flip) and on 152 occasions during a three-year period, Sweden's government made decisions based on the drawing of lots. *Id.* at 280.



maybe this idea isn't so ridiculous<sup>47</sup>—I just realized California has initiatives!)<sup>48</sup> The statute says:

(a) Any federal or state election decided by a margin of 0.5% or less shall ultimately be resolved by a coin flip to be held the day after the conclusion of the official canvass of the vote. The coin shall be flipped by a National Football League official, shall be broadcast on television, and shall be witnessed by up to ten designees of each candidate. The candidate who is leading based on the results of the official canvass shall get to call “heads” or “tails.” The call must be made before the coin is launched into the air.

(b) If the official canvass shows a greater than 0.5% disparity in the margin between the candidates, the candidate who is in second place may not contest the results of the official canvass in order to get within the 0.5% margin. Instead, any such challenge must demonstrate, by clear and convincing evidence, that there are enough votes in doubt so as to place the losing candidate ahead of the winning candidate.

(c) Elections may not be resolved by duel.

All right, so we have legislative counsel pretty it up a bit, but you get the idea.

And am I the only one intrigued by what such a law would have given us in the 2000 Presidential election? After all, five states—Florida, Iowa, New Mexico, Oregon, Wisconsin—featured a 0.5% margin or less.<sup>49</sup> That means George W. Bush and Al Gore would have had to traverse the nation in what would easily have been the best five-game series of all time. Imagine how the networks, not to mention our citizenry, would just eat this up. Surely it would make for better television than watching a bunch of reporters read and then interpret a Supreme Court opinion on live television,<sup>50</sup> although that scene made for an absolute perfect “10” on the “unintentional comedy” scale.<sup>51</sup>

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<sup>47</sup> *Supra* note 19 and accompanying text.

<sup>48</sup> CAL. CONST. art. 2, § 8.

<sup>49</sup> CNN.com, Election 2000, <http://www.cnn.com/ELECTION/2000/results/> (follow “President” hyperlink; change dropdown menu “Display States Alphabetically” to view each state) (last visited Sept. 25, 2006) (showing states decided by half a percentage point or less in the 2000 Presidential election).

<sup>50</sup> James Poniewozik, *The Short Memory of TV Pundits*, TIME ONLINE, Dec. 13, 2000, <http://www.time.com/time/nation/article/0,8599,91691,00.htm> (describing the actions of television reporters when the Court handed down *Bush v. Gore*).

<sup>51</sup> To the best of my knowledge, the “unintentional comedy rating” (UCR) was created by ESPN.com’s Bill Simmons, a.k.a. The Sports Guy. The UCR involves a highly sophisticated measurement (the assignment of a number between one and ten) of “those moments when something or someone cracks you up . . . even though that wasn’t necessarily the original intention.” Bill Simmons,

## IV. THE SUPERIORITY OF THE MODEST PROPOSAL

Why would a coin toss be a superior method for resolving close elections? There is, of course, the small benefit of saving money. A coin flip eliminates the need for election administrators to spend their most precious resource, cold hard cash, on recounts.<sup>52</sup> Why waste money on recounts when that money would be better spent to hire more poll workers or to buy better voting machines or to buy anything else that would improve the overall administration of elections?

Candidates, political parties, and campaign donors would also save money by not having to hire lawyers. As things stand now, candidates need to hire lawyers to mount or defend legal challenges—an expense that can be quite steep. In the recent Washington gubernatorial recount and litigation, the political parties spent more than half a million dollars on legal challenges.<sup>53</sup> And the Bush/Gore recount expenses ran well into the millions.<sup>54</sup> A coin flip eliminates most post-election litigation expenses.<sup>55</sup>

In addition, a close election can also sometimes result in the need to re-run the balloting. Use of a coin toss would eliminate the monetary expense of a complete “do-over.” A coin toss also ensures that one candidate does not benefit from “an undue advantage in a re-vote or new election.”<sup>56</sup> For example, a new election could result in a shift in voter turnout that could favor one particular candidate. Moreover, the use of a coin toss to eliminate re-running an election provides efficiencies for voters. Voters would never be charged the expense of the time and effort it takes to cast their ballots a second time.

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*The Sports Guy's Official UCR*, <http://proxy.espn.go.com/espn/page2/story?page=simmons/021107> (last visited May 9, 2006).

<sup>52</sup> A recount can easily cost election administrators thousands of dollars. Marisol Bello & Kathleen Gray, *Board Grants Recount in Mayoral Race: Detroit Hand Tally Could Start Wednesday*, DETROIT FREE PRESS, Dec. 2, 2005, at 1, available at LEXIS, News Library, DETFRP File (noting that a recount in Detroit's mayoral race would cost between \$200,000 and \$500,000).

<sup>53</sup> Paul Shukovsky, *In Election Struggle, Kerry Rides Again to Gregoire's Aid*, SEATTLE POST-INTELLIGENCER, May 2, 2005, at A1, available at LEXIS, News Library, SEAPIN (describing how “within two months of the election, the Democrats already had spent \$400,000 on legal challenges, while the Republicans had spent \$300,000”).

<sup>54</sup> It's not clear exactly how much the Bush and Gore campaigns spent on the recount—it is clear, however, that it amounted to millions of dollars. Anthony Corrado, *Financing the 2000 Presidential General Election*, in FINANCING THE 2000 ELECTION 99–102 (David B. Magleby ed., 2002), available at <http://www.brookings.edu/gs/cf/Financing2000/ch04.pdf>.

<sup>55</sup> Using a coin toss might also improve the self-esteem of the losing candidate. After all, to lose by bad luck is better than, say, being rejected by the people. See JON ELSTER, SOLOMONIC JUDGMENTS 107 (1989) (describing lottery elections in England and how “[t]o be rejected by fortune was less dishonorable than being rejected by the community”).

<sup>56</sup> *Fladell v. Elections Canvassing Comm'n*, CL 00-10965AB, slip op. at 13 (15th Jud. Cir. Fla. Nov. 20, 2000) (order on motion for declaratory, injunctive and other relief), available at <http://election2000.stanford.edu/fladell1120.pdf>.

Eliminating recounts also reduces the potential for fraud, as recounts create an additional opportunity and a great incentive to engage in electoral chicanery. Perhaps the most famous example of post-election day hanky-panky is Lyndon Johnson's 1948 Senate contest where, several days after the election, 203 votes were "discovered" and, with an astounding 202 of those votes for Johnson, he emerged victorious.<sup>57</sup> Or, more recently, you could talk to losing Washington gubernatorial candidate Dino Rossi about the discovery of additional ballots in Kings County during a recount.<sup>58</sup> Bottom line: a coin toss eliminates an additional opportunity for fraud.<sup>59</sup>

Using a coin toss to decide close elections can also be justified from a historical perspective. While they didn't technically use a coin toss, those in Ancient Athens used lots to choose many of their elected officials.<sup>60</sup> After all, if citations to Ancient Greece can be used to justify ex-felon disfranchisement,<sup>61</sup> why not use citations to Ancient Greece to justify coin tosses as well? Of course, I freely admit that some readers may find it unconvincing to reach back thousands of years to a foreign society to justify a modern-day practice.

The greatest benefit, however, might come from boosting (or at least not further diminishing) the confidence of the American people in Our Democracy and Our Judiciary. Resolving close elections by "gerrymandering" the votes until you get the desired result might cause the general public to lose confidence in the fairness of our political process. Calls for making sure every vote gets counted seem to demand the counting of every vote until a certain political party gets enough votes to give it victory. Conversely, calls for ending the counting of votes seem to demand the disenfranchisement of some voters so a certain political party can make sure it doesn't lose. It's all so unseemly, which must be why political parties can hypocritically adopt the other side's sketchy tactics at a moment's notice.<sup>62</sup> Perhaps even worse, resolving close elections by

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<sup>57</sup> Tokaji, *supra* note 16, at 1782.

<sup>58</sup> To be clear, I'm not saying that what happened in Kings County amounted to fraud, as these allegations have not been conclusively proven. I use this example only to raise the possibility that recounts provide an additional opportunity and motive for fraud.

<sup>59</sup> One always has to be careful when arguing about eliminating the "opportunity" for fraud. Conducting any election creates an opportunity for fraud, but that does not mean we should not conduct any elections at all and, instead, opt for dictatorship. It seems to me, though, that the incentives and ability to commit fraud are quite a bit higher when: (1) the election is known to be a dead heat; and (2) the political perpetrators of fraud have a more precise idea of exactly how many fraudulent votes they need to "manufacture." It would also seem much easier to commit, and much tougher to detect, fraud committed on a small scale—and to shift the outcomes of a close election, one generally needs only to engage in small-scale fraud.

<sup>60</sup> See generally JAMES WYCLIFFE HEADLAM, *ELECTION BY LOT AT ATHENS* (2d ed. 1933).

<sup>61</sup> *Hayden v. Pataki*, 449 F.3d 305, 316 (2d. Cir. 2006) (discussing felon disfranchisement in Ancient Greece and Rome).

<sup>62</sup> Compare Mike Carter, *Dems Do the Math, Say Rossi Still Loses*, SEATTLE TIMES, May 11, 2005, at B1, available at LEXIS, News Library, SEATTM File (describing how Republicans

sending your lawyers to court so that you can get a judge to order the recounting of the votes to achieve a desired result causes significant parts of the general public to not only lose confidence in the fairness of Our Democracy but in the fairness of Our Judiciary.<sup>63</sup> Judges look more and more like nakedly partisan actors, protecting their own political interest.

But this is a law review essay and what would a law review essay be without a little theory. So let's do some. Notre Dame Professor John Copeland Nagle has (and I'm serious about the next word) smartly identified three fundamentals that should guide any reform designed to help resolve a close election: timeliness, fairness (i.e., nonpartisanship), and expertise in the subject area.<sup>64</sup> The modest proposal satisfies all three of these prerequisites.

*Timeliness.* To ensure an orderly transition of government, elections need to be definitively resolved relatively soon after conduct of the election.<sup>65</sup> So I conducted an empirical study that went like this: (1) my extraordinarily patient spouse<sup>66</sup> held a stop-watch; (2) I held a quarter; (3) she started the stopwatch when I called "heads" or "tails"; (4) I flipped the quarter in the air and let it land on the ground; (5) she stopped the stopwatch the moment the coin came to a stop and I was able to identify which side of the coin was facing up; (6) repeat steps one through five until bored or an episode of *Curb Your Enthusiasm* comes on.

The result of this groundbreaking, empirical, cutting-edge research was that it takes, on average, 2.13457698 seconds to flip a coin. Best of all, I am pleased to report that these results are statistically significant in that I personally am 78% confident (within an interval of +/- 19%) of the accuracy of the results. However, in the interests of full disclosure, I must admit that no verifiable "paper trail" exists for this research.<sup>67</sup>

*Fairness/Nonpartisanship.* The public needs to know that the results of the election do not reflect blatant and obvious partisanship on the part of

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selectively investigated certain counties in their search for felon voters), *with* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 74 (2000) (describing how Democrats selectively sought recounts in certain counties).

<sup>63</sup> *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting) (noting how deciding a close election can embroil judges in partisan conflict and undermine respect for the judicial process). *See also* Hasen, *supra* note 16, at 993 ("Putting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts.").

<sup>64</sup> Nagle, *supra* note 19, at 1753 ("Any more perfect machinery [for resolving close elections] must employ unbiased decisionmakers who are expert in the factual and legal questions that may arise and able to reach a decision in a timely manner.").

<sup>65</sup> *Id.* ("[A]n effective means of resolving a disputed election must reach its conclusion quickly enough to establish who is entitled to serve in office once it becomes vacant.").

<sup>66</sup> *See* Letter from Jennifer Pitts to Michael J. Pitts (Jan. 1, 2006) (on file with author) (detailing the difficulty of dealing with Mr. Pitts on a daily basis and suggesting improvements to his persona).

<sup>67</sup> *See* Verified Voting Foundation, About the Verified Voting Foundation, <http://www.verifiedvotingfoundation.org/article.php?list=type&type=52> (last visited May 4, 2006) (website of organization dedicated to ensuring that all electronic voting machines employ a voter verifiable paper trail).

public officials,<sup>68</sup> whether these public officials be election officials or judges. Well-cloaked, secretive, and subtle partisanship is, of course, acceptable, expected, and perhaps even, on some level, desirable.

Well, there's just one tiny problem with all this. People. Okay, people, especially the ones ahead of me in the airport security line, are always the problem. In this specific context, the "people problem" is that as long as there are people deciding close election contests, the losers of the election will do their absolute darnedest to brand the people involved in making the ultimate choice as partisan hacks.<sup>69</sup> And that's if they're being nice about it. Slightly more mean-spirited would be to call them cheats and criminals.

Just look at what happened in two of the closest Presidential elections of all time. In the Hayes-Tilden contest of 1876, a commission of seven Democrats and seven Republicans was created, with the tie-breaking vote given to Justice Bradley who "most contemporary observers viewed . . . as fair-minded and nonpartisan."<sup>70</sup> Yet, for some unknown reason, he did not seem so nonpartisan after he delivered the election to Hayes.<sup>71</sup> More than a century later, the Court, influenced in large part by that right-winger Anthony Kennedy, decided to usurp our democratic process in 2000.<sup>72</sup> Hmmmm, then again, the right-wingers don't seem too happy with Justice Kennedy.<sup>73</sup> Must be the last name, but I digress.

Here is the thing about a coin—you cannot brand it as partisan. For those of you who only carry around c-notes and have not seen one recently, perhaps the singular most defining characteristic of a coin is that it is an inanimate object. As such, a coin has no preferred candidate. In fact, it does not even know what a "candidate" is. A coin does not care if you are a Republican, a Democrat, or a Ralph Nader.<sup>74</sup>

True, we most certainly must address some counter-arguments to the coin's neutral qualities. For instance, claims of a two-sided coin could run rampant among partisans of the losing side. But how seriously would

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<sup>68</sup> Nagle, *supra* note 19, at 1762 ("The successful resolution of a contested election must achieve fairness to the parties involved and the appearance of fairness to the general public.").

<sup>69</sup> *Cf.* WILLIAM H. REHNQUIST, CENTENNIAL CRISIS 6 (2004) (speculating that when a dispute erupts following a close election, "there is no means of resolving it that will satisfy both sides").

<sup>70</sup> Nagle, *supra* note 19, at 1746.

<sup>71</sup> *Id.* at 1747 (recounting how Justice Bradley was branded as a partisan actor).

<sup>72</sup> David Margolick, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310 (describing, from a critical, politically liberal perspective, the role Justice Kennedy played in *Bush v. Gore*).

<sup>73</sup> Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3, available at LEXIS, News Library, WPOST File ("Conservative leaders meeting in Washington yesterday . . . decided that Kennedy, a Ronald Reagan appointee, should be impeached, or worse.").

<sup>74</sup> I suppose it possible the losers of the coin toss could argue that a different game of chance or even a game that involves more skill should be used. For example, after being defeated in a coin toss in a tied election for the Groveland, Florida, city council, the seventy-five-year-old losing candidate declared: "I would just as soon shoot an eight-ball or shoot balls from the foul line or have a game of hearts." Associated Press, *Coin Toss Determines Winner in Fla. Race*, Nov. 13, 2004, available at LexisNexis Academic, Wire Services.

“[w]e the people,”<sup>75</sup> take this claim? When was the last time you saw a two-sided coin? Have you ever seen one? Ask your friends if they have. Bet not. The two-sided coin is nothing more than a straw man argument. The proverbial red herring. Snuffleupagus from *Sesame Street*. All right, I know, that’s enough.

It might also be plausibly argued that use of a coin favors Republicans. After all, every single Republican is wealthy. Filthy rich, in fact.<sup>76</sup> So Republicans, being more familiar with the ways of money will, *ergo*, have better knowledge about the ways in which a coin flips. Then again, Republicans may be so rich that they never use coins and, indeed, give them away as alms to the poor. And we would certainly agree that the poor are all Democrats.<sup>77</sup> So in the end, it’s tough to come to a definitive conclusion as to which way this argument cuts. Actually, truth be told, I sort of lost track of the argument about two or three sentences ago.

*Expertise.* This is really an easy one to address. The theory is that anyone who is going to resolve an election should have expertise in the kinds of factual and legal questions that will arise during the course of an election contest.<sup>78</sup> Here again, the coin flip provides a superior method. After all, no longer would one have use for people who can determine the intent of a voter, read statutes, synthesize caselaw, and render haughty, Solomonic decisions. With the modest proposal, we just need an expert in flipping coins.

Quite obviously, the place to find such an expert is from football. Now just wait a second before you go accusing me of being “un-patriotic” for looking to “foreign” laws and mores<sup>79</sup>—that would be AMERICAN football.<sup>80</sup> A small, private American-owned business known as the National Football League (NFL) has numerous experts in this field. Importantly, these officials know what big-game pressure is all about. An NFL official has to do the job in front of thousands of fans and millions of television viewers every week<sup>81</sup> whereas a Supreme Court Justice only

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<sup>75</sup> U.S. CONST., pmbl.

<sup>76</sup> Cf. Carla Marinucci, *The Mouth that Won’t Stop Roaring: Even Some Democrats Weary of Dean’s Blunt Style*, SAN FRANCISCO CHRON., June 8, 2005, at A1, available at LEXIS, News Library, SFCHRN File (capturing Democratic National Committee chairman Howard Dean’s statement that Republicans “never made an honest living in their lives”).

<sup>77</sup> Actually, while these stereotypes of the socioeconomic status of Republicans and Democrats once reflected “rough truths,” this no longer seems to be the case. Karl Zinmeister, *Dem de la Crème*, WALL ST. J., Sept. 6, 2004, at A12, available at LEXIS, News Library, WSJNL File. See also Dan Balz, *Disparate Coalitions Now Make Up Two Parties, Study Finds*, WASH. POST, May 16, 2005, at A15, available at LEXIS, News Library, WPOST File (reporting on a study showing “Republicans are no longer the party of just the wealthy, nor are Democrats the party purely of the working class”).

<sup>78</sup> Nagle, *supra* note 19, at 1759–60.

<sup>79</sup> See generally Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS July–Aug. 2004, at 40 (criticizing the use of foreign legal decisions as precedent).

<sup>80</sup> As opposed to Australian Rules Football or soccer.

<sup>81</sup> For example, approximately ninety million Americans typically watch the Super Bowl. Stuart Elliott, *With Back-to-Basics Messages, the N.F.L. Plays it Safe, Ad Marketers are Responding*, N.Y.

performs before a small live-studio audience.<sup>82</sup> True, NFL officials would not be absolutely foolproof (what is?) and, believe it or not, have been known to occasionally miff a coin toss.<sup>83</sup> But we undoubtedly can all find common ground in the principle that election administrators, lawyers, and judges mess up far more often than NFL officials performing a coin toss.<sup>84</sup>

#### V. WHAT'S WRONG WITH THE MODEST PROPOSAL?

All right, no proposal, even a modest one, can be perfect. As *Poison* once so poetically told us, “Every rose has its thorn.”<sup>85</sup> To have made it this far, you must be an intelligent reader and, most likely, a law professor. So certainly many objections have already sprung into your fertile mind, but a few potential objections to the modest proposal would seem to rise above the rest, which I will coarsely categorize thusly:

- “For Pete’s sake, that’s so anti-democratic;”
- “Elections are perfect because errors are evenly spread among the candidates;”
- “Candidates, election administrators, lawyers, and judges will find a way to mess up even this simple rule of decision-making;” and
- “This just won’t work for local elections.”<sup>86</sup>

*Anti-Democratic.* “My word,” you say, “if the modest proposal actually gets implemented the winner of an election might not win the coin flip and the majority will not rule. This is America. America! We do not allow 49.7% of our populace to choose our representative when 50.2% of our populace wants somebody else to do the people’s business.”<sup>87</sup>

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TIMES, Sept. 8, 2004, at C7, available at LEXIS, News Library, NYT File.

<sup>82</sup> Akhil Reed Amar, *Too Much Order in The Court: How the Justices Betray Their Own Free Speech Principles*, Oct. 18, 2002, <http://writ.news.findlaw.com/amar/20021018.html> (“The Supreme Court bars television cameras and radio microphones from its public oral arguments.”).

<sup>83</sup> Referee.com, *Heads or Tails*, <http://www.referee.com/sampleArticles/2001/SampleArticle0101/headsortails/headsortails.html> (last visited May 16, 2005) (describing controversy involving a coin toss during a 1998 Thanksgiving Day game between the Pittsburgh Steelers and Detroit Lions).

<sup>84</sup> Of course, for deciding a local election, we would not need NFL officials. College or high school officials would undoubtedly suffice.

<sup>85</sup> *Poison History*, [http://www.poisonweb.com/thepoisonwebhtml/pzon\\_history1.html](http://www.poisonweb.com/thepoisonwebhtml/pzon_history1.html) (last visited May 4, 2006) (official website detailing band’s history).

<sup>86</sup> Another possible objection might be that using a coin toss as a rule of decision in a close election could result in lower turnout. This is because one of the tools used to motivate voters to cast ballots is to emphasize the few elections where one vote made a world of difference. To the extent that the argument that one vote matters actually does motivate people to turn out, coin tosses would eliminate these types of arguments. Of course, though, if my modest proposal was adopted we might still motivate voters by saying their vote could determine the difference between a coin flip or not.

<sup>87</sup> Choper, *supra* note 20, at 340 (arguing that deciding *Bush v. Gore* by a coin flip would “strike many citizens as unacceptable because of our national sense of propriety and admirable belief in the search for ‘truth,’ both of which might affect the coin-toss winner’s mantle of legitimacy to govern”).

Obviously, the main counter to this argument has already been previously disclosed. Elections, by definition, are error prone, so there is no certainty that the hypothetical “majority” is the actual true majority. Nevertheless, let’s take this argument at face value and let’s assume you could determine with absolute certainty the winner of an election within the 0.5% margin,<sup>88</sup> and let’s assume we go to a coin flip.

First of all, the number of instances where this occurs will be very small. Again, relatively few elections fall within this margin.<sup>89</sup> Additionally, when we flip a coin, about 50% of the time the winner will be the person who the “numbers” tell us was the winner. So, over the long haul, candidate A will win 50% of the time and candidate B will prevail 50% of the time. Anyway, stripping this argument of the “fuzzy math,” we are basically talking about a wee small number of cases in which this anti-democratic objection comes into play.

Moreover, there are plenty of elections in which we let less than a majority of the populace determine the outcome, to no real detriment to the Nation or to faith in Our Democracy. Bill Clinton never received more than 50% of the vote and certainly nobody thought he was an illegitimate President.<sup>90</sup> Well, maybe a few did.<sup>91</sup> Okay, you say, but Bill Clinton clearly defeated the other candidates in those contests and, while he did not get a majority, he got a plurality of the votes cast. Fair enough, so let’s try George W. Bush. In the 2000 election, Bush actually lost the popular vote by half a million or so.<sup>92</sup> Again, much like Clinton, nobody considered “W” to be an illegitimate President. Okay, maybe that is not quite correct either.<sup>93</sup> Nevertheless, you see the point, even if all the facts do not quite add up.<sup>94</sup>

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<sup>88</sup> You may wonder why 0.5% was chosen as the margin. The reason is that 0.5% serves as the trigger for a recount in a number of states. ALA. CODE § 17-13-12 (1975); COLO. REV. STAT. § 1-10.5-101 (West 2001); N.D. CENT. CODE § 16.1-16-01(1)(b) (2004); 25 PA. CONS. STAT. ANN. §3154(g) (West 2004). In fact, you might even consider extending the margin to 1%, as that’s the margin that a number of other states use to trigger a recount. GA. CODE ANN. § 21-2-495(c) (West 2003); ME. REV. STAT. ANN. tit. 21-A, § 737-A (2005); MO. REV. STAT. § 115.601 (2005); NEB. REV. STAT. § 32-1119 (2005); S.C. CODE ANN. § 7-17-280 (2004); VA. STAT. ANN. § 24.2-800 (West 2003); WYO. STAT. § 22-16-109 (1977).

<sup>89</sup> For example, in the 2002 general election for the United States House of Representatives, only two contests came within the 0.5% spread—Louisiana’s 5th District and Colorado’s 7th District. MICHAEL BARONE & RICHARD COHEN, *THE ALMANAC OF AMERICAN POLITICS* 327, 714, 1786 (2004).

<sup>90</sup> In 1992, Clinton garnered 43% of the vote. President Elect 1992: The Unofficial Homepage of the Electoral College, <http://presidentelect.org/e1992.html> (last visited July 13, 2006). In 1996, he garnered 49.2%. President Elect 1996: The Unofficial Homepage of the Electoral College, <http://presidentelect.org/e1996.html> (last visited July 13, 2006).

<sup>91</sup> See, e.g., Brent Barksdale, *Clinton—The Illegitimate President*, [http://www.politicalusa.com/columnists/barksdale/barksdale\\_009.htm](http://www.politicalusa.com/columnists/barksdale/barksdale_009.htm) (2001) (on file with Connecticut Law Review) (describing President Clinton as illegitimate because he “never received the support of the majority of Americans”).

<sup>92</sup> BARONE & COHEN, *supra* note 88, at 49.

<sup>93</sup> See, e.g., Sonofbush.com, *Son of Bush: The Criminal Who Stole the Presidency*, <http://www.sonofbush.com> (last visited May 4, 2006) (“George W. Bush is an illegitimate president.



Anyway, the bottom line in my estimation is that flipping a coin will not, in the end, be perceived as any less legitimate than numerous recounts and legal maneuvers.<sup>95</sup> After all, if the people of the Great State of Texas abide coin flips to decide who advances to the high school football playoffs,<sup>96</sup> certainly the people of America can abide coin flips to resolve far less weighty matters like who gets to be President, Senator, or Representative.<sup>97</sup>

*Errors are Evenly Spread.* You might argue against the modest proposal by targeting the core assumption behind it—the fact that elections are imperfect. Sure, you’ll concede that elections have flaws, but you might suppose that errors in election administration seem likely to impact each candidate equally. If a couple of machines malfunction then how do we know one particular candidate gained an unfair, illegitimate advantage? Errors are probably evenly spread among candidates, so the candidate who is ahead actually is the “true” winner.

Maybe, but I doubt it. The problem with this theory is that errors generally are not spread across the entire electorate. Instead, errors occur sporadically. For example, if every single machine broke down at the same time during an election then it’s plausible, though not guaranteed, that the resulting errors would be evenly spread among the candidates. But that’s not what happens when machines malfunction. What typically happens is that a machine loses votes in a precinct that is 90% Republican. Or, to take a different example, a felon purge occurs that targets African-Americans,<sup>98</sup> the overwhelming majority of whom support Democrats.<sup>99</sup> Granted, over a long period of time errors are probably evenly spread among the two major political parties. John F. Kennedy won a

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He stole the 2000 election using his brother Jeb to fix the Florida election.”).

<sup>94</sup> Abraham Lincoln was also elected without a majority of the popular vote. Nobody thought this to be illegitimate except for the seven states that subsequently seceded.

<sup>95</sup> *But see* Len Maniace, *Irvington to Let Runoffs Decide Vote Deadlocks*, J. NEWS, Nov. 22, 2005, at 3A, available at LEXIS, News Library, JNLNWS File (describing how the village of Irvington, New York, was proposing to eliminate coin flips for tied elections because voters found it to be an unsatisfying method of concluding an election).

<sup>96</sup> H.G. BISSINGER, *FRIDAY NIGHT LIGHTS* 251 (1990).

<sup>97</sup> Perhaps, though, there is an even greater legitimacy problem. People might, as suggested by Columbia Political Scientist Jon Elster, be repulsed by leaving something as important as an election to chance. *See* Elster, *supra* note 55, at 55 (noting that “arbitrary chance is often repulsive. Even when we have no reason to decide one way or another, we would like the outcome to be determined by reasons”). According to Elster, “[r]ather than accept the limits of reason” people “prefer the rituals of reason.” *Id.* at 37. Perhaps in a vacuum this might be the case. However, when you put on the “reason” side of the ledger numerous recounts and legal wranglings, I’m not sure these rituals look “reasonable” to most people.

<sup>98</sup> *See, e.g.*, John Lantigua, *How the GOP Gamed the System in Florida: Florida Voter Rolls Purged Before Presidential Election*, 272 THE NATION 11, Apr. 30, 2001, available at LEXIS, News Library, NATION File (describing the mistakes made during Florida’s attempt to purge felons).

<sup>99</sup> *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 91 (D.D.C. 2002) (describing how African-American voters in Georgia tend to vote for Democratic Party candidates in excess of 90% of the time).

controversial squeaker against Richard Nixon in 1960 and, forty years later, Bush did the same to Gore. However, at any single given election, it seems highly unlikely errors are spread evenly amongst the candidates.

*“Same Old Song and Dance, My Friend.”*<sup>100</sup> Another obvious objection is that even in the face of a simple statute creating a simple rule of decision-making, lawyers and judges will manage to get involved in the fray and all the modest proposal will do is move the margin of litigation to a different place. In other words, candidates who lose by 50.3% to 49.7% (a margin of 0.6 percentage points) might engage in scorched earth litigation so as to get within the 0.5% margin necessary to trigger a coin toss.

Agreed. As with any statute, lawyers and losing candidates will zealously try to wrest victory from the clutches of defeat. And if they intelligently forum-shop for the right (or left) judge, they might be able to pull it off.

That is the reason for subsection (b) of the modest proposal. This subsection requires a candidate who loses by more than 0.5% of the vote to prove that enough questionable activity occurred so as to cover a large enough number of votes to overcome the entire deficit. Put more concretely, if Candidate A loses to Candidate B by 0.6% and by a total margin of 1000 votes, Candidate A must show, by clear and convincing evidence, that at least 1001 votes are in doubt in order to mount a successful election challenge and get within the coin-toss mechanism.

In essence, this is how many election contests work today. If a losing candidate can show that enough votes were in doubt so as to call into question the accuracy of the election, then a court will sometimes order a new election, but if a court finds that the number of votes in question would not be outcome determinative, then the contest fails.<sup>101</sup> Here’s a hypothetical example of how this works: if a candidate wins an election by ten votes and it turns out eleven of that candidate’s dearly departed relatives managed to vote, then a court would likely order a new election because the obvious election flaws may have been outcome determinative.

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<sup>100</sup> Aerosmith, *Same Old Song and Dance*, on *GET YOUR WINGS* (The Record Plant 1974).

<sup>101</sup> See, e.g., *McCavitt v. Registrar of Voters of Brockton*, 434 N.E.2d 620, 631 (1982) (“[W]henver the irregularity or illegality of the election is such that the result of the election would be placed in doubt, then the election must be set aside and the judge must order a new election.”) (internal quotes omitted). *Taft v. Cuyahoga County Bd. of Elections*, No. 2006-0477, slip op. at 8, (Ohio 2006) (noting that to prevail in an election contest a candidate must “establish by clear and convincing evidence that one or more election irregularities occurred and that the irregularity or irregularities affected enough votes to change or make uncertain the election result”). See also NEB. REV. STAT. § 32-1101(8) (2004):

When the [election] misconduct is on the part of an election commissioner, a county clerk, an inspector, a judge or clerk of election, a member of a counting or canvassing board, or an employee of the election commissioner or county clerk, it shall be insufficient to set aside the election unless the vote of the county, precinct, or township would change the result as to that office.

In contrast, if only two non-relatives managed to rise from the dead on election day, then a court would not order a new election because there are not enough questionable votes to throw the outcome into doubt.

Apart from the clear statutory language that would prevent candidates from litigating to try and get within the 0.5% coin toss margin, there likely would be a political backlash for losing candidates who try to use litigation and recounts to get within the margin. In such an instance, public opprobrium would serve as a major disincentive to mounting this type of challenge. After all, any defeated candidate trying to sneak into the coin toss would likely be viewed as the ultimate “Sore Loserman.”<sup>102</sup> Simply put, a vast super-majority of the public would not stand for it.

*Local v. Federal and State.* Finally, what about local elections, such as cities and school districts, where one or two votes could be a margin of greater than 0.5%—what to do in these cases? First, you could have a separate subsection in the statute to deal with local elections that would allow for a coin flip when the margin was within a certain number of “raw” votes.<sup>103</sup> But even aside from that, a local election just is not likely to trigger the type of confidence reducing litigation that results from close elections on the federal and state level. Local candidates generally cannot go out and hire Larry Tribe and Ted Olsen to concoct an endless number of legal claims and local candidates cannot send teams of lawyers to “protect” the right to vote. Sure, some will have the resources to take their case to court and contest it all the way up the legal food chain to the Supreme Court. But such an occurrence will be relatively rare in the large scheme of things. In fact, if a close election contest occurs and the modest proposal is on the books, a state judge might just use the “modest” proposal under her equitable powers to resolve a local election dispute.<sup>104</sup>

In sum, and to, for an ever so brief moment, engage all you law and economics acolytes out there—it’s a cost-benefit analysis. The benefits of the modest proposal outweigh the costs.

## VI. CONCLUSION

Since the 2000 Presidential election, well-meaning election reformers have made a number of worthy suggestions for improving Our Democracy.

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<sup>102</sup> Tom Lowenstein, *Get Over It*, THE AMERICAN PROSPECT ONLINE, Feb. 12, 2001, <http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleID=296> (describing the “Sore Loserman” campaign from Florida 2000).

<sup>103</sup> A number of states use a raw number of votes to trigger recounts in contests with low voter turnout. *E.g.*, MINN. STAT. ANN. § 204C.35 (West 2005) (allowing for a recount when the margin of victory “is ten votes or less and the total number of votes cast for the nomination is 400 votes or less”).

<sup>104</sup> One final objection might be that eliminating recounts and litigation could stifle efforts to reform Our Democracy. For instance, if there had been no recount or court decisions in *Bush v. Gore*, would we have spent millions of dollars to upgrade machinery? One has to admit that, on some level, there might be a silver lining to the recount and litigation cloud.

But there's no magic pill to make election administration absolutely perfect and there's absolutely no way to eliminate razor-thin election margins. Currently, we use a curious alchemy of recounts and litigation to resolve closely contested elections. Maybe, though, we'd be better off relying on the alchemy of the United States Mint. Maybe we should put an end to recounts and post-election litigation. Maybe, just maybe, we should flip a coin.