

JENNIFER NOU

Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts

ABSTRACT. Voting machine failures continue to plague American elections. These failures have fueled the growing sense that private machine manufacturers must be held accountable. This Note argues that, because legitimacy externalities and resource disparities across election jurisdictions pose persistent threats to electoral integrity, meaningful accountability will require greater federal oversight. This oversight must take into account the unique nature of the public-private partnership that defines this nation's system of election administration. This Note thus proposes an amendment to the Help America Vote Act of 2002, which would condition federal funds on state procurement contracts. These procurement contracts would mandate performance-based requirements for vendors to supply the means with which to verify votes cast. Such contracts should not only have third-party beneficiary enforcement mechanisms, but also override the doctrine of trade secrecy invoked by manufacturers to prevent software disclosure.

AUTHOR. Yale Law School, J.D. 2008; Oxford University, M.Phil. 2004; Yale College, B.A. 2002. I am grateful to Michael Kang, Anne O'Hagen Karl, Nicholas Parrillo, Richard Posner, Susan Rose-Ackerman, and Dan Tokaji for their thoughtful comments. Special thanks to Heather Gerken for inspiration and to Jerry Mashaw for his many insights.



NOTE CONTENTS

INTRODUCTION	746
I. THE FEDERAL IMPERATIVE	751
A. Legitimacy Externalities	752
B. Resource Disparities	755
II. PUBLIC AND PRIVATE ACCOUNTABILITY PROBLEMS	759
A. The Katherine Harris Problem	761
B. The Stunted Market Problem	764
III. PROCUREMENT CONTRACTS AS AN ACCOUNTABILITY TOOL	770
A. Diversifying the Toolkit	771
B. Procurement's Promise	774
IV. TOWARD PRINCIPLED REFORM	776
A. Amending the Help America Vote Act	777
1. Design Versus Performance	777
2. Contracting Out of Trade Secrets	782
B. Enforcing HAVA	788
CONCLUSION	792

INTRODUCTION

For democracy to be done, it must be seen to be done.¹ Political legitimacy springs not only from how the state acts, but also from how those actions are publicly perceived. Nowhere is this insight more crucial than in election law and administration, where casting a ballot can mark the start of a saga. Perhaps now more than ever, Americans leave the polls wondering whether their votes were counted—and for the right candidate. But if the media spectacle of *Bush v. Gore*² was this nation's wake-up call, the latest round of elections did little to allay those fears. Newspaper headlines relayed stories of disappearing ballots and malfunctioning machines.³ Battleground states had more than their fair share of woes,⁴ though larger margins of victory in 2008 have dampened the real and perceived consequences. With soaring rates of voter turnout,⁵ voters'

-
1. This observation modifies the well-known refrain that for “justice to be done, it must be seen to be done.” See, e.g., Amnesty International, Justice Must Be Seen To Be Done, <http://www.amnesty.org/en/library/asset/MDE23/010/2004/en/dom-MDE230102004en.pdf> (Aug. 2004) (criticizing Saudi Arabia's denial of independent observers to verify the fairness of criminal trials as “denying themselves the opportunity to show how they are advancing human rights”).
 2. 531 U.S. 98 (2000).
 3. See, e.g., Sewell Chan, *Big Turnout Means Lines for Voters Across City*, N.Y. TIMES, Nov. 5, 2008, at P15 (“Probably the greatest problem cited by voters was breakdown of voting machines in several precincts.”); Greg Gordon, *Glitches Mar Voting but Apparently Don't Tarnish Outcome*, MCCLATCHY NEWSPAPERS, Nov. 4, 2008, <http://www.mcclatchydc.com/146/story/55304.html> (reporting on “[w]aits of up to seven hours, voting machine failures and registration glitches”); Christian M. Wade, *Voting Vendor May Be Ousted*, TAMPA TRIB. (Fla.), Nov. 8, 2008, <http://www2.tbo.com/content/2008/nov/08/080013/na-voting-vendor-may-be-ousted/> (“Memory cards on each of the [county's] voting machines became overloaded and the data couldn't be transferred to machines tabulating the totals.”).
 4. See, e.g., Ben Conery, *Three Swing States See Machine Problems*, WASH. TIMES, Nov. 4, 2008, <http://washingtontimes.com/news/2008/nov/05/three-swing-states-see-machine-problems/> (“Reports of long lines at the polls, malfunctioning voting machines and ballot shortages came from several states Tuesday morning as the 2008 elections kicked off, including problems in the battleground states of Virginia, Florida and Pennsylvania.”); Carol J. Williams & Noam N. Levey, *Voting Problems Look Isolated*, L.A. TIMES, Nov. 5, 2008, <http://www.latimes.com/news/printedition/asection/la-na-votingproblems5-2008nov05,0,5479930.story> (reporting that voting machine “glitches [we]re most pronounced in battleground states”).
 5. See Kathleen Burge, *As in '04, Voter Turnout Was High*, BOSTON GLOBE, Nov. 9, 2008, http://www.boston.com/news/local/articles/2008/11/09/as_in_04_voter_turnout_was_high (observing that “national voter turnout soared”); Clarence Page, *Jackson's Eloquent Tears*, CHI. TRIB., Nov. 9, 2008, at 40 (describing “reports that Obama increased voter turnout

PRIVATIZING DEMOCRACY

experiences with and the growing media attention to voting machine glitches have cast a pall on Election Day, throwing into question the results of political contests nationwide.⁶ The need for accountability abounds.

Central to this growing sense of unease is the role that for-profit companies play in the provision of our electoral infrastructure. One famous flashpoint occurred in 2003 when Walden O'Dell—then-chief executive of Diebold Election Systems, a voting machine manufacturer—sent out a fundraising letter on behalf of George W. Bush, promising that he was “committed to helping Ohio deliver its electoral votes to the president next year.”⁷ Few need to be reminded of Ohio’s pivotal role in the ensuing race to know why O'Dell’s remarks raised hackles.⁸ Consider still the revelation following Chuck Hagel’s surprising Senate race win in 1996, called by some the “major Republican upset in the November election.”⁹ Until two weeks before he announced his candidacy, Chuck Hagel had been chairman of American Information Systems, now known as Election Systems & Software.¹⁰ This company was the same one that supplied many of the very voting machines used to count his election’s votes.¹¹ While there has been little, if any, evidence of actual tampering or undue influence, the perception of impropriety is undeniable.¹²

since 2004 among self-identified Republicans (up 3 percent), moderates (up 6 percent) and conservatives (up 5 percent”).

6. See, e.g., Mark Brunswick, *Tension Escalates as Recount Fluctuates*, STAR TRIB. (Minneapolis), Nov. 8, 2008, at A1 (reporting that voting machine time-stamp problems are calling into doubt Senate race’s vote tallies); Greg Grisolano, *County Discovers Problem in Voting: Machine Error Could Affect Race for County Attorney*, JOPLIN GLOBE (Mo.), Nov. 7, 2008, at 1A (describing how a “programming error in the voting machines at one Crawford County polling place could swing the outcome of the county attorney’s race”).
7. Ian Urbina, *Voting Officials Face New Rules To Bar Conflicts*, N.Y. TIMES, Aug. 1, 2007, at A1; Paul R. LaMonica, *The Trouble with E-voting*, CNNMONEY.COM, Aug. 30, 2004, http://money.cnn.com/2004/08/30/technology/election_diebold/.
8. See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1220 (2005) (describing Ohio as “a pivotal swing state in the 2004 election” and “the state on which the outcome of the presidency turned”).
9. Myra MacPherson, *Brothers in Arms*, WASH. POST, Jan. 13, 1997, at D1.
10. See ELLIOT D. COHEN & BRUCE W. FRASER, *THE LAST DAYS OF DEMOCRACY* 277 (2007); United States Senator - Chuck Hagel, <http://hagel.senate.gov/public/index.cfm?FuseAction=Biography.Home> (last visited Dec. 5, 2008) (noting that Senator Hagel served as Chairman of the Board of American Information Systems).
11. See JAMES MOORE, *BUSH’S WAR FOR REELECTION* 304 (2004) (“Senator Hagel was an owner of the company that produced the machines that counted 85 percent of the votes in elections he won”); Bob Fitrakis & Harvey Wasserman, *Diebold’s Political Machine*, MOTHERJONES.COM, Mar. 5, 2004, <http://www.motherjones.com/commentary/>

These episodes reflect America's public-private partnership of election administration: a publicly funded system for the private provision of governmental services.¹³ This hybrid regime features thousands of decentralized bureaucracies and a select group of private vendors that produce the equipment and requisite software to count millions of ballots.¹⁴ An increasing demand for vote-counting goods and services has only augmented the private sector's role. With butterfly ballots still fresh in voters' minds, for example, many counties switched from paper-based ballot systems to Direct Record Electronic (DRE) systems—stand-alone machines that record votes in their internal memories.¹⁵ In 2006, more Americans than ever used electronic voting machines to cast their ballots, accounting for millions of dollars in revenue.¹⁶ Georgia, as well as several other states, employed DRE touch screens in every precinct.¹⁷ Though some states like California have recently decertified their DREs due to security concerns,¹⁸ major problems with paper ballots in

columns/2004/03/03_200.html (“[M]achines made by [American Information Systems] probably tallied 85 percent of the votes cast in the 1996 vote . . .”).

12. See MOORE, *supra* note 11, at 305 (noting in the context of the controversy surrounding Senator Hagel that “[t]here are several perceived political apparent conflicts of interest among the companies producing electronic voting machines”).
13. See Stephen H. Linder & Pauline Vaillancourt Rosenau, *Mapping the Terrain of the Public-Private Policy Partnership*, in PUBLIC-PRIVATE PARTNERSHIPS 1 (Pauline Vaillancourt Rosenau ed., 2000).
14. See CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 48, 53 (2001), http://vote.caltech.edu/drupal/files/report/voting_what_is_what_could_be.pdf.
15. See BRENNAN CTR. FOR JUSTICE, THE MACHINERY OF DEMOCRACY: VOTING SYSTEM SECURITY, ACCESSIBILITY, USABILITY, AND COST 3 (2006) (describing various types of DRE machines); ERIC A. FISCHER, VOTING TECHNOLOGIES IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS 5 (2001); Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1738 (2005) (“DREs are [] stand-alone machines that record votes in their internal memories.”). The most recent models include ATM-style touch screens, in which voters touch the screen to cast their votes. See HENRY E. BRADY ET AL., COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES 13 (2001). Others feature “voter-verifiable paper trails,” which allow voters to contemporaneously confirm that their vote was accurately memorialized on paper. Though responsible for only 12.2% of the total vote in 2000, the figure more than doubled by 2004 to nearly 30%, making it the second most popular method behind optical scan.
16. See Michael J. de la Merced, *Maker of Voting Machines Receives a Takeover Offer*, N.Y. TIMES, Mar. 3, 2008, at A14 (noting that Diebold earned \$61 million in revenue in 2007 and \$195 million in 2006).
17. See Tod Newcombe, *Putting the “E” in Elections*, GOV'T TECH., Dec. 20, 2002, available at <http://www.govtech.net/magazine/story.print.php?id=36408>.
18. Press Release, Cal. Sec'y of State, Secretary of State Debra Bowen Moves To Strengthen Voter Confidence in Election Security Following Top-to-Bottom Review of Voting Systems

PRIVATIZING DEMOCRACY

recent primaries suggest that many jurisdictions will revisit their technological options.¹⁹ These jurisdictions will then turn to private vendors as both consultants and suppliers, further reinforcing the necessarily symbiotic relationship between public and private interests in election administration.

Private companies will thus continue to play a pivotal role in the core democratic task of administering elections. While election administration has never been performed solely by government,²⁰ the need for technological innovation coupled with recent outlays in federal funding guarantee that private actors will be entrusted with central electoral functions. This prospect demands the recasting of familiar debates over privatization and the kinds of institutions that will ensure accountability.²¹ The confluence of private interests and technological development also raises novel legal issues surrounding the ownership of intellectual property marshaled for inherently public purposes. All the while, the need for election integrity—and the perception of integrity—remains paramount.

This Note proceeds in four Parts. Part I critically examines threats to voter confidence resulting from disputed election results and voting machine failures. Breakdowns in technology or simple incompetence in one locality can impose legitimacy externalities on others. That is, questionable electoral outcomes in one election can cast grave doubts upon the results of another, even in the absence of formal challenges. These Election Day snafus serve only to exacerbate striking resource disparities in election administration across localities arising from wealth inequalities and competing budgetary priorities.²² Poorer counties, for example, tend to have more antiquated voting equipment while affluent ones can afford more modern technologies, which yield lower

(Aug. 3, 2007), available at http://www.sos.ca.gov/elections/voting_systems/ttbr/db07_042_ttbr_system_decisions_release.pdf.

19. See Ted Rowlands, *Paper Ballots Could Delay California Results*, CNN.COM, Feb. 5, 2008, <http://www.cnn.com/2008/POLITICS/02/04/california.ballots/>.
20. See ROY G. SALTMAN, *THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE* 178 (2006).
21. See Jack M. Beermann, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507 (2001); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *HARV. L. REV.* 1229, 1260 (2003); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 *HARV. L. REV.* 1422 (2003).
22. See Paul S. Herrnson, *Improving Election Technology and Administration: Toward a Larger Federal Role in Elections?*, 13 *STAN. L. & POL'Y REV.* 147, 151-52 (2002) (“[The] most prevalent explanation for the lack of uniformity [in election standards] is the unequal distribution of wealth across counties.”).

rates of vote invalidation.²³ A lack of centralized coordination has also resulted in diverging election standards and ballot design, with little sense of shared best practices.²⁴ Taken together, these interjurisdictional threats to voter confidence make plain the need for greater federal intervention in election administration.

Given this need for a more robust federal role, Part II considers America's existing mix of what I will call *accountability tools*—the institutional means through which actors force others to account for their actions and praise or blame them accordingly. These tools provide both *ex ante* incentives to structure parties' relationships as well as meaningful mechanisms to enforce these relationships *ex post*. They can take many forms, including market transactions, regulatory mandates, or familiar legal sanctions such as criminal punishment or civil damages. In the context of voting reform, the most prominent federal effort to restructure electoral institutions has been the Help America Vote Act of 2002 (HAVA).²⁵ The Help America Vote Act was Congress's first real effort to replace outdated vote-counting technology and spur voluntary national standards for voting machinery. A combination of short-sightedness and timidity, however, prompted states and localities to quickly purchase and invest in expensive voting equipment. Consequently, HAVA's one-time payouts have succeeded only in cutting short the development of a secondary market and concomitant avenues for competition.

A major challenge for future election reform, then, is to develop vigorous market incentives for innovation safeguarded by greater public inspection and transparency. Legitimate elections demand mechanisms that can ensure robust oversight without stifling advances in voting technology and security. Part III thus conceptually develops a largely overlooked device in the election accountability toolkit: the institutional design of procurement contracts. Procurement contracts differ from traditional commercial contracts insofar as they combine competition and bargaining with an independent body of norms

23. For example, poorer voters in Fulton County, Georgia, cast their ballots on more antiquated punch-card voting machines, while more affluent residents in Georgia's Cobb and Gwinnett counties vote on more modern optical-scan machines. Those voting in Fulton County were 10.4 times more likely to have their vote invalidated than those voting in Cobb and Gwinnett County. *Id.* at 152; see also Leslie Wayne, *The 2000 Election: The Voting System: Close Vote Illuminates Hodgepodge of Ballots*, N.Y. TIMES, Nov. 10, 2000, at A24 ("With county budgets for elections often given a low priority, local election officials often lack money to buy modern voting equipment . . .").

24. See BRENNAN CTR. FOR JUSTICE, *supra* note 15, at 1 ("Counties make decisions about ballot design and instruction language without performing usability testing to avoid voter confusion and mistake.").

25. 42 U.S.C. §§ 15,301-15,545 (Supp. V. 2005).

PRIVATIZING DEMOCRACY

emphasizing transparency and fairness.²⁶ Longer-term contracts can also help tie the hands of successive election officials well past their party's stint in power. This would help create incentives for officials to purchase equipment that best serves the public interest, rather than short-sighted partisan aims. Furthermore, procurement contracts can also limit the remedies available to private contractors in the event of government breach as well as impose unique requirements justified by distinct public needs.²⁷ While contracts may seem worrisome in their ability to obscure traditional lines of responsibility, this Part will argue that well-designed contracts signal not a retreat of government oversight, but rather a reconfiguration much needed in election administration.

Armed with these insights, Part IV then proposes two related reforms using procurement contracts to hold both private manufacturers and election officials accountable. First, it suggests that the Help America Vote Act be amended to mandate, as a condition of federal funding, that state procurement contracts include a performance provision requiring bidders to provide the technology and access with which to verify votes cast. When mandatory contractual provisions are performance based, they can encourage the market to supply accountability-enhancing options such as open-source technology or voter-verified paper trails. This Part will also explore the reasons why procurement contracts will likely result in more innovation and resource flexibility relative to legislative bargains struck in Congress. Second, current (and proposed) HAVA provisions should be enforced through the explicit designation of candidates as third-party beneficiaries to voting machine procurement contracts. Allowing candidates to sue state election officials and private manufacturers for specific performance to disclose underlying source code and to verify election results would not only provide a meaningful sanction, but also increase the public legitimacy of the American election system as a whole.

I. THE FEDERAL IMPERATIVE

That states and localities continue to administer federal elections with minimal congressional regulation is largely the product of path-dependence and simple indifference. But the electoral landscape is changing, and so, too, is

26. The American Bar Association, for example, has promulgated a model procurement code for state and local governments with explicitly designated purposes that include “increas[ing] public confidence in the procedures followed in public procurement” and “ensur[ing] the fair and equitable treatment of all persons who deal with the procurement system of this [State].” MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOV'TS § 1-101(2)(d)-(e) (2000).

27. See Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 165 (2000).

the need for greater uniformity and jurisdictional equality. This Part argues that Congress has both the power and the urgent mandate to provide baseline standards for election administration. This nation's Founders explicitly anticipated the need for federal intervention in election administration and enshrined it in constitutional text.²⁸ The Elections Clause provides that state legislatures should have the power to prescribe "Times, Places and Manner of holding Elections for Senators and Representatives," but that Congress should nonetheless be allowed to "make or alter such Regulations."²⁹ To the drafters, federal oversight was still necessary as a check against state legislatures that abused their powers, particularly given that the same equipment and infrastructure were usually used in both state and federal contests.³⁰ While states would be given considerable leeway in their election practices, Congress would maintain the power to safeguard the integrity of the ballot box.

A. *Legitimacy Externalities*

The federal government's traditional reluctance to legislate in the electoral arena, however, has been a major cause of our figurative and literal hanging chads.³¹ Although Congress has tepidly exercised its constitutional grant over the years,³² recent doubts about the validity of elections have highlighted what is at stake in failing to critically reexamine the status quo. Palm Beach County's dimpled butterfly ballots in 2000, for instance, "brought with [them] a fierce light of public scrutiny [that] uncovered election administration's family

-
28. In addition to the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, other constitutional sources for the congressional regulation of elections include the Fourteenth Amendment, U.S. CONST. amend. XIV, §§ 1, 5; the Spending Clause, U.S. CONST. art. I, § 8, cl. 1; and the Commerce Clause, U.S. CONST., art. 1, § 8, cl. 3. See Pamela S. Karlan & Daniel R. Ortiz, *Congressional Authority To Regulate Elections*, in THE FEDERAL REGULATION OF ELECTIONS 14, 17-21 (Kenneth Gross et al. eds., 2001).
 29. U.S. CONST. art. I, § 4, cl. 1. Among the areas in which Congress might wish to regulate, according to Madison, was "whether the electors should vote by ballot or *viva voce*." SALTMAN, *supra* note 20, at 45 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 240-41 (Max Farrand ed., 1911)).
 30. See Karlan & Ortiz, *supra* note 28, at 16 ("Although as a formal matter the Elections Clause gives Congress power only to regulate elections for the House and Senate, states may find it easier and cheaper simply to standardize to the federally mandated congressional model for all the elections—presidential, state, or local—they conduct.").
 31. See SALTMAN, *supra* note 20, at 185 (arguing that "failed federalism fueled the Florida fiasco" (emphasis omitted)).
 32. See *infra* Section II.B.

PRIVATIZING DEMOCRACY

secret: the tottering and decrepit nature of U.S. voting technology.”³³ Suddenly, voters were forced to second-guess whether the machines on which they had voted had correctly recorded their preferences. The ensuing debacle thrust blinking election officials into the spotlight, their motives studied with skepticism. The public outcry was swift. The U.S. Commission on Civil Rights immediately undertook a study of voting irregularities.³⁴ By November 18, 2001, the *New York Times*, *Washington Post*, and *Sun-Sentinel* released the results of their attempts to corroborate or rebut the certified results.³⁵ Former Presidents Gerald Ford and Jimmy Carter chaired a bipartisan commission charged with evaluating the nation’s voting technology.³⁶

Since then, a sense of wary cynicism pervades many discussions of ballot integrity amid reports of a steady erosion in voter confidence. Numerous studies tell tales of disaffected voters and a growing expectation that ballots will be spoiled or miscounted, though recent research suggests that these changes vary by demographic.³⁷ A Gallup poll conducted shortly after the 2000 election, for instance, found that more than six in ten Americans had “little” or “no confidence” in the nation’s vote counting.³⁸ A National Election Study during a similar period found that confidence in the fairness of elections had dropped by a quarter.³⁹ And Democrats were not the only ones disaffected. During that same timespan, twice as many Republicans considered the 2000 election “unfair.”⁴⁰ Furthermore, a post-2004 election study by NBC and the

33. SALTMAN, *supra* note 20, at 1.

34. U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES DURING THE 2000 ELECTION (2001), available at <http://usccr.gov/pubs/vote2000/report/mail.htm>.

35. See Ford Fessenden, *Ballots Cast by Blacks and Older Voters Were Tossed in Far Greater Numbers*, N.Y. TIMES, Nov. 12, 2001, at A17; Dan Keating & John Mintz, *Florida Black Ballots Affected Most in 2000; Uncounted Votes Common, Survey Finds*, WASH. POST, Nov. 13, 2001, at A3; Sally Kestin, Buddy Nevins & John Maines, *The Disenfranchised: Poor, Uneducated Rejected Most in 2000 Election*, SUN-SENTINEL (Ft. Lauderdale), Nov. 18, 2001, at 1F.

36. See NAT’L COMM’N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2002).

37. See R. Michael Alvarez, Thad E. Hall & Morgan Llewellyn, *On American Voter Confidence*, 29 U. ARK. LITTLE ROCK L. REV. 651, 653 (2007) (finding evidence of “substantial racial and partisan ‘gaps’ in voter confidence”).

38. See Andrew Kohut, Pew Research Ctr., Public Concern About the Vote Count and Uncertainty About Electronic Voting Machines (Nov. 6, 2006), <http://pewresearch.org/pubs/87/public-concern-about-the-vote-count-and-uncertainty-about>.

39. See Jeffrey Zaino & Jeanne Zaino, *Election by Litigation: The Electoral Process Post-Bush v. Gore*, 62 DISP. RESOL. J. 72, 76 (2007) (citation omitted).

40. *Id.* at 76-77.

Wall Street Journal found that more than one in four Americans overall were concerned that the vote count was “unfair.”⁴¹ As a broader observation, a “significant portion of the U.S. voting population professed little confidence that their vote [would] be counted as intended.”⁴² A more recent study, based on a random survey of voters following the 2006 midterm elections in two competitive congressional districts found “substantial evidence that voters’ direct experience with the voting process influence[d] their voter confidence.”⁴³ Importantly, “[w]hen voters use a voting machine that they agree produces verifiable results, they are more confident in the election process.”⁴⁴ In this manner, data suggest that rates of voter confidence are tied to voters’ experiences at the polls: when voting machines fail, the effects extend beyond the election results and permeate perceptions about the electoral system itself.

Spillover effects from botched elections nationwide have only exacerbated these stirring signs of unrest. When voting technology in one jurisdiction—say Miami-Dade County, Florida—fails to register votes or lacks the processes by which to verify them, the validity of other jurisdictions’ election results are similarly thrown into question. Call these *legitimacy externalities*. As news of spoiled ballots spreads, so does voter disillusionment, and those leaving the polls in other states or counties are left to worry whether their vote, too, would slip through the cracks. Real and perceived election snafus garner media attention,⁴⁵ which often frames such events in highly partisan terms.⁴⁶ Not only does this phenomenon exist for presidential elections, where the results in

-
41. See NBC NEWS/WALL STREET JOURNAL, STUDY #6050, at 11 question 8, <http://online.wsj.com/public/resources/documents/poll20041217.pdf>; Rasmussen Reports, 58% Worried About 2004 Voting Debacle (Oct. 19, 2004), http://www.rasmussenreports.com/public_content/politics/election_2004/58_worried_about_2004_voting_debacle. A nationwide Pew/AP survey of registered voters had a similar result with twelve percent of respondents expressing that they were “not at all” confident about whether their ballots would be tallied properly. Kohut, *supra* note 38.
 42. R. Michael Alvarez, Morgan Llewellyn & Thad E. Hall, *Are Americans Confident Their Ballots Are Counted?* 1 (Caltech/MIT Voting Tech. Project, Working Paper No. 49, 2006), available at http://www.vote.caltech.edu/media/documents/wps/vtp_wp49.pdf.
 43. Lonna Rae Atkeson & Kyle L. Saunders, *The Effect of Election Administration on Voter Confidence: A Local Matter?*, 40 PS: POL. SCI. & POL. 655, 657 (2007).
 44. *Id.* at 658.
 45. See Alvarez et al., *supra* note 37, at 654-55 (“The media was the primary conduit through which the public learned about election administration after 2000. Obviously, the media plays an important role in shaping voter confidence because the media frames the issue of voter confidence.”).
 46. *Id.* at 657 (“The specific issue of voter confidence is largely dealt with in the debate surrounding voting technology, which is framed as a result of the partisan and political context of a close election that had a highly partisan and bitter conclusion.”).

PRIVATIZING DEMOCRACY

one county could have real effects on the national stage, but also in House and Senate races where putative winners serve in national bodies. The same general insight rings true in statewide races across districts. Ignoring these externalities will only reinforce the perception that vote-counting problems will continue unchecked, thus undermining incentives for voter engagement and the notion of self-governance as a whole. When voters are led to believe their votes will not be counted, fewer will see any utility in turning out on Election Day.

As a result, there is a genuine need for federal intervention to prevent externalities from the weakest link—whether they arise from the missteps of individual manufacturers or state election officials. Assertive action at the federal level to enforce uniform standards and otherwise regulate the voting machine industry could go far in restoring the nation’s faith in the legitimacy of their elected officials. Many voters seem to agree. A Washington Post/ABC News poll taken in the wake of the 2000 election reported that sixty-one percent of the public believed the federal government should establish rules for voting in presidential elections, while only thirty-five percent wanted the states and counties to continue to set them.⁴⁷ Thus, Congress has both the means and the mandate to take bold steps toward protecting the integrity of America’s election.

B. Resource Disparities

Despite the externalities imposed on other jurisdictions, few states currently possess the incentives to internalize the social costs of their resource allocation decisions. Federal intervention, by contrast, can better coordinate and collect information on the extent of these costs and who should bear them to maximize efficiency and effectiveness. As it stands, very little data are available on the quantifiable costs of election administration, helping to explain the lack of systematic public attention to the issue.⁴⁸ This lack of sustained attention, in turn, has stymied any large-scale attempt to implement a uniform methodology for reporting election-related outlays. Election expenditures are currently unreported in the *Census of Governments*, the annual U.S. Census

47. See Richard Morin & Claudia Deane, *Public Backs Uniform U.S. Voting Rules: Poll Finds Wide Support for Guidelines on Ballots, Closing Times, Recounts*, WASH. POST, Dec. 18, 2000, at A1.

48. See COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 59 (2005) (“Information on the cost of elections is difficult to obtain, because both state and local authorities are involved in running elections, and local authorities often neglect to track what they spend on elections.”).

Bureau report on the costs of state and local government functions.⁴⁹ Inconsistent accounting and data collection practices across states and counties further highlight the need for coordinated and centralized information gathering—a role naturally suited for the federal government. Without sanctions or the empirical evidence necessary to assign blame, state election officials have little motivation to invest in expensive new voting technology or expend the political capital necessary to hold vendors accountable for machine failures.

Notwithstanding the dearth of official cost data, various academic and private studies have nevertheless attempted to estimate the magnitude of these expenses. The Caltech/MIT Voting Technology Project, for example, canvassed various county and state governments and found that they spent approximately \$1 billion dollars in the aggregate on election administration in 2000.⁵⁰ To put this figure in context, counties generally spend over ten times that amount on solid waste management and parks and recreation.⁵¹ The Caltech/MIT report also itemized total expenses suggesting that, at least in 2000, voter registration and general administration accounted for most expenses: roughly \$300 million and \$400 million, respectively. Reports from the voting equipment industry and local budgets also reveal that equipment purchases and maintenance amount to about \$150 million to \$200 million annually, or roughly fifteen to twenty percent of total election administration expenditures. These figures are surely different today given recent changes in federal legislation, but they still give some sense of the scope of the costs at issue.⁵² A more assertive federal presence would further shed light on election administration expenses across jurisdictions.

One clear observation is that the expenses of elections and voter registration are borne mostly not by the state or federal government, but by local governments and, even then, “only reluctantly.”⁵³ This resource burden lies largely on county and city governments, which are confronted with decisions whether to allocate additional resources, on the one hand, to garbage collection and police provision, or on the other hand, to buying new voting

49. See, e.g., U.S. CENSUS BUREAU, 2007 CENSUS OF GOVERNMENTS, available at <http://www.census.gov/govs/www/cog2007.html> (last visited Dec. 5, 2008).

50. This figure did not include some particularly large outlays on equipment. See CALTECH/MIT VOTING TECH. PROJECT, *supra* note 14, at 50.

51. *Id.*

52. *Id.* at 51.

53. Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 425 (2004) (citing NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 36, at 25, 69).

PRIVATIZING DEMOCRACY

equipment and enhancing election worker training.⁵⁴ Perhaps not surprisingly, the balance often tips in favor of the former—in some counties more than others.⁵⁵ As such, outdated or inadequate voting technology reflects both disparities in wealth and tax revenues across counties, as well as budgetary decisions to spend funds on other municipal priorities. Smaller jurisdictions are also inevitably forced to spend a disproportionate amount more on election administration given their economies of scale. A survey of election data from counties in nine states reveals that these economies of scale exist only for precincts with over twenty-five thousand voters.⁵⁶ Insofar as one's right to vote should not depend on "factors [like] geography,"⁵⁷ this location-dependent variability is difficult to justify. In light of *Bush v. Gore*,⁵⁸ which some argue renders the use of more "error-prone . . . voting technology in some areas within the state but not others" a violation of the Equal Protection Clause,⁵⁹ such variation may elevate the issue from one of mere fairness to a bona fide constitutional question.

Confronted with these interjurisdictional resource disparities, a stronger federal presence could help to ensure that such inequalities do not translate into systematic deprivations of the ability to vote.⁶⁰ By establishing a minimum floor, the federal government has the potential to help decrease resource disparities across electoral jurisdictions and also marshal the benefits accruing from economies of scale. This argument is, of course, familiar in other contexts. Congress has long debated the need for federal intervention in education—another traditionally state-centered system—on the grounds that resource inequalities across school districts are indefensible.⁶¹ Some support

-
54. See NAT'L TASK FORCE ON ELECTION REFORM, ELECTION 2000: REVIEW AND RECOMMENDATIONS BY THE NATION'S ELECTIONS ADMINISTRATORS 3, 30 (2001).
55. *Id.*; see also NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 36, at 68 ("The costs of election administration are borne almost entirely by the level least able to afford them: county and city governments.").
56. See CALTECH/MIT VOTING TECH. PROJECT, *supra* note 14, at 50.
57. *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) ("These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography.").
58. 531 U.S. 98 (2000).
59. See Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert Bush v. Gore into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL'Y 357, 358 (2002).
60. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285-86 (2003) (arguing that the federal government has "greater resources at its disposal to condition and shape the behavior of private contractors").
61. See, e.g., *An Examination of the Federal Role in School Finance: Hearings on Examining the Need for School Finance Reform, Focusing on the Adequacy of Educational Finance in the United States*

the No Child Left Behind Act⁶² precisely on the grounds that standardized benchmarks would contribute to the greater “likelihood that existing resource disparities among schools will decline.”⁶³ A similar argument underpins the need for a robust federal role in election administration and the procurement of voting machines in particular.

Yet some have remarked that one of the “great curiosities” of the history of election administration is that it has taken “so long for any significant federal role to emerge.”⁶⁴ Until recently, Congress had only enacted a handful of laws governing election administration. The first was the Election Law of 1871, which provided that votes in congressional elections were to be cast by “written or printed ballot, any law of any State to the contrary notwithstanding,” and that any votes cast by other means (including voice votes) “shall be of none effect.”⁶⁵ Even centuries ago, federal legislators, though hardly bold, recognized their potential role in setting standards for state election practices. The next iteration of legislation occurred in 1896, when an election gone awry for the House in western New York was the impetus for a new federal law. The returns showed that Henry C. Brewster had defeated William E. Ryan by 25,399 votes to 17,109. Ryan, however, insisted that 31,354 votes cast in Rochester had been cast by voting machine, and were thus invalid given that federal law required written ballots.⁶⁶ A congressional committee investigated and concluded that Brewster would have won anyway, even if the machines had not been used.⁶⁷ Brewster was thus awarded the seat.⁶⁸

Nevertheless, Congress adopted a law on February 14, 1899, which stated that “[a]ll votes for Representatives in Congress must be by written or printed ballot, or voting machines the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of

and Its Effect on the Quality of Education, Before the Subcomm. on Education, Arts and Humanities of the S. Comm. on Labor and Human Resources, 103d Cong. 79 (1993) (statement of Sen. Christopher Dodd).

62. No Child Left Behind Act of 2001, 20 Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).
63. PAUL E. PETERSON & MARTIN R. WEST, *NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 12 (2003).
64. Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 *ELECTION L.J.* 118, 122 (2007) (reviewing SALTMAN, *supra* note 20).
65. SALTMAN, *supra* note 20, at 82.
66. *Id.* at 117-18.
67. *Id.* at 118.
68. *Id.*

PRIVATIZING DEMOCRACY

no effect.”⁶⁹ In other words, the new statute provided that congressional elections could be conducted either by ballot or on voting machines. An important effect of this new law was that it ensured that each state government would be in “charge of the approval of voting machines”—a trend that continues to the present.⁷⁰ Since this trend was only precipitated by statute, however, congressional action could just as easily shift the responsibility to a federal agency or, at the very least, set national standards in conjunction with those of the states.

But just because Congress has the authority to enact legislation does not mean that the wholesale centralization of election administration is a panacea. Asking the federal government to become more involved with the purchase of voting machinery might raise the worry that the party in control of Congress and the White House would be able to entrench itself in future elections. This entrenchment could occur, for instance, through contracts awarded to captured vendors who would then manipulate the machines to achieve some predetermined electoral outcome. The uneasiness would deepen with the knowledge that most states and counties use the same machinery in both federal and nonfederal elections. In this view, decentralization helps ensure that voting machine control is better dispersed across various interests and parties. This kind of pluralist objection, however, gives short shrift to the already discussed drawbacks of ceding complete control to the states. The most pragmatic solution will thus likely strike some middle ground between centralized federal standards and creative experimentation in the states.

II. PUBLIC AND PRIVATE ACCOUNTABILITY PROBLEMS

If legitimacy externalities and resource disparities underscore the need for federal reform, the critical issue, then, is what form such intervention should take. When public infrastructure fails—whether bridges collapse or tunnels implode—citizens rightly demand answers from both private contractors and the officials charged with overseeing them. Newspaper columnists scream: “Media, Demand . . . Accountability.”⁷¹ Pundits solemnly pronounce that “as citizens . . . we have a responsibility to hold our government accountable for

69. Act of Feb. 14, 1899, ch. 154, 30 Stat. 836 (codified at 2 U.S.C. § 9 (2000)).

70. SALTMAN, *supra* note 20, at 118.

71. *E.g.*, Colleen Patrick, *Media, Demand Katrina Accountability*, SEATTLE POST-INTELLIGENCER, Sept. 8, 2005, at B9.

disasters they cause.”⁷² These moments of perceived crisis are not the only motivations driving demands for accountability, but they are usually the most powerful. If the 2000 presidential election laid bare the problems with voting equipment, more recent elections have only added to the chorus.⁷³ Changes in technology have further wrought new fears about the validity of election results and the attendant ability to verify them. Accordingly, a growing number of citizens and commentators alike has demanded accountability from those who manufacture voting machinery.

When invoked, however, the concept of “accountability” conveys a reformist cachet, but often at the expense of careful analytical delineation.⁷⁴ As a first pass, the word by itself suggests that voters should, at a minimum, have the ability to call to account those entrusted to count their votes accurately. Holding a party accountable requires both the means to force an accounting, as well as a set of liabilities based on that accounting. Whether these demands for accountability are successfully met, in turn, largely depends on the relevant institutional mechanisms available for doling out carrots and wielding sticks. These *accountability tools*, as I shall call them, comprise the instruments through which actors extract explanations, and praise or blame them accordingly. In other words, they provide the institutional means by which an aggrieved party obtains an accounting and sanctions those responsible for errors revealed through that accounting. Accountability tools, in turn, are a smaller subset of what some have referred to as “policy tools,” or the “tools or instruments through which governments seek to influence citizen behavior and achieve

-
72. Elizabeth Anderson, Letter to the Editor, *Tunnel Tragedy: A Case of Compromised Public Safety*, BOSTON GLOBE, July, 12, 2006, at A8 (calling for greater accountability in the wake of the Big Dig tunnel collapse in Boston).
73. See Lisa Guernsey, *Holding the Vote-Counting Machines Accountable*, N.Y. TIMES, Sept. 16, 2004, at G8; Scott Wyland, *Florida: Elections Chief Urges Citizens To Demand Vote Accountability*, DAYTONA BEACH NEWS J., May 21, 2006, <http://www.verifiedvotingfoundation.org/article.php?id=6357>.
74. See Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 115 (Michael Dowdle ed., 2006) (describing the concept of accountability as “protean”); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2074 (2005) (“Some of the proposals that have been associated with . . . accountability have obvious merits, some have subtle merits, and some have obvious or subtle demerits. Very few of them, however, have very much to do with the concept of accountability. Invocation of this concept confers a certain cachet on these proposals—it makes them fashionable—but it neither justifies nor illuminates them.”).

PRIVATIZING DEMOCRACY

policy purposes.⁷⁵ These tools can take many forms—lawsuits, statutes, audits, external inspections—each with respective strengths and weaknesses.⁷⁶

Although the literature is rife with various taxonomies of accountability,⁷⁷ this Part will draw upon two familiar conceptions—public and private accountability—as a heuristic for exploring the range of accountability tools and why some are more likely to be successful than others in the electoral context. Public accountability regimes largely rely upon elections as legitimating institutions and look to the political process as a means of sanctioning bad actors. Private accountability regimes, by contrast, rely upon the market forces of supply and demand—calibrated to profit-maximization—to punish underperforming parties.⁷⁸ Examining why features of these regimes are missing in the current context will then provide an analytic framework for identifying the kinds of institutional design features to which our election reform efforts should aspire.

A. *The Katherine Harris Problem*

At first, relying on the concept of public accountability to vindicate election integrity seems like a bad joke, for at its core this kind of regime mainly (though not solely) relies on elections as a sanctioning mechanism.⁷⁹ Early movements in administrative law, for example, understood the enterprise as an effort “to reconcile the operation of the federal bureaucracy with the basic political values of . . . representative democracy and public accountability of

-
75. Anne Schneider & Helen Ingram, *Behavioral Assumptions of Policy Tools*, 52 J. POL. 510, 511-20 (1990); see ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE* 8 (1953).
76. See generally Theodore J. Lowi, *Four Systems of Policy, Politics, and Choice*, 32 PUB. ADMIN. REV. 298 (1972) (comparing and contrasting various policy tools).
77. See, e.g., Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005) (proposing “participation” and “delegation” models of accountability); Mashaw, *supra* note 74, at 118-26 (providing a “partial taxonomy” of “accountability regimes”). While this literature is theoretically rich, instead of searching for a conceptual consensus, I seek only to define particular terms as I use them in order to advance my more substantive argument.
78. See Minow, *supra* note 21, at 1263 (“Private economic markets generate accountability through the operation of supply and demand, which tests the viability of ideas, products, and processes by their ability to attract and maintain a sufficient number of purchasers to meet costs and generate desirable profits.”).
79. See Mashaw, *supra* note 74, at 120-21 (arguing that one of the most visible forms of “public governance accountability”—what he calls “political accountability”—is the election).

public office holders through competitive elections.”⁸⁰ But this phenomenon—the perception that partisans are calling the shots—is more than mere irony. Rather, it is a real and persistent feature of our current election administration system that might usefully be referred to as the *Katherine Harris problem*. The Katherine Harris problem is the gnawing notion that election winners charged with holding election administrators accountable also lack the incentives to do so after they have won. The well-publicized consequences of this peculiar feature of our electoral system are familiar. Perhaps most famously, during the 2000 election, Katherine Harris served as both co-chair of Florida’s Bush-Cheney campaign and the state’s chief election officer.⁸¹ Amid calls for a recount, Harris and the Democratic Attorney General clashed over the statutory grounds for doing so.⁸² After the Florida Supreme Court ruled against her, Harris announced that all recounts had to be finished by November 14, 2000.⁸³ Again, she was rebuffed by the state supreme court, which moved the deadline to November 26, 2000.⁸⁴ When one county sought a further extension, Harris denied the request,⁸⁵ and instead certified a Bush-Cheney victory in Florida by 537 votes.⁸⁶ Unsurprisingly, many viewed Harris’s motives with suspicion.⁸⁷ Consequently, to many, Katherine Harris quickly became a symbol for the idea that the very institutions designed to keep elected officials in check also depend on those same officials for oversight. Are foxes guarding the henhouse?⁸⁸

-
80. DAVID A. SCHULTZ & ROBERT MARANTO, *THE POLITICS OF CIVIL SERVICE REFORM* 74 (1998); see also Rubin, *supra* note 74, at 2074 (“[T]he idea that elected officials are accountable rests on the principle of election, where one chooses another to express or represent her views . . .”).
81. See SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 29 (2006).
82. *Id.* at 30; see RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 92-94 (2001).
83. OVERTON, *supra* note 81, at 30.
84. *Id.* at 31.
85. *Id.*
86. *Id.* at 32.
87. See POSNER, *supra* note 82, at 245 (“The Florida election officials’ interpretations of the code were reasonable . . . but the widespread suspicion that their *motivation* was political is understandable, to say the least.”).
88. Cf. Nathaniel Persily, Reply, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (arguing that politically motivated redistricting is more desirable than judicial efforts to police it).

PRIVATIZING DEMOCRACY

Though there is some degree of professionalization, most states' chief election officials are partisanly elected, while others are appointed.⁸⁹ These same officials routinely participate as candidates in races they are responsible for overseeing or act as leaders of their respective political parties. In 2000, for example, the secretaries of state in Arizona, Kansas, Michigan, Missouri, and Ohio also chaired their states' reelection campaigns for President Bush.⁹⁰ More recently, secretaries of state in at least seven states have overseen gubernatorial or congressional races in which they were also candidates.⁹¹ There is little surprise, then, when those called upon to certify the election results often call shots or interpret standards in ways that happen to benefit their parties.

But the scope of this decision-making power starts not after the polls close, but reaches as far back to when the voting equipment itself is chosen. And even there, partisanship—or at least the perception of partisanship—continues to pervade. While federal ethics rules require lawmakers to wait a year after leaving office before taking jobs as lobbyists, no such prohibitions exist for election officials. As a result, “there is a revolving door between election administration and the voting machine industry.”⁹² Recently, top election officials in at least five states left their government posts to become lobbyists for the growing voting machine industry after HAVA granted billions of dollars to states to update their machines.⁹³ When California Secretary of State Bill Jones left office in 2003, for example, he became a consultant to Sequoia Voting Systems. The Assistant Secretary of State also joined Sequoia full-time.⁹⁴ Similarly, former secretaries of state from Florida and Georgia joined Election Systems & Software and Diebold Election Systems, respectively, as lobbyists.⁹⁵ San Diego's Deborah Seiler went to work in 1991 as a customer service and sales representative for two voting machine vendors after more

89. See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration To Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974-76 (2005) (noting that state chief election officials are elected in thirty-three states). Locally, there is even greater variation, as the state-based method of selection does not necessarily match that employed by the local. In California, for example, the secretary of state runs in a partisan election, but on the county level the local official may either be a county clerk elected in a nonpartisan election or a registrar of voters appointed by and serving under the county board of supervisors. CAL. CONST. art. V, § 11; CAL. GOV'T CODE § 26802 (West 2008).

90. See Urbina, *supra* note 7.

91. *Id.*

92. *Id.*

93. *Id.*; see *infra* Section II.B.

94. Editorial, *On the Voting Machine Makers' Tab*, N.Y. TIMES, Sept. 12, 2004, at WK12.

95. *Id.*

than a decade of service as the chief elections officer.⁹⁶ By 2004, Seiler was a county election official again, where she negotiated contracts for voting machines.⁹⁷ When election officials charged with choosing and accepting bids for voting equipment have recent ties to the companies who manufacture them, the temptation for self-dealing is great. Even more perniciously, the potential for collusion increases, and voters are left to wonder whether the machines before them were rigged in favor of the party most eager to walk through the revolving door.

In this manner, the touchstones of traditional public accountability—elections—are inappropriate as a principled means of vindicating the legitimacy of American elections themselves. The Katherine Harris problem is, for now, a persistent feature of our electoral system. This problem manifests itself both in terms of the perceived self-dealing of partisanly appointed or elected election officials, as well as the revolving door between the voting machine industry and political parties. Because public accountability is an inadequate heuristic for understanding the kind of mechanisms that are necessary to foster election integrity, it is necessary to look to other accountability tools and how they might create the proper incentives for sanctioning election administrators and voting machine vendors alike.

B. *The Stunted Market Problem*

This nexus among candidates, election administrators, and private contractors underscores the special nature of the accountability problem in the election context. Securing public confidence in elections will depend both on public accountability tools that can regulate the relevant private parties, as well as private accountability measures to check partisan public officials. Put differently, just as public regulation is often justified in the wake of market failure, markets can also step in where government agents have failed. In these circumstances, “privatization will replace political accountability with market accountability . . . competitive suppliers will prevail and eliminate the poor ones.”⁹⁸ Insofar as partisanship will always threaten the legitimacy of election results, private accountability tools can help prevent the inevitable temptations that arise from asking politicians to regulate themselves. Market incentives for

96. See Urbina, *supra* note 7.

97. *Id.*

98. Peter Hettich, *Governance by Mutual Benchmarking in Postal Markets: How State-Owned Enterprises May Induce Private Competitors To Observe Policy Goals*, 32 U. DAYTON L. REV. 199, 216 (2007).

PRIVATIZING DEMOCRACY

profit and reputation among repeat players would penalize manufacturers who produce faulty machines and the election officials who continue to contract with them. By decoupling the Katherine Harris problem and voting technology investment decisions, the nation's election infrastructure would more likely serve democratic values like security, transparency, and accuracy.

Numerous characteristics of the private market for voting machines, however, suggest that it is unlikely to be a robust one on its own. Elections are relatively infrequent, occurring only once or twice a year. The barriers to entry in terms of start-up costs and capital can be formidable.⁹⁹ The resulting lack of competition and new market players stymies innovation. Unfortunately, Congress's short-sighted Help America Vote Act (HAVA) stunted whatever potential there was for proper market incentives to promote electoral integrity.¹⁰⁰ Passed in 2002, HAVA provided over \$3.8 billion in federal funding to spend on election administration reform,¹⁰¹ including \$325 million for states to replace or upgrade their voting equipment.¹⁰² Section 102 authorized payments to states for the replacement of punch card or lever voting machines as long as they could commit to the replacements in time for the November 2004 election, extendible for good cause until the first general election held after January 1, 2006.¹⁰³ Twenty-three states sought and received such a waiver.¹⁰⁴ Because the Act encouraged the relatively quick purchase and replacement of voting technology, it limited opportunities and incentives for the industry to develop best practices, experiment with different technologies, and cultivate professional relationships with election officials in identifying their constituents' needs.

The legislation instituted a number of deadlines that spurred the quick sale of existing technology rather than allowing time to vet and test better-designed models or develop newer ones, thus undermining the market's power to spur

99. See Joseph Lorenzo Hall, *Transparency and Access to Source Code in Electronic Voting* 12-13 (2006), http://www.josephhall.org/papers/jhall_evto6.pdf (unpublished manuscript) (describing barriers to entry in the voting machine market).

100. 42 U.S.C. §§ 15,301-15,545 (Supp. V. 2005).

101. *Id.* §§ 15,304, 15,407, 15,424, 15,443, 15,453, 15,472.

102. See *id.* §§ 15,301-15,302, 15,481; ELECTION REFORM INFO. PROJECT, UNIV. OF RICHMOND, *ELECTION REFORM BRIEFINGS: THE BUSINESS OF ELECTIONS 8* (2004), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/electionline_081104.pdf.

103. 42 U.S.C. § 15,302.

104. United States Election Assistance Commission, *Frequently Asked Questions Regarding Appropriate Uses of HAVA Funds* (Oct. 2006), http://www.eac.gov/election/HAVA_Funds/docs/legal-faq2019a.pdf/attachment_download/file.

innovation. Critically, the Help America Vote Act required that any money unspent by the final deadline of January 1, 2006, be repaid to the federal government.¹⁰⁵ For the producers of voting machines, HAVA was thus immediately recognized as an “unprecedented” revenue boon.¹⁰⁶ Increasing their market share would depend primarily on their ability to sell quickly; thus, “there was little incentive to develop ‘better’ machines and every incentive to sell as many machines as possible.”¹⁰⁷ And those who won the race won big. Four companies—Diebold Election Systems, Election Systems & Software (ES&S), Sequoia Voting Systems, and Hart InterCivic—count eighty percent of all the ballots in America.¹⁰⁸ Diebold alone has sold more than 130,000 voting machines resulting in revenues of at least \$230 million.¹⁰⁹ Although this handful of companies dominates, the industry has also seen rapid growth, with at least nineteen known vendors competing for multimillion dollar state and local contracts.¹¹⁰

Because the burgeoning voting industry is still nascent—with novel technology features demanded rapidly in response to newly discovered flaws—standards for security, functionality, and accessibility have fluctuated greatly. Against this backdrop, states have found themselves saddled with deficient voting machines and increasingly dependent upon vendors for maintenance and technical support.¹¹¹ By encouraging purchases, HAVA stymied incentives for innovation and ensured that future upgrades would occur “only infrequently and at great cost to state and local election agencies.”¹¹² In other words, the Help America Vote Act stunted a potentially robust market by artificially inflating demand and encouraging quick and expensive investments in still-developing technology. Because suppliers were competing in a relatively new market with eager and impatient buyers, they had little incentive to develop and test products that could better help guarantee election integrity. Furthermore, HAVA had no funding provisions for subsequent years of

105. 42 U.S.C. § 15,302.

106. Warren Stewart, *Do You Know How Your Vote Will Be Counted?*, WASH. SPECTATOR, Mar. 1, 2006, at 1.

107. *Id.*

108. Robert F. Kennedy, Jr., *Will the Next Election Be Hacked?*, ROLLING STONE, Oct. 5, 2006, at 42.

109. *See id.* at 43.

110. ELECTION REFORM INFO. PROJECT, *supra* note 102, at 5.

111. *See* ELLEN THEISEN, VENDORS ARE UNDERMINING THE STRUCTURE OF U.S. ELECTIONS 22 (2008), <http://www.votersunite.org/info/ReclaimElections.pdf>.

112. Brandon Fail, Comment, *HAVA's Unintended Consequences: A Lesson for Next Time*, 116 YALE L.J. 493, 494 (2006).

PRIVATIZING DEMOCRACY

equipment and maintenance, leaving counties to fend for themselves in negotiating warranties or service contracts.¹¹³

At least one commentator has also pointed out that “HAVA’s strict four-year timetable encouraged and entrenched the practice of purchasing election equipment, despite the fact that leasing may well be a better option.”¹¹⁴ Many counties in Rhode Island, Maryland, and a few other states currently engage in the practice, and the results have been promising.¹¹⁵ Leasing both avoids the large upfront investments in equipment and better accommodates upgrades. States can also strike lease agreements that actually lower total costs over the long run, despite short-term premiums. In Rhode Island, for example, the state legislature stipulated that they would only lease from ES&S if the total cost, including service and equipment, was less each year than maintaining the state’s lever machines.¹¹⁶ Rhode Island’s lease-to-own agreements—including maintenance, service, and consulting—cost approximately \$1.50 per voter per year (over fifteen years).¹¹⁷ A report published by the Maryland Secretary of State’s office similarly suggests that leasing costs range from \$1 to \$3 per voter per year, depending on population density.¹¹⁸ These estimates are only slightly higher than what some counties currently budget annually for their voting equipment purchases and maintenance.¹¹⁹

In addition to subverting the market mechanisms that may have increased competition or created a secondary leasing market, HAVA’s regulatory structure also lacks real authority and consistently fails to exercise what little authority it does possess. As a result, the Act neglects to provide an institutional apparatus that might otherwise substitute public accountability measures for the markets it displaced. HAVA’s Title II, for instance, established the Election Assistance Commission (EAC) to serve as an information clearinghouse and provide election assistance with the active involvement of the Department of Commerce’s National Institute of Standards and Technology.¹²⁰ In many ways, “[t]he EAC was designed to have as little regulatory power as possible,”¹²¹ with an even number of members (four) and

113. See THEISEN, *supra* note 111, at 22.

114. Fail, *supra* note 112, at 494 (emphases omitted).

115. CALTECH/MIT VOTING TECH. PROJECT, *supra* note 14, at 52.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. 42 U.S.C. §§ 15,321-15,362 (Supp. V. 2005).

121. Shambon, *supra* note 53, at 428.

three-member approval required to undertake any action. “For the most part, [the Commission] cannot ‘issue rules, promulgate regulations, or impose any requirement on a state or unit of local government.’”¹²² Among the EAC’s duties are to develop and adopt voluntary guidelines on provisional voting, statewide voter registration databases, and mail-in registration;¹²³ to conduct studies on election administration;¹²⁴ and to research methods of improving access for voters with disabilities and those who are not proficient in English.¹²⁵ While the EAC does not have the power to impose binding requirements on state and local election officials, it does have the power—indeed the responsibility—to conduct research and issue nonbinding guidance.¹²⁶ Accordingly, in 2005, the EAC released the *Voluntary Voting System Guidelines* for system functional requirements, performance characteristics, documentation requirements, and evaluation criteria for the national certification of voting systems.¹²⁷ The guidelines took effect in December 2007, at which time voting systems would no longer be tested against the 2002 voting system standards developed by the Federal Election Commission.¹²⁸

Even then, however, voting systems will likely be tested by independent testing authorities (ITAs), private entities that contract directly with private vendors to conduct manual and automated source code review, documentation review, and some systems-level testing of full voting systems.¹²⁹ Each voting system must pass both hardware and software testing by an ITA before it is considered “federally qualified” and given a National Association of State Election Directors identification number.¹³⁰

122. *Id.* (quoting 42 U.S.C. § 15,329).

123. 42 U.S.C. § 15,501(a).

124. *Id.* § 15,322(3).

125. *Id.* § 15,441(a)-(b).

126. *Id.* § 15,322(1), (3).

127. States may decide, however, to adopt these guidelines before the effective date. See GOV’T ACCOUNTABILITY OFFICE, ELECTIONS: FEDERAL EFFORTS TO IMPROVE SECURITY AND RELIABILITY OF ELECTRONIC VOTING SYSTEMS ARE UNDER WAY, BUT KEY ACTIVITIES NEED TO BE COMPLETED 17-18 (2005), available at <http://www.gao.gov/new.items/do5956.pdf>.

128. See ERIC A. FISCHER, FEDERAL VOLUNTARY VOTING SYSTEM GUIDELINES: FAQs, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 1 (2006), available at http://assets.opencrs.com/rpts/RS22363_20060111.pdf.

129. See ELLEN THEISEN, MYTH BREAKERS: FACTS ABOUT ELECTRONIC ELECTIONS 18-24 (2005) (describing testing and certification processes), available at <http://www.votersunite.org/MB2.pdf>.

130. *Id.*

PRIVATIZING DEMOCRACY

Because the testing and qualification process is conducted under a confidential contract between the ITA and the vendor applying for qualification, the results are kept secret from election officials, the media, and the general public.¹³¹ “While some states allow any voting system to be offered for sale that has been certified to meet the voluntary federal standards, many states impose additional requirements. In these states, vendors must demonstrate that they have met these additional standards before offering their machines for sale in that state.”¹³² Most states contract out to the ITAs to ensure that vendors meet these additional standards.¹³³ As such, the overall system is highly fragmented, decentralized, and nontransparent.

By allowing states the ultimate authority to set standards and contract with private testing authorities, HAVA had the effect of shifting from a system of local control with loose state and federal oversight to one with stronger state control and still weak federal oversight. While the EAC issues voluntary federal guidelines for voting equipment, states are the entities finally charged with deciding whether to adopt these testing and certification requirements entirely, in part, or not at all. As of 2004, twenty-six states using DRE equipment for the first time required voting systems to be certified according to federal requirements.¹³⁴ Others may require state certification of voting systems but do not require national testing.¹³⁵ Based on an April 2005 survey, the EAC has identified at least thirty states that require their voting systems to meet federal standards issued by the Federal Election Commission, EAC, or both.¹³⁶ Despite these limited incentives for compliance, the ultimate discretion in terms of what kind of voting technology to use, and who to buy it from continues to lie with the states. Even though most states have currently adopted federally promulgated standards, their continuing compliance remains strictly voluntary with no consistent means of enforcement.

131. *Id.*

132. DOUGLAS W. JONES, TESTING VOTING SYSTEMS (2004), <http://www.cs.uiowa.edu/~jones/voting/testing.shtml>.

133. *Id.*

134. GOV'T ACCOUNTABILITY OFFICE, ELECTIONS: ALL LEVELS OF GOVERNMENT ARE NEEDED TO ADDRESS ELECTRONIC VOTING SYSTEM CHALLENGES 37 (2007), *available at* <http://www.gao.gov/new.items/do7576t.pdf>.

135. *Id.* at 17.

136. *Id.*

III. PROCUREMENT CONTRACTS AS AN ACCOUNTABILITY TOOL

If partisanship renders public accountability mechanisms necessarily suspect while emaciated markets subvert private forms of accountability, accountability tools in the election context must find creative ways to replicate features of both. This Part explores those aspects of both regimes best suited to confront the unique problems that confound the administration of elections. Public measures are essential in still-nascent voting machine markets to establish federal oversight mechanisms that emphasize transparency and prevent legitimacy externalities, kept in check by electoral mandates. Private measures, in turn, are crucial for creating external incentives based on the bottom line, independent of the Katherine Harris problem of perceived self-dealing. These regimes—public and private accountability—are not always mutually distinct, but they help to model the dimensions along which incremental reforms might be pursued. Because both sets of institutional design features are often at cross-purposes, they must be well ordered to induce profit-driven innovation at one stage, even if it entails disclosing trade secrets or allowing public access and verification in another.

Against this backdrop, procurement contracts emerge as an important, though largely overlooked, accountability tool. Procurement contracts encompass an important hybridization of traditionally public and private principles well-suited to mimicking market relationships through bargaining and maintaining important baselines through mandatory clauses. On the one hand, procurement contracts resemble traditional commercial contracts with their respective causes of action and remedies. On the other hand, government procurement at all levels also requires contractors to follow a well-developed body of regulations designed to achieve a battery of public norms.¹³⁷ Procurement contracts thus offer features of both public and private accountability that can be marshaled in fruitful ways. While their use is certainly not new—state governments have regularly used procurement contracts to purchase voting machines—it is time to draw renewed attention to how such contracts can be designed to serve uniquely democratic values.

137. See Freeman, *supra* note 27, at 164-65; see also Elissa Bretz, *The ABCs of Accountability: Can Federal Contracting Regulations Fix School Privatization?*, 36 PUB. CONT. L.J. 667, 677-79 (2007) (describing policies underlying federal procurement process); Steven Kelman, *Buying Commercial: An Introduction and Framework*, 27 PUB. CONT. L.J. 249, 250-51 (1998) (explaining various requirements imposed by “statute and regulation” in the government contracting process).

PRIVATIZING DEMOCRACY

A. Diversifying the Toolkit

Governments have long procured from private vendors a multitude of goods and services, ranging from office supplies to weapons systems.¹³⁸ Relative to internal production, purchasing from external vendors allows the government flexibility and the delegation of expertise and research to outside firms.¹³⁹ Though procurement regulations vary widely across states,¹⁴⁰ general principles of procurement help shed light upon the ethos underlying the procurement regulation system as a whole. At their core are two norms that promote both public and private accountability: transparency and fair competition.¹⁴¹ While the latter promotes best-value and market sanctions, the former allows those affected to demand information from vendors and officials alike.

What has not, however, been well articulated in the literature—particularly on election administration reform—is the procurement contract’s potential role for fostering greater access to the technology responsible for facilitating elections. Technological purchases particularly demand rethinking about the dynamic relationship between government officials and manufacturers, who must be relied upon to service and provide updates as public uses for a specific technology evolve.¹⁴² As the federal government has become an increasingly “prominent purchaser in the private marketplace,” attaching “collateral conditions to procurement contracts” is an increasingly effective tool for shaping public policy.¹⁴³ Procurement contracts present a wide range of options for meeting needs unique to the voting machine market and its attendant need

138. See LESTER M. SALAMON, *PARTNERS IN PUBLIC SERVICE* 42-43 (1995); Freeman, *supra* note 27, at 155.

139. See STEVEN KELMAN, *PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE* 2 (1990).

140. See Daniel I. Gordon, *Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make*, 35 *PUB. CONT. L.J.* 427, 435 (2006) (“[D]ifferent levels of Government may have different procurement law systems (as the individual states do in the United States) . . .”).

141. See Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law*, 36 *PUB. CONT. L.J.* 307, 308 (2007) (“Policymakers crafting a sound procurement system must balance a number of goals. Of those goals, experience has shown that competition, transparency, and integrity are probably the most important.” (emphasis omitted)).

142. See KELMAN, *supra* note 139, at 1-2 (discussing how government purchases of computer technology present unique considerations regarding the need for innovation and flexibility).

143. Andrew George Sakallaris, *Questioning the Sacred Cow: Reexamining the Justifications for Small Business Set Asides*, 36 *PUB. CONT. L.J.* 685, 686-87 (2007).

for democratic legitimacy. Each of these options must be evaluated with a keen eye toward preventing the negative externalities that threaten and undermine voter confidence.

Federal procurement contracts are currently governed by elaborate statutory and regulatory requirements, including the Federal Acquisition Regulation (FAR).¹⁴⁴ The FAR establishes detailed procedures for almost every aspect of the procurement process including notice, competition, awards, and contract management.¹⁴⁵ The Competition in Contracting Act of 1984, in turn, requires the federal government to use two defined methods of competitive bid procedures: sealed bidding and competitive proposals.¹⁴⁶ The sealed bidding process essentially entails formally advertising specific procurement needs and then awarding the contract based on the lowest bid.¹⁴⁷ Using price as the sole criterion for government contracts can be an attractive metric because it removes discretion from public officials, while also saving taxpayers money.¹⁴⁸

Procurement by competitive proposals, by contrast, involves the publication of a request for proposals (RFP) that notifies vendors of that which the government seeks. Bidders respond to the RFP with written proposals and often live demonstrations of specified tasks. The government then selects the vendor whose proposal best matches the criteria in the RFP.¹⁴⁹ Unlike sealed bidding, competitive proposals are intended to allow greater discretion and the recognition of criteria other than price alone.¹⁵⁰ At the same time, this discretion is still constrained through further regulations that restrict the specific rules, criteria, and information that can be used to award the final contract.¹⁵¹ Because an express purpose of the Federal Acquisition Regulation is

144. The FAR states, for example, that one of its key purposes is “[p]romoting competition.” 48 C.F.R. § 13.104 (2007). The principal requirements are contained in Titles 10 and 41 of the *United States Code*, see 10 U.S.C. §§ 2202, 2302-2331 (2000); 41 U.S.C. §§ 251-266, and the Federal Acquisition Regulation, 48 C.F.R. pts. 1-53. The Title 10 provisions cover procurement by the Armed Forces, Coast Guard, and NASA. See 10 U.S.C. § 2303. The Title 41 provisions cover procurement by the federal government generally and executive agencies. See 41 U.S.C. § 252.

145. See 48 C.F.R. pt. 1.

146. 41 U.S.C. § 253.

147. See KELMAN, *supra* note 139, at 15.

148. *Id.*

149. *Id.* at 18-19.

150. *Id.*

151. *Id.* (“The three major limitations on discretion in procurement by competitive proposals are the rules and practices for establishing the government’s requirements, the criteria by which proposals from vendors are evaluated, and the information that may be used in evaluating proposals against those criteria.”).

PRIVATIZING DEMOCRACY

to promote “business [conducted] with integrity, fairness, and openness,”¹⁵² agencies are required to set out detailed evaluation criteria and follow these criteria when awarding a contract. Most major government purchases of information technology including electronic voting machines are acquired through competitive proposals.¹⁵³

Given the relative lack of traditional administrative law constraints in many states,¹⁵⁴ the competitive contracting process is an important—though under-theorized—accountability mechanism. When purchasing voting machines, state and local governments are not contracting to allow private actors to play significant roles performing ongoing public services in the same way as they might for, say, private prisons.¹⁵⁵ At the same time, they are not contracting for the purchase of a discrete good. Instead, election officials are, in effect, purchasing the mechanization of vote counting, including the machinery and a bundle of services like repair and expertise. As a result, while procurement contracts do not raise precisely the same oversight and “public function” questions as in the more purely service delivery context,¹⁵⁶ they can

152. 48 C.F.R. § 1.102(b)(3) (2008).

153. See KELMAN, *supra* note 139, at 8, 18. For examples of RFPs for vote-counting technology, see Verified Voting Foundation, Voting Equipment RFPs Issued to Date, <http://www.verifiedvotingfoundation.org/article.php?id=6129> (last visited Dec. 15, 2008).

154. See Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 555 (2001) (describing how state institutions differ from federal ones in ways that undermine traditional administrative law constraints: state legislatures are “more prone to faction” and apt to “produc[e] . . . incoherent regulatory schemes”; state executive branches lack mechanisms of direct electoral accountability; and state judges are less independent). State legislatures also meet less frequently than Congress does so they often exercise greater control through rules review procedures at the expense of a robust separation of powers. See *id.* at 562-68. Once again, however, asking elected legislators to review regulations for the acquisition of vote-counting equipment is yet another version of the Katherine Harris problem. Similarly, many state judges are elected, so even judicial review over state procurement regulations is subject to heightened suspicion in the election administration context.

155. There is a large literature on the implications of prison privatization. See, e.g., BYRON EUGENE PRICE, *MERCHANDIZING PRISONERS: WHO REALLY PAYS FOR PRISON PRIVATIZATION?* (2006) (exploring the implications of publicly traded for-profit prisons); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005) (calling for a reevaluation of punishment practices in light of state private prisons); Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577 (1992) (comparing empirical indices of quality between public and private prisons).

156. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621 (1991); G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 345 (1997).

nevertheless play a central role in securing and enforcing consistent election integrity.

B. Procurement's Promise

But what kind of role should procurement contracts play in promoting election integrity? Procurement contracts are, by design, relatively flexible in the scope of their provisions since governments have wide latitude in their requests for competitive proposals and the terms upon which they enter into contractual agreements.¹⁵⁷ The heterogeneity of current procurement practices in election technology, in turn, reflects the wide variation in state implementation plans submitted pursuant to the Help America Vote Act.¹⁵⁸ After HAVA's enactment, some states moved aggressively to purchase one Direct Record Electronic (DRE) system for the whole state.¹⁵⁹ Some delayed their choices because of federal funding uncertainty, questions over what the EAC would ultimately decide constituted HAVA Title III compliance,¹⁶⁰ a desire for technological improvements,¹⁶¹ or controversies over DRE security.¹⁶² Some decided to leave the choice wholly to local governments.¹⁶³ Several states simply retained their current systems like paper balloting for budgetary reasons.¹⁶⁴

There are currently four major procurement regimes across states: state-level procurement of one voting system, state-level procurement of multiple voting systems, local level procurement, and a "wait and see" method.¹⁶⁵ Under the first method, which is deployed in six states,¹⁶⁶ state governments control the entire procurement process and have purchased one voting system for either the entire state, or only those jurisdictions that needed their machines replaced. In contrast, two states—Ohio and Michigan—have taken a more intermediary approach by negotiating contracts with several vendors (in the

157. See Lewis J. Baker, *Procurement Disputes at the State and Local Level: A Hodgepodge of Remedies*, 25 PUB. CONT. L.J. 265, 285 (1996).

158. See Shambon, *supra* note 53, at 431-37.

159. See *id.* at 432 (Mississippi and South Carolina).

160. *Id.*

161. *Id.* (Connecticut, Nebraska, and Vermont).

162. *Id.*

163. *Id.* (Massachusetts).

164. *Id.* at 433.

165. ELECTION REFORM INFO. PROJECT, *supra* note 102, at 12.

166. *Id.* (Arizona, Georgia, Maryland, Nevada, North Dakota, and South Carolina).

PRIVATIZING DEMOCRACY

hopes of receiving better prices through bulk purchases) and then allowing counties to select from this list.¹⁶⁷ A number of other states, including Pennsylvania and California, have continued the traditional practice of allowing local officials to purchase voting systems for their jurisdictions. Others are waiting to see whether the EAC and National Institute of Standards and Technology will provide more specific guidelines on the procurement process; these states hope to purchase high quality machinery and are allowing others to test various models.¹⁶⁸

Since procurement practices vary widely across states, federal legislation requiring standard provisions in every state voting machine contract would introduce some much needed uniformity. These narrow mandatory clauses could preserve the discretion and tailoring necessary for local budgets, while at the same time promoting structured competition around baseline national requirements. Procurement contracts can thus serve as a gap-filling mechanism against the current backdrop of weak regulatory oversight and lack of centralized coordination. These contracts have the potential to function as a crucial accountability mechanism that should be thought of in tandem with other tools in the broader policy toolkit, creating the necessary “multiple” and “overlapping” accountability checks on the rationality and transparency of decisionmaking.¹⁶⁹ Procurement contracts can be especially valuable in the electoral context because of their ability to create ex ante incentives through RFPs and negotiations encouraging manufacturers and officials to work together toward the same result: voting technology that not only records and counts votes accurately, but also can be publicly verified.

Indeed, this very impulse for joint cooperation lies at the heart of recent legal challenges. In *Americans for Safe Access v. County of Alameda*, for instance, proponents of marijuana legalization cited California’s Election Code and Constitution in challenging a defeated ballot measure that lost by a margin of 191 votes.¹⁷⁰ The trial court ruled that after the lawsuit was filed, county election officials should have preserved the data on Diebold machines in case of a court-ordered recount.¹⁷¹ Specifically, the judge found that county officials had not only failed to retrieve backup data from electronic voting machines’

167. *Id.*

168. *Id.*

169. Jocelyn M. Johnston & Barbara S. Romzek, *Contracting and Accountability in State Medicaid Reform: Rhetoric, Theories, and Reality*, 59 PUB. ADMIN. REV. 383, 387 (1999).

170. Amended Complaint, *Ams. for Safe Access v. County of Alameda*, No. RG 04-192053, at 26 (Cal. App. Dep’t Super. Ct. Dec. 30, 2004).

171. Final Judgment, *Ams. for Safe Access v. County of Alameda*, No. RG 04-192053, at 2 (Cal. App. Dep’t Super. Ct. Feb. 27, 2008).

activity logs, but also returned the devices to their manufacturer, Diebold Election Systems. “Why the County did so is anybody’s guess,” the judge declared, “[b]ut the result is absolutely certain: the information on those machines is lost completely.”¹⁷² Voters no longer had the ability to verify the results of the election. Thus, the judge ruled that Alameda County should pay attorneys’ fees and reimburse the plaintiffs more than \$22,000 for the disputed recount costs.¹⁷³ Though election officials (as opposed to manufacturers) were directly sanctioned here, the important point is that the specific harm suffered by the plaintiffs was their inability to access the information necessary for corroborating the referendum’s results. Election officials as well as private voting machine vendors lacked the incentives to keep and ensure access to the data stored on the machines.

Instead of relying only on the statutory or constitutional remedies available in a particular state, however, parties seeking to verify an election’s results should also be able to look at the underlying procurement contracts as a further enforcement mechanism. While the next Part will suggest specific considerations for designing these contracts, this Part has argued that the procurement process has been a conceptually underdeveloped arena for thinking about accountability in election administration—and should no longer be. Procurement contracts can usefully be considered hybrids of traditional public and private accountability principles insofar as they are subject to a variety of norms such as transparency and fairness and also depend on market competition and efficiency in the ultimate award of the contract itself.

IV. TOWARD PRINCIPLED REFORM

When officials and vendors alike refuse to allow election results to be verified, few contractual avenues for relief are consistently available across states. This disparity results in part from variations in procurement regimes. Contracting localities diverge in bidding criteria, the parties designated to upgrade technology and, most importantly, who bears the legal risks should voting machines fail. This heterogeneity exacerbates the problem of legitimacy externalities. Underspecified and unenforced vendor contracts make it easier for manufacturers and officials to pass the buck when ballots disappear or machines malfunction. A lack of public and private accountability in one

172. Order Granting Sanctions and Continuing Motions for Sanctions, *Ams. for Safe Access v. County of Alameda*, No. RG 04-192053, at 8 (Cal. App. Dep’t Super. Ct. Sept. 25, 2007).

173. Final Judgment, *supra* note 171, at 3. In addition, the judge voided the previous ballot measure and ordered it to be returned to the ballot in November 2008. *Id.* 2-3.

PRIVATIZING DEMOCRACY

jurisdiction fosters nagging doubts about the results in others; voters across the country are left to wonder whether anyone is responsible for ensuring that their votes are properly counted. Partisanship and the perverse incentives arising from the industry's revolving door only add to these fears.

This Part argues that an important first step toward publicly legitimate elections requires centralized baseline standards and the development of best practices. It accordingly proposes one narrow set of amendments to the Help America Vote Act and enforcement measures aimed at improving the performance of voting machines through incentive-based bargaining. These amendments would attempt to ensure better access to vote-counting software through mandatory procurement contract provisions, while still respecting the need to protect business investments. Critically, these provisions should focus on performance-, not design-based, standards that are enforced by third-party beneficiaries. By the same token, this Part also discusses some broader principles by which other proposals might be drafted and debated. Although not a call for the wholesale federalization of election administration, these targeted reforms could go far in mitigating the democratic threats presented by unverifiable elections.

A. Amending the Help America Vote Act

HAVA was and remains a watershed piece of legislation. In addition to committing federal funds toward new voting technology and requiring accessibility for disabled voters, HAVA also created the Election Assistance Commission.¹⁷⁴ In effect, the Act transferred the task of election administration from localities to a stronger state-centered regime with still deferential federal oversight.¹⁷⁵ Many aspects of the Act remain important and relevant. Nevertheless, continuing public travails with voting technology demand HAVA's amendment.

1. Design Versus Performance

Recent efforts to amend the Help America Vote Act usually focus on how voting machines should be designed. The most prominent proposals, for example, advocate some form of voter-verified paper trails,¹⁷⁶ which would

^{174.} 42 U.S.C. §§ 15,301(a), (b)(1)(F), 15,321, 15,481(a)(3).

^{175.} Shambon, *supra* note 53, at 431.

^{176.} See Clifford A. Jones, *Out of Guatemala?: Election Law Reform in Florida and the Legacy of Bush v. Gore in the 2004 Presidential Election*, 5 ELECTION L.J. 121, 136 (2006) ("Although

require attached printers to generate a contemporaneous paper record for voters to review.¹⁷⁷ Design-based standards like these specify how a technology must operate and what features it must possess.¹⁷⁸ Their principal advantage is their enforceability: after manufacturers follow strict directions for how to build a product, an inspector can readily determine compliance.¹⁷⁹ The major problem with design-based proposals, however, is that they tend to stifle innovation—particularly under conditions of legal or technological uncertainty.

Performance standards, by contrast, set forth guidelines for the functions that a piece of technology should be able to perform.¹⁸⁰ Instead of specifying every feature of the machinery itself, performance standards simply identify the kinds of outcomes the technology should be able to obtain.¹⁸¹ While design standards define the method by which manufacturers are required to achieve a stated goal, manufacturers under a performance standard are free to achieve the enumerated goal in any way they deem most cost-efficient.¹⁸² The principal advantage of this approach is that, in effect, it allows the market to create and shape a product.¹⁸³ Through competition, manufacturers possess the incentives to develop new software and hardware features to minimize their costs.

What HAVA currently lacks—and needs—is a provision that governs procurement contracts between states and private manufacturers. Section 305 of the Act explicitly provides that “[t]he specific choices on the methods of complying with the requirements of this title shall be left to the discretion of the State.”¹⁸⁴ States are asked to draft “state plans” through which they

election reform communities initially embraced DREs for the many advantages they offer, the last few years or so have seen a rise in concern about the lack of paper trails, specifically voter-verified paper trails, due to perceived threats to ballot security in the form of fraud or manipulation that some believe would be facilitated by DRE machines.”); Tokaji, *supra* note 15, at 1780 (“The flurry of attention to DRE security has caused many advocates to call for a ‘voter-verified paper audit trail,’ prompting bills to mandate this device in both the House and the Senate.”).

177. See Tokaji, *supra* note 15, at 1780.

178. See Sidney A. Shapiro & Robert L. Glicksman, *Goals, Instruments, and Environmental Policy Choice*, 10 DUKE ENVTL. L. & POL’Y F. 297, 305 (2000).

179. See Jay P. Kesan & Rajiv C. Shah, *Shaping Code*, 18 HARV. J.L. & TECH. 319, 340-41 (2005).

180. See STEPHEN BREYER, *REGULATION AND ITS REFORM* 105 (1982); SHARON J. LASKOWSKI ET AL., *IMPROVING THE USABILITY AND ACCESSIBILITY OF VOTING SYSTEMS AND PRODUCTS* 10 (2004), <http://vote.nist.gov/Final%20Human%20Factors%20Report%20%205-04.pdf>.

181. See NEIL GUNNINGHAM & PETER GRABOSKY, *SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY* 442 (1998).

182. See Shapiro & Glicksman, *supra* note 178, at 305.

183. *Id.*

184. 42 U.S.C. §§ 15,485.

PRIVATIZING DEMOCRACY

demonstrate and certify HAVA compliance.¹⁸⁵ State legislatures must then pass implementing legislation. While maintaining this orientation toward cooperative federalism,¹⁸⁶ section 305 (by reference to section 301, which deals with “voting system” requirements)¹⁸⁷ should be amended with a requirement that every state procurement contract with voting machine vendors contain a mandatory clause as a condition for federal funding. Although the precise language would necessarily be developed through consultation with stakeholders and experts, in substance, this narrow clause would demand that all state procurement contracts using federal funds to purchase new voting equipment would allow for the means to verify the votes cast. In other words, this clause would require that the technology and software used in all voting machines would be transparent and available for inspection after contested elections.

However worded, this provision should be performance based, rather than design based. It would delineate the requisite standards, not the specific form of technology—whether open source, paper verified, and so on—that a voting machine should meet. When procurement contract provisions are sufficiently centered on performance, such contracts can introduce market incentives to drive the development of accountability-enhancing design options. In effect, they can be an effective and judicially sanctioned method of “shifting design risk to [the contractor.]”¹⁸⁸ Requiring states to engage in contractual bargaining with proposed vendors has the potential to increase competition and innovation.

There are, of course, numerous challenges to drafting the language of this performance-based clause and the exact wording would benefit from legislative hearings. Because these provisions are intended to define a result—transparent

185. *Id.* § 15,403(a)-(b).

186. Cooperative federalism requires “that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.” *Alden v. Maine*, 527 U.S. 706, 748 (1999). In this view, though the federal government is charged with promoting and protecting federal interests, it must do so in a way that does not “unduly interfere with the legitimate activities of the states.” *Younger v. Harris*, 401 U.S. 37, 44 (1971).

187. 42 U.S.C. § 15,841. The section defines “voting system[s]” as “the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment)” used to “define ballots,” “cast and count votes,” “report or display election results,” and “maintain and produce any audit trail information.” *Id.* 15,481(b)(1).

188. Laura A. Hauser & William J. Tinsley Jr., *Eyes Wide Open: Contractors Must Learn To Identify and React to Design Risks Assumed Under Performance Specifications*, CONSTRUCTION LAW., Summer 2007, at 32.

and accountable vote-counting—rather than the process through which to achieve that result, the clause must identify a narrow, verifiable goal without needlessly constraining the contractor’s ability to meet that goal.¹⁸⁹ The clause should emphasize that its purpose is to provide as much design flexibility and responsibility to the contractor as possible. But again, these specifications cannot be drafted in isolation, but only after consultation with stakeholders who could provide more information about budgeting concerns and costs. Procurement officers should conduct design surveys to ensure that the specifications are sufficiently well defined to enable the contractor to submit a bid for the work that will likely result in the desired end product.

This kind of proposal is not unprecedented. The Environmental Protection Agency, for example, mandates the inclusion of particular clauses in all construction contracts awarded to a grantee.¹⁹⁰ These include “a changes clause, a differing site conditions clause, a suspension of work clause, a termination for default clause, a termination for convenience clause, a right to audit clause and a clause providing for a price reduction for defective cost or pricing data.”¹⁹¹ More specifically, the required contractual language expressly states that “[t]he owner and the contractor agree that the following supplemental general provisions apply to the work to be performed under this contract and that these provisions supersede any conflicting provisions of this contract.”¹⁹² In this manner, voting machine contracts—like the EPA’s construction contracts—should contain off-the-rack provisions that would trump competing efforts to contract around them.

Certainly, a straight statutory mandate by itself could also spur state legislatures to require vendors to allow access to their vote-counting software. However, political entities including state legislatures often lack the political will or resources to adequately protect the interests of voters and candidates. To illustrate, the North Carolina State Board of Elections was charged by statute to procure voting machines only when it could have access to their software, which would be placed in escrow.¹⁹³ In late 2005, however, a potential vendor, Diebold, invoked its commercial property rights and brought a declaratory judgment action against the state, arguing that it could not

189. *Id.* at 36.

190. See 40 C.F.R. § 35.938-8 (2008); Baker, *supra* note 157, at 285.

191. Baker, *supra* note 157, at 285.

192. 40 C.F.R. pt. 35, subpt. E, app. C-2(1)(a) (2008).

193. Act of Aug. 26, 2005, ch. 323, sec. 2(a), §§ 163-165.9A(a)(1), 2005 N.C. Sess. Laws 1156, 1161.

PRIVATIZING DEMOCRACY

supply the required information.¹⁹⁴ Diebold explained that its software constituted a trade secret, and thus did not have to be divulged.¹⁹⁵ After Diebold refused to comply with the law, the Board of Elections, in effect, nullified the statute and proceeded to approve Diebold as a vendor on the tenuous grounds that none of the other bidders could comply with the statutory requirement.¹⁹⁶ Its contract included no requirement to disclose software. A court challenge to that decision was unsuccessful,¹⁹⁷ and ultimately the only fact that prevented the use of Diebold's machines in North Carolina was Diebold's independent decision to withdraw from the state.¹⁹⁸

As this example illustrates, election officials have various incentives—whether born of expediency or the revolving door—that counsel against the unfettered delegation of technology purchasing decisions. Rather, federal funds should be conditioned on a performance-based clause in procurement contracts, whereby suppliers compete for bids through processes that emphasize norms like transparency and fairness. By contrast, simply requiring software disclosure without subjecting it to the procurement process could mean that the requirement would be grafted on after a vendor has already been chosen. Election officials could simply nullify the statute when forced to deal bilaterally with a foregone manufacturer.

Congress could enact such a measure under its various powers, most importantly those granted under the Election¹⁹⁹ and Spending²⁰⁰ Clauses. Consistent with this authority, courts have interpreted Congress's power pursuant to the Elections Clause broadly in upholding legislation like the National Voter Registration Act of 1993.²⁰¹ Under the Spending Clause,

194. See Complaint at 6-8, 10, *Diebold Election Sys., Inc. v. N.C. State Bd. of Elections*, No. 05-CVS-15474 (N.C. Nov. 4, 2005), available at http://www.eff.org/Activism/E-voting/diebold_complaint.pdf.

195. *Id.*

196. See Anne Broache, *North Carolina Defends E-Voting Certifications*, CNETNEWS.COM, Dec. 2, 2005, http://news.com.com/North+Carolina+defends+e-voting+certifications/2100-1028_3-5980671.html.

197. See Electronic Frontier Foundation, *Litigation*, <http://www.eff.org/Activism/E-voting/> (last visited Dec. 5, 2008).

198. Diebold's rival vendor Election Systems & Software eventually agreed to comply with the state's law. See Press Release, Elec. Frontier Found., *After EFF Litigation, Diebold Pulls Out of North Carolina* (Dec. 23, 2005), <http://www.eff.org/press/archives/2005/12/23>.

199. U.S. CONST. art. I, § 4, cl. 1.

200. *Id.* § 8, cl. 1.

201. *E.g.*, *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997); *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 798 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995).

conditional grants like HAVA merely create incentives rather than coercive pronouncements for states and thus do not constitute unconstitutional intrusions into state sovereignty.²⁰² A conditional spending statute is constitutionally permissible since states retain the formal choice either to enact the federal conditions or to refuse the federal funding altogether.²⁰³ For example, Congress has conditioned states' receipt of federal highway funds on the enactment of laws requiring the use of seatbelts,²⁰⁴ as well as raising the drinking age to twenty-one years.²⁰⁵ The Clean Air Act requires states to participate in cleaning up air pollution,²⁰⁶ while the Rehabilitation Act requires federally funded programs to build facilities that accommodate persons with disabilities.²⁰⁷ A host of federal statutes similarly require recipients of federal grants to comply with environmental or safety standards in state procurement and construction contracts.²⁰⁸

2. Contracting Out of Trade Secrets

Given Congress's power, procurement contracts offer an opportunity to shape the incentives of election officials up front, in ways that may stave off costly post-election litigation. Election officials, knowing they could face litigation under the contract, have a greater motivation to draft the contract such that candidates and voters will have greater access *ex ante* to underlying

202. See *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987).

203. See *New York v. United States*, 505 U.S. 144, 168 (1992). In exercising this power, courts have also held that Congress would have to comply with four limitations: (1) the spending must be in pursuit of the general welfare, (2) the condition imposed on the receipt of federal funds must be stated unambiguously so that a state accepting the federal funds is aware of the consequence of that acceptance, (3) the condition on the funds must be related to the federal interest for which the money is being spent, and (4) there must be no other independent constitutional bar. See *Dole*, 483 U.S. at 207-08.

204. Federal Aid Highway Act, 23 U.S.C. § 153 (2000).

205. *Id.* § 158.

206. 42 U.S.C. § 7410.

207. 29 U.S.C. §§ 701-796.

208. See Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 968 n.216 (2007) ("The U.S. Environmental Protection Agency (EPA) has taken an initial step in this direction for the automotive sector by forming a partnership with automobile original equipment manufacturers and their suppliers to encourage the adoption of supplier requirements."); Suppliers Partnership for the Environment, <http://www.supplierspartnership.org> (last visited Dec. 5, 2008). The EPA also has identified private supply-chain contracting requirements as a possible means of reducing the environmental risks posed by nanotechnology. See *Nanoscale Materials*, Notice of Public Meeting, 70 Fed. Reg. 24,574 (May 10, 2005).

PRIVATIZING DEMOCRACY

software and hardware. Indeed, successful election administration demands the means for voters or candidates to examine the data and technology that record and count votes. These technological features serve important reassurance functions. Because HAVA spurred jurisdictions to purchase equipment with little oversight and an expedited timetable, many of them were left with little bargaining power to exact concessions from vendors. As a result, the current regime provides few, if any, avenues of recourse against private manufacturers, who invoke the doctrine of trade secrecy in refusing to divulge their software source code to those contesting election results.

A trade secret is defined as any privileged information used in business that gives one a competitive market advantage.²⁰⁹ The trade secrets doctrine allows businesses to keep commercially valuable information secret for a potentially unlimited amount of time, as a means of concealing their software code and manufacturing processes from competitors.²¹⁰ Consequently, voters and candidates have few legal options for forcing disclosure. Take, for example, a recent November 2006 ruling by a Florida appellate court holding that congressional candidate Christine Jennings could not have access to the software that counted votes during her disputed contest for Florida's thirteenth district.²¹¹ During the election, irregularly high undervote rates on the iVotronic machines used in Sarasota County drew national attention.²¹² Undervotes occur when voters fail to select any candidate on the ballot.²¹³ While absentee ballots in Sarasota County reflected a typical congressional undervote rate of around two percent, the iVotronics reflected an undervote rate of over sixteen percent.²¹⁴ Although the reason for the anomaly is unclear—perhaps more people simply declined to mark a candidate—without access to

209. RESTATEMENT OF TORTS § 757 cmt. b (1939) (“A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”).

210. See David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135 (2007).

211. *Jennings v. Elections Canvassing Comm’n*, No. 1D07-0011 (Fla. Dist. Ct. App. June 18, 2007) (order denying petition for certiorari), available at http://www.votetrustusa.org/pdfs/Florida_Folder/opinion_001.pdf; see also Warren Stewart, *Florida Court Rules in Favor of ES&S Trade Secret Protection*, VOTETRUSTUSA, June 19, 2007, http://votetrustusa.org/index.php?option=com_content&task=view&id=2498&Itemid=113.

212. Bob Mahlburg & Maurice Tamman, *Dist. 13 Voting Analysis Shows Broad Problem*, HERALD-TRIB. (Sarasota, Fla.), Nov. 9, 2006 at 1A.

213. See Laurin Frisina et al., *Ballot Formats, Touchscreens, and Undervotes: A Study of the 2006 Midterm Elections in Florida*, 7 ELECTION L.J. 25, 26 (2008).

214. See Stewart, *supra* note 211.

the software source code, it was difficult to evaluate, let alone rule out, the role that malfunctioning software may have played.²¹⁵ Nevertheless, the judge decided that it was more important to protect trade secrets than to determine the cause of over eighteen thousand undervotes.²¹⁶

In confronting this tension between vendors' intellectual property rights and the demand for accountability, well-designed procurement contracts can help strike a careful balance. When manufacturers submit their bids, they could choose from a variety of options, including source code escrow requirements, independent code reviews, mandatory disclosure of source code, and required use of open source code.²¹⁷ Each option differently balances the various commercial, democratic, and performance interests at stake.

While source code escrow requirements and independent code review center on the actors entitled to see the software, disclosed and open source software requirements focus on the underlying technology. More specifically, source code escrow involves placing the programming code for the voting system with a third party and specifying under what conditions the code may be released.²¹⁸ When there is an independent code review requirement, by contrast, state election officials may ask an independent party to inspect the source code in addition to review at the federal certification level.²¹⁹

In turn, required disclosure of source code requirements allows only for its limited use, usually for evaluation purposes, without permission to make further copies, modify the work, or distribute it.²²⁰ In contrast, open-source software is software that is commonly programmed by volunteers and released under generous licensing provisions that allow users to exercise a number of rights such as copying, modification and distribution.²²¹ The main benefit of disclosed code is that it allows enhanced access while still retaining many of the proprietary features that preserve monetary incentives for software designers. Open-source software, on the other hand, allows direct access to the source code. Anyone who accepts the terms of the open-source license will have the

215. *Id.*

216. *Id.*

217. Hall, *supra* note 99, at 1.

218. *Id.* at 1 n.2.

219. *Id.* at 1 n.3.

220. *Id.* at 1 n.5.

221. *Id.*

PRIVATIZING DEMOCRACY

freedom to examine the code; as a result, the legitimacy of the code might increase even as the potential for profit declines.²²²

At the same time, disclosed code does not allow the robust testing that open-source code promotes due to restraints in the making of derivative works key to certain forms of open-source testing. In addition, there are common risks associated with both means of providing software access. Since computer scientists have yet to find a method for writing bug-free software, public disclosure of the system source code will inevitably result in the disclosure of vulnerabilities to would-be hackers seeking to alter election results.²²³ Those tasked with defending voting systems—usually local election staff—are often poorly trained to identify serious code-level vulnerabilities.

Despite these disadvantages, all of the strategies guarantee limited contractual overrides of a manufacturer's attempts to completely shield access to software through the trade secrets doctrine. Procurement contracts would encourage competition among vendors pursuant to a mandated clause requiring access to the means with which to verify election results and vote-counting software. Parties will therefore be more likely to negotiate a balance between the interests protected as trade secrets and voters' demands for accountability. Put differently, the incentives of vendors and procurement officers during the procurement process—to minimize costs and secure the contract by designing better functioning and more secure technology—have the potential to foster bargaining resulting in agreements for tailored software disclosures, say, only in the event of a litigation challenge by candidates in close races.

Although some might argue that the end of robust trade secrecy in software source code would dissipate the already small profit margins,²²⁴ such objections overstate their case. Cutting back on trade secret protection could lower barriers to entry, thus making the industry more palatable for smaller firms, which would, in turn, create economic pressure for more research and development. In addition, commercial incentives would still encourage market competition for profit. By removing the role of copyright and trade secrecy, for

222. See, e.g., Deirdre K. Mulligan & Joseph Lorenzo Hall, A Ctr. for Correct, Usable, Reliable, Auditable, Transparent Elections (ACCURATE), *Open Source Software—Does It Have a Place in California's Electoral System?* (Feb. 8, 2006), available at http://josephhall.org/papers/JHall_DMulligan_testimony_CASenate-20060208.pdf (representing prepared testimony before the California Senate Elections, Reapportionment and Constitutional Amendments Committee).

223. See Peter P. Swire, *A Model for When Disclosure Helps Security: What Is Different About Computer and Network Security?*, 3 J. ON TELECOMM. & HIGH TECH. L. 163 (2004).

224. See Hall, *supra* note 99, at 9.

example, open source software regimes allow a vendor's competitors to modify their code and compete; at the same time, however, qualitatively better-designed or more secure software could still be sold on the market, and would benefit from the increased testing and public oversight. Disclosed source code regimes, on the other hand, provide vendors more flexibility to protect the intellectual property interests than standard open source licenses. With disclosed source provisions, intellectual property claims would become less of an issue, since such claims would turn substantially on the agreed-upon disclosed source license. In this manner, the market and technological tradeoffs between various kinds of software and disclosure agreements require more sophisticated thinking that would be facilitated by well-designed performance provisions refined through the competitive, procurement process.

The proposal here would differ from recent legislative bills like H.R. 811 as it would allow for more market-based bargaining relative to a static legislative bargain. Entitled the "Voter Confidence and Increased Accessibility Act of 2007," and often referred to as the "Holt Election Reform Bill" after its sponsor, H.R. 811 originally proposed that

[n]o voting system used in an election for Federal office shall at any time contain or use any software not certified by the State for use in the election or any software undisclosed to the State in the certification process. The appropriate election official shall disclose . . . and the Commission shall make . . . source code, object code, executable representation, and ballot programming files available for inspection promptly upon request to any person.²²⁵

Reflecting the bipartisan momentum for reform, the bill had 216 cosponsors in the House (only 218 are needed to pass). Because Congress failed to take any action on the bill after May 2007, it will need to be reintroduced, if at all, in a future next session.

H.R. 811 was amended and reported out by the House Administration Committee with a requirement that election software be released to "qualified persons" who sign nondisclosure agreements protecting intellectual property rights and trade secrets.²²⁶ "Qualified persons" included governmental entities responsible for reviewing the software, in addition to parties to pre-election

225. See Voter Confidence and Increased Accessibility Act of 2007, H.R. 811, 110th Cong. § 9 (2007).

226. Voter Confidence and Increased Accountability Act of 2007, H. Rep. No. 110-154, at 4, 35 (2007).

PRIVATIZING DEMOCRACY

and post-election challenges.²²⁷ In effect, the amendment reversed the intent of the original software disclosure provisions which explicitly declared voting system software a trade secret and prohibited any public disclosure, although it did allow for litigating parties to examine the code. Importantly, the definition of “election-dedicated software” explicitly excluded “commercial-off-the-shelf-software” (COTS).²²⁸ Given that many voting machine manufacturers rely heavily on commercial-off-the-shelf software (like Microsoft Windows) for their voting machines, the new amendment suggested that very little of the manufacturer’s intellectual property would be protected in escrow.²²⁹ As a 2003 Congressional Research Service report notes, the “way COTS software is tested and used in current DREs might itself create vulnerabilities.”²³⁰ In this manner, provisions like those that were at issue in H.R. 811 are subject to continuous legislative amendment as interest groups and lobbyists whittle away at various design features. Performance-based features refined through the procurement process, on the other hand, would allow for more technological innovation and foster competition to provide software options with more accessibility and thus greater accountability at the state and local levels.

Needless to say, then, for electronic voting machines, a wide range of options remains on the table in terms of how to meet the various needs of voters while promoting the efficiency and effectiveness of elections. As this technology continues to develop, issues surrounding software and the internal infrastructure of voting machines will inevitably take central stage as it did in Florida’s thirteenth congressional district, and Christine Jennings’s attempt to contest those results.²³¹ Under the amendments to HAVA proposed here, state or local governments promulgating their procurement requests would have a host of design options at their disposal, which would comply with the mandate to contract for access to underlying source code. In their RFPs, for example, state and local governments could demand the limited ownership of intellectual property and the circumstances under which parties would have access to it.²³² These procurement requests would specify the conditions under

227. *Id.*

228. *Id.*

229. ERIC A. FISCHER, CONG. RESEARCH SERV., ELECTION REFORM AND ELECTRONIC VOTING SYSTEMS (DREs): ANALYSIS OF SECURITY ISSUES 26 (2003), available at <http://www.epic.org/privacy/voting/crsreport.pdf>.

230. *Id.* at 26 n.102.

231. For discussion of the litigation, see *supra* text accompanying notes 211-216.

232. This approach has also been recommended by the National Association of State Procurement Officials and National Association of State Chief Information Officers. See

which bidders would have to provide the means with which to verify how their software functioned.

B. Enforcing HAVA

In addition to encouraging experimentation in balancing the interests of both parties to the contract, performance-based procurement provisions could provide more remedies relative to more command-and-control statutory measures—provided that meaningful enforcement measures are in place. Because procurement contracts can be flexibly designed, parties can agree to any combination of sanctions upon breach. As such, the proposed amendment to the Help America Vote Act should also explicitly recognize electoral candidates as third-party beneficiaries to enforce the procurement provisions.²³³ Doing so would provide a genuinely meaningful accountability tool that not only requires voting machine manufacturers to provide an account of machine performance, but also sanctions manufacturers based on a failure to provide such an account.

Under the reigning HAVA regime, if state and local authorities fail to comply with voting systems standards, the U.S. Attorney General can bring a civil action against the state or local jurisdiction in federal district court for declaratory and injunctive relief.²³⁴ In addition, states receiving federal funds under HAVA must establish administrative complaint procedures that can be used by those who believe there has been a violation of Title III.²³⁵ In practice, however, the federal government often underenforces conditions placed on

NAT'L ASS'N OF STATE PROCUREMENT OFFICIALS & NAT'L ASS'N OF STATE CHIEF INFO. OFFICERS, NEGOTIATING IP ON THE WAY TO THE WIN-WIN: NASCIO'S INTELLECTUAL PROPERTY RECOMMENDATIONS 4 (2005), available at http://www.naspo.org/old_site/whitepapers/NASPO_NASCIOResearchBrief030205.pdf.

233. Voters are another potential class of third-party beneficiaries. Though an explicit statutory grant of standing to voters may raise standing doctrine concerns stemming from harms that are too “generalized,” see, e.g., *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613 (1989), there are important policy reasons why a narrower class, like candidates, would be better equipped to bring the claims. First, candidates have ample incentives to redress the harms arising from a failure to enforce the performance provisions of state procurement contracts—particularly when they are on the losing end of a closely contested election. Because the pressure to concede mounts quickly, the claims would be brought in a timely manner. Second, if voters were enabled to bring suits, they would be well positioned to extort gains or promises from the declared electoral victor in exchange for an agreement not to bring suit. As such, narrowly defining the class of third-party beneficiaries to candidates is prudentially sound.

234. 42 U.S.C. § 15,511 (Supp. V. 2005).

235. *Id.* § 15,512.

PRIVATIZING DEMOCRACY

federal grants.²³⁶ Federal agencies' desires to preserve positive relationships with state administrators coupled with a simple lack of monitoring resources contribute to this phenomenon.²³⁷ For the accountability benefits secured under conditional grants to be meaningful, however, they must be enforceable. Over the years, litigants have advanced several theories to accomplish this end for different statutes, including the finding of an implied private right of action, the application of § 1983, and third-party beneficiary theory.²³⁸ Because the courts have significantly limited recovery under implied private right of action and § 1983 theories, more straightforward contractual claims by third parties provide the most promising grounds for robust enforcement.²³⁹

Therefore, HAVA should also be amended to grant explicit recognition of third-party beneficiaries to enforce the provisions of state procurement contracts. While voters would naturally be one potential class of beneficiaries, electoral candidates would be the best positioned to engage in such enforcement. Not only could candidates adequately serve as representatives for voter interests when bringing suit, but allowing voters to enforce the statute would potentially create crowded dockets requiring quick resolution, as well as extortion incentives as winning candidates would be asked to buy off voters threatening costly litigation. Candidates would be able to sue for specific performance and injunctive relief, and thus gain access to inspect voting machines' underlying source code and records.

Indeed, the Supreme Court has long acknowledged that Congress can enact legislation under its Spending Clause powers by placing conditions on the grant of federal funds.²⁴⁰ Such legislation is "in the nature of a contract" because "in return for federal funds the [recipients] agree to comply with federally imposed conditions."²⁴¹ Under this contract analogy, the Court has

236. See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1248 (1999) ("[F]ederal agencies may likely underenforce federal grant conditions relating to local autonomy, either because they lack the resources to monitor state compliance or because they wish to preserve their resources for other battles deemed more important to the success of the program.").

237. *Id.*

238. An implied private right of action is characterized as the idea that a court may "find" legislative intent to permit an individual to enforce a federal statute in the absence of express language to that effect. 42 U.S.C. § 1983 (2000).

239. *Pharm. Research & Mfrs. of Am. v. Walsh* 538 U.S. 644, 683 (2003); *Blessing v. Freestone*, 520 U.S. 329 (1997).

240. See *Barnes v. Gorman*, 536 U.S. 181, 185-86 (2002) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999)); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

241. *Pennhurst*, 451 U.S. at 17.

found that Congress must unambiguously state each of the conditions that it has placed on the grant of federal monies.²⁴² Just as a valid contract requires offer and acceptance of its terms, “[t]he legitimacy of Congress’[s] power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the ‘contract.’ . . . Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously.”²⁴³ Under these explicit provisions, a recipient of federal grants “*may be held liable to third-party beneficiaries* for intentional conduct that violates the clear terms of the relevant statute.”²⁴⁴ At the same time, recipients would not be held liable to third-party beneficiaries for a “failure to comply with vague language describing the objectives of the statute,” so Congress must be especially clear in specifying the relevant statutory provisions.²⁴⁵

Third-party beneficiaries to a contract are those intended by the drafters to benefit from the contract itself.²⁴⁶ Given that HAVA is a conditional federal funding program, Congress can explicitly designate candidates as third-party beneficiaries of its contract-like relationship with state bodies who accept the funding and, in doing so, authorize and accord standing to candidates who would be able to bring suit to enforce the contractual conditions.²⁴⁷ Although

242. *Id.*

243. *Id.*; see also *Davis*, 526 U.S. at 640; *Gebser*, 524 U.S. at 287.

244. *Gorman*, 536 U.S. at 187 (emphasis added).

245. *Id.*

246. See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979). The *Second Restatement's* formulation provides that a party is an intended beneficiary, and thus has rights under a contract, if

unless otherwise agreed between promisor and promisee . . . recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either: (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Id.

247. Standing requires a plaintiff to allege he has suffered a concrete injury, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), traceable to the defendant's action, see *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976), that can be effectively redressed by the court, *id.* at 38, 43. Applying this test, candidates surely suffer a concrete injury—deprivation of office—as the result of faulty voting machine software. Such defects would be directly assignable to the manufacturer's actions, and injunctive remedies would be readily available in court. More importantly, when Congress explicitly designates who can bring suit to enforce its actions, courts are likely to find standing as long as particularized injuries are identifiable. See *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 352-

PRIVATIZING DEMOCRACY

the Supreme Court has not directly ruled on the precise issue of whether state or federal law should govern, a growing body of case law in the lower courts suggests that state law would determine the available causes of action for enforcing the related, but distinct contractual relationship between state bodies and manufacturers. For example, in *Brogdon ex rel. Cline v. National Healthcare Corp.*,²⁴⁸ “residents of a long-term health care facility sued its owners for failing to provide basic, and required, care.”²⁴⁹ Specifically, the plaintiffs alleged that the defendants had breached the contract between the health care facility and the Georgia Department of Community Health pursuant to Medicaid and Medicare legislation.²⁵⁰

In holding that state law governed the contract at issue, the court examined the legislative history of Medicaid and Medicare statutes and determined that Congress had not intended to create a private cause of action.²⁵¹ Moreover, it relied on *Miree v. DeKalb County*,²⁵² in which the Supreme Court held that whether the plaintiffs were third-party beneficiaries was a matter of state, not federal, law. *Miree*, however, did not implicate Congress’s spending power, nor its ability to directly designate the intended beneficiaries of its legislation. *Miree* involved victims of an airline crash who brought a diversity action against the owner of an airport on the grounds that they were third-party beneficiaries of a contract between the airport and the Federal Aviation Administration (FAA), which obligated the airport to take certain precautions.²⁵³ Given no indication that Congress intended to displace state law,²⁵⁴ and because the case involved “federal interest[s] only insofar as such lawsuits might be thought to advance federal aviation policy by inducing compliance with FAA safety provisions,”²⁵⁵ the Supreme Court held that the contract should be evaluated under state law.²⁵⁶

53 (1984); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 103 (2007) (“When Congress passes a statute, it may specify who is entitled to bring suit under that statute. . . . However, Congress can always choose to be more specific; it may limit the set of plaintiffs who may challenge governmental action.”).

248. 103 F. Supp. 2d 1322 (N.D. Ga. 2000).

249. *Id.* at 1324-25.

250. *Id.* at 1325.

251. *Id.* at 1330.

252. 433 U.S. 25 (1977).

253. *Id.* at 27.

254. *Id.* at 32.

255. *Id.*

256. *Id.* at 32-33.

Thus, while it is possible that a reviewing court would apply a similar analysis to a procurement contract adopted pursuant to HAVA, should Congress explicitly recognize the federal interests in ensuring election integrity as well as an intention to displace state law in crafting a robust enforcement scheme, the legislative scheme would likely preempt state law. Even if a court decided to apply state law in enforcing the contract, the explicit designation of third-party beneficiaries in the contract itself would render it likely that candidates would still be able to enforce the contract under traditional state contract law principles. Given these precedents as well as the settled recognition that the federal government has broad discretion to determine the proper remedy for enforcing conditions on federal spending, Congress should explicitly provide third-party beneficiaries with standing to enforce the terms of HAVA, even if cabined only to the amendment proposed here. In doing so, Congress would create a meaningful sanction for holding voting machine manufacturers to account when they fail to provide access to the technological means by which election results can be verified. This enforcement mechanism would not only help meet the demand for accountability, but also vindicate the larger democratic promise underlying HAVA itself.

CONCLUSION

America's existing system of oversight and decisionmaking in the purchase of voting machines is heterogeneous, partisan, and underfunded.²⁵⁷ Together, these features result in few levers of accountability and overt incentives to subvert the ones that exist. Not surprisingly, precarious dips in voter confidence threaten to undermine the legitimacy of elections as a whole. Costs borne by local governments eager, but constrained, in their ability to upgrade their voting technology increase the incentives for election officials to participate in the revolving door between election administration and the voting machine industry. Technological breakdowns on Election Day further contribute to unmet demands for accountability, weakened by an emaciated system of statutory and regulatory oversight. Proprietary restrictions on software code as well as nontransparent testing and certification procedures shroud much of the process in secrecy.

A federal approach to the procurement of voting machines would help to ensure accountability and value for state governments, as well as potentially

257. See Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 82 (2004) (declaring that a “partisan and decentralized” system “is a peculiarly American means to resolve disputed elections”).

PRIVATIZING DEMOCRACY

increase long-term profits for contractors. It would also reduce incentives for vendors to forum shop by providing services to states with the weakest standards or lacking the political will to enforce them. Thus, as a condition of federal grants, Congress should tailor privatization experiments to extend public interests not only to the state and local government grantees that directly receive the funds, but also to the private contractors with whom they contract. To accomplish this, Congress must provide meaningful enforcement mechanisms with which to do so.

Two challenges face our electoral system: spurring technological innovation and safeguarding values like accuracy and transparency.²⁵⁸ Insofar as elections serve a fundamental democratic function, the importance of ensuring their legitimacy is at a zenith. Toward these ends, well-designed procurement contracts can provide an important means of extending public interest priorities on behalf of voters to private actors, and of exacting compromises and gains through bargaining that might otherwise reside beyond the federal government's regulatory reach.

258. Tokaji, *supra* note 15, at 1796.