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CLEAN ELECTION REFORM AND ITS HIDDEN COSTS: LESSONS FROM FLORIDA AND QUEBEC¹

Comparing the Democratic Deficit in Canada and the U.S.: Defining, Measuring, Fixing

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Poll fraud and error afflict all democracies. Many governments and stakeholders, consequently, find it necessary to take measures to reduce election cheating and sloppiness, what we might call “clean” election reforms for short. It is often assumed that such reforms unambiguously enhance the quality of elections. The reality, however, is that sometimes a measure ostensibly adopted to improve the conduct of elections can also or instead damage the very principles of democratic fairness and inclusiveness that this measure was seemingly intended to promote.

To borrow an analogy from medicine, we might call this unhappy outcome an “iatrogenic” effect of efforts to prevent vote fraud and error. In Greek, *iatros* means “doctor” and *genic* means “produced by.” An iatrogenic illness is one induced by treatment. By this analogy, the original afflictions are dirty or sloppy electoral practices (vote buying, registration fraud, fraudulent voting, tampering with the vote count, the use of error-prone voting technologies, and the like); the treatment is clean election reform (new forms of identification, purging ineligible voters from the registry, tighter ballot counting rules, new voting technologies, etc.); and the treatment-induced illnesses are various forms of damage to democracy, most notably vote depression (a drop in the number of people who register, turn out to vote, or have their votes count).

We find cases of iatrogenic harm all around the world. In Venezuela, a bungled effort to automate the electoral process led to the exclusion of up to 5 percent of the electorate during the 2000 elections. In South Africa, tightened registration rules put in place for the 1999 elections prevented roughly 6 percent of the voting-age population from participating in the polls. In post-Soviet Georgia, the poorly handled computerization of electoral lists for the 2003 elections kept an estimated 10 to 15 percent of the electorate from being able to cast their ballots. In a data set that I compiled, I found similar instances of iatrogenic harm in 21 other countries during the 16-year period from 1991 to 2006 (Schaffer 2008, 203-15).

Among those countries is the United States. An overzealous purge of the voter’s lists in the run up to the 2000 elections in Florida disenfranchised enough eligible voters to have potentially altered the outcome

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of the presidential race (more on this below). And after the disaster of Florida 2000, reforming the mechanics of voting rose high on the American public agenda. Many local election officials hurriedly purchased the latest in election technology, direct-recording electronic voting machines, only to find that they had serious security flaws, left no paper trail of how voters cast their ballots, were difficult for ordinary poll workers to operate, and sometimes malfunctioned. In Mercer County, Pennsylvania, machine glitches during the 2004 elections caused at least four thousand votes to disappear, representing 8 percent or more of all that were cast (Independent Election Committee 2005). That same year, seven thousand people in Orange County, California, did not have their votes recorded - more than 1 percent of all votes cast - because ill-trained precinct workers provided them with incorrect access codes.²

There are other instances of iatrogenic harm in the United States. A faulty purge of Kentucky's voter rolls prior to the 2006 elections improperly removed some eight thousand people.³ More than fifteen hundred registration forms submitted in Los Angeles County, California, in 2006 were rejected because of glitches in its new database system.⁴ The restrictive interpretation of a new voter registration law by Ohio's secretary of state dramatically lowered for five months before the 2006 elections the number of new registration cards collected by grassroots organizations (the law was later thrown out by a federal judge).⁵ The improper or unlawful implementation of voter identification requirements in South Dakota (2004), Washington (2005), Ohio (2006), Missouri (2006), and Georgia (2006) caused an unknown number of legitimate voters to be turned away from the polls.⁶

Canada has not been immune to iatrogenic harm either. In Quebec, the interplay of a 1936 reform, which gave parties the right to name poll workers, and the dissemination in 1995 of new and tightened ballot invalidation instructions led to the voiding of a high number of perfectly valid votes in the 1995 sovereignty referendum (more on this below). Quebec again had problems with high rates of ballot rejection in the 2005 municipal elections, though in these elections the problem lay with the use of new voting technologies. The province, which began small-scale use of electronic voting in 1996, expanded the deployment of the various types of electronic voting machines for the 2005 municipal elections to cover 10 percent of the province's municipalities. Five different types of machines were used. Because of a combination of mismanagement, machine limitations, and inadequate voter education, the eighty-one municipalities that used three of the machine types experienced rates of ballot rejection that were on

² "7,000 Orange County Voters Were Given Bad Ballots," *Los Angeles Times*, March 9, 2004.

³ "Judge: Purged Voters Should Be Reinstated, Put on Inactive List," Associated Press, October 2, 2006.

⁴ "New ID System May Block Voters," *Los Angeles Times*, March 29, 2006.

⁵ "New Regulation Rules Stir Voter Debate in Ohio," *New York Times*, August 6, 2006.

⁶ "Legislators Endorse New Rule Requiring Signs at Polling Places," Associated Press, September 3, 2004; "2 Groups Object to Ad about Bringing ID to Vote," *Seattle Times*, August 26, 2005; "IDs, Balky Machines Trip Up Some Voters," *Columbus Dispatch*, November 6, 2006; "Secretary of State Blasts County on IDs," *St. Louis Post-Dispatch*, November 9, 2006; Carnahan (2007, 15-17); "Not All Bibb Workers Knew That Photo ID Not Required," *Macon Telegraph*, July 19, 2006; "Letters on Voter ID under Fire; 200,000 Mailed Out after Law Struck Down," *Atlanta-Journal Constitution*, October 13, 2006.

average two to four times higher than those in municipalities that used traditional voting methods. In effect, the expanded use of electronic voting voided thousands of votes that would have counted had the new technologies not been used (DGEQ 2006, 125-47).

Manipulation

There are a variety of ways in which clean election reform can produce iatrogenic harm. Under particular conditions, the actions of lawmakers, election officials, candidates and their agents, and civic educators can each cause harm, and this harm can be either intended or unintended. Because of space constraints, in this paper I will focus only on *intentional* vote depression caused by *election administrators*, what I will call “manipulation” for short. I will examine, in particular, two relatively well-studied cases of manipulation - the purging of the voter rolls in Florida in the run up to the 2000 elections and the invalidation of ballots in the 1995 Quebec sovereignty referendum - to isolate some of the conditions that facilitate manipulation, and to identify at least one measure that might be adopted to prevent it.

The Purging of the Voter Rolls in Florida

It all began when incumbent Miami mayor Joe Carollo was forced into a runoff with former mayor Xavier Suarez in the 1997 mayoral election.

Between the general election and the runoff, news broke of a Florida Department of Law Enforcement sting operation: a Suarez campaign worker was arrested for buying from undercover agents the absentee ballots of three dead voters. The probe widened. Days before the runoff agents found in the house of one campaign volunteer one hundred absentee ballots, twenty-one voter registration cards, and fifty blank applications for absentee ballots. Details emerged of a well-orchestrated absentee ballot fraud scheme in District 3, a part of Little Havana. At the center were campaign workers and volunteers for Commissioner Humberto Hernandez, a backer of Suarez. These “vote brokers” bought absentee ballots for about ten dollars each, procured and voted with the absentee ballots of deceased voters, and induced a number of out-of-city residents to fraudulently register to vote in the district.

Carollo contested the general election results in court, arguing that he should have been declared the outright winner since he had won a majority if the absentee ballots were excluded from the count. During hearings, a documents expert testified that there were at least 225 illegal absentee ballots cast. An FBI agent found that 113 absentee voters had used false addresses. Another expert produced evidence that more than 480 ballots had been procured or witnessed by only 29 vote brokers. In March 1998, the judge voided the election results, and ordered a new election. An appeals court later amended this decision and installed Carollo as mayor.

As the legal drama played out, journalists from the *Miami Herald* conducted their own investigation. In February 1998, the paper published an article, which would later win it a Pulitzer Prize, on illegal voting by felons. Felons, under Florida law at that time, did not have the right to vote until they completed their prison term, as well as their parole or probation, and then successfully petitioned the clemency board to restore their civil rights. Among the findings of the investigative report: 105 ineligible felons voted in the

1997 Miami mayoral election, while 2,800 ineligible felons were on the voter rolls of Miami-Dade County.⁷

In the first months of 1998, the Florida state legislature began work on a package of anti-vote-fraud measures to prevent a Miami-like scandal from happening again. Among the provisions were tightened absentee ballot rules and mechanisms to eliminate from the voter rolls dead people and felons who had not had their civil rights restored.

Opposition to the bill came mostly from lawmakers (and the State Association of Supervisors of Elections) who thought that loopholes in the absentee ballot regulations would allow vote brokers to continue to operate. Black legislators were also disproportionately against the bill. Three of five black senators declined to support it, as did fourteen of fifteen members of the House Black Caucus. The main concern they voiced in floor debates was that tightened absentee ballot rules would make it more difficult for elderly (presumably minority) Floridians to vote. Nobody, in either committee or floor debates, raised questions about the cleansing of the voter rolls.

In April 1998, both houses of the Republican-controlled Florida state legislature voted in favor of the bill. It received strong bipartisan support in the senate, garnering the votes of nineteen out of twenty-four Republicans, and eleven of the sixteen Democrats. In the house, almost all Republicans voted for it (fifty-eight of sixty-six), along with almost a third of the Democrats (fifteen of fifty-four). The antifraud package became law in May 1998.

A few months later, the U.S. Justice Department blocked Florida from implementing the new absentee ballot rules (but not the purge of ineligible voters). Minorities, the department pointed out, make disproportionate use of absentee ballots since they are more likely to have trouble getting time off from work to vote or finding transportation to get to the polling place. The new restrictions would thus prevent more blacks and Hispanics than whites from voting.

In Florida, the secretary of state, an elected official, is charged with overseeing the administration of elections. In 1994, Republican Sandra Mortham had been elected to that post and had come out strongly in favor of tightened voting rules. "It's a sad state of affairs," she said, "when it's easier to get a voter's card than it is to get a card from Blockbuster's."⁸ Indeed, her office had helped craft the election reform package passed by the legislature. After the law's adoption, she was bitterly disappointed when the federal government put the absentee ballot restrictions on hold. "When the next dead man votes here in the State of Florida," she told reporters, "it's at the courtesy of the U.S. Department of Justice."⁹

With the absentee ballots rules in limbo, Mortham implemented the part of the law that she could - namely, the purging of the voter rolls. The new law authorized the Florida Department of State's Division of Elections to create a central voter file and to contract with a private company to cross-check the names in this file against names in databases containing criminal records, records of deceased

⁷ "Felons Vote, Too - But It's a Crime," *Miami Herald*, February 15, 1998.

⁸ "Voter Registration Crackdown Proposed," *Florida Times-Union*, April 3, 1998.

⁹ "U.S. Justice Department Delays Florida Vote-Fraud Laws," *Tallahassee Democrat*, August 11, 1998.

persons, and other information. The Division of Elections was required to distribute the resulting list of names to county election supervisors, who were charged with verifying the information and using it to purge the voter rolls. By August 1998, a Tallahassee firm ran the first cross-check and found that more than fifty thousand felons were illegally registered to vote, or so it appeared. The list contained so many errors that Division of Elections director Ethel Baxter issued a series of memoranda to all county supervisors instructing them to allow a listed person to vote if there was “reasonable doubt” about the accuracy of the information (CCR 2001, 68). The list was soon scrapped, and in November Baxter hired a different contractor, Database Technologies (DBT), to prepare a new one.

In January 1999, Republican Jeb Bush assumed the post of governor, and Republican Katherine Harris took over as secretary of state, both having won the November election. Soon after, DBT produced a new list of 42,322 names. While DBT executives voiced concerns about the high number of false positives likely contained in the list, Division of Election officials in the new administration pressed for looser search parameters in future checks. Thus while the company recommended that first and middle names match in the right order, state officials decided that the two names could occur in either order so that, say, a Floridian named Betty Sue would match a felon named Sue Betty. The company also recommended that last names match exactly, but state officials decided instead to require only a 90 percent match. As a Division of Elections official wrote at that time in a memo to DBT, “obviously, we want to capture more names that possibly aren’t matches and let the supervisors make a final determination rather than exclude certain matches altogether” (quoted in CCR 2001, 62).

When state officials discovered in the spring of 1999 that DBT had databases of felony convictions in other states, they requested the company to expand the search to include out-of-state felons as well. In dealing with felons from states that automatically restore civil rights, the Division of Elections instructed DBT to verify the person’s status with the other state’s executive board of clemency. Felons from states with no executive board of clemency, Division of Elections officials decided, should be required to apply for clemency in Florida to have their voting rights restored (CCR 2001, 64-66).

This policy led to the exclusion of felons from Ohio, Texas, Illinois, and other states (Stuart 2004, 471-72). The policy also ran counter to Florida law. An ex post facto investigation by the United States Commission on Civil Rights (CCR 2001, 65) concluded that Division of Election officials failed to

[a]ssess the interpretation of comparable statutes that require Florida’s acceptance of a sister state’s restoration of civil rights conferred upon a convicted felon. Although the issue of voting rights was not specifically addressed, two Florida courts of appeal have ruled that if an individual enters Florida with his or her civil rights, then through the full faith and credit clause of the U.S. Constitution, he or she need not apply for clemency upon arriving in Florida.

The Division of the Elections had, in other words, no right to require that citizens request the restoration of rights they already possessed. There were, however, compelling partisan motives for the Republican-controlled Florida Department of State to keep out-of-state (and Floridian) felons off the voter rolls. Nationwide, felons are disproportionately black (the felony conviction rate for black men is seven times higher than that of white men), and blacks are likely to vote overwhelmingly Democratic. Indeed, in 2000, nine out of ten black voters in both Florida and the country as a whole turned out for the Democratic presidential candidate, Al Gore (Bositis 2000).

While no Florida officials ever admitted publicly that the overextension of the purge was motivated by partisanship, the evidence points strongly in that direction. Perhaps most revealing is the fact that DBT employees had discussed with state officials in late 1997 or early 1998 a specific flaw in the matching procedures, a flaw that caused Hispanics - who tend to vote Republican in Florida - to be systematically omitted from the purge lists. This flaw resulted from an incongruity between the voter registration database and the database of Florida felons. Because the felon database contained no Hispanic category while the voter registration database did (voter registration forms asked for such information), the records of people who had identified themselves as Hispanic when registering to vote did not match any felon database records. Thus anyone who self-identified as Hispanic when registering was not included on the purge lists. DBT and state officials became aware of this problem and analyzed one of the resulting lists together. In the words of a company spokesperson, "we determined jointly that it was not reliable."¹⁰ But state officials took no action to correct the flaw. Despite their eagerness in 1999 to expand other match parameters, they chose not to loosen this one. It is worth noting, in this context, that according to the Division of Elections official most directly involved in the management of the purge lists, it was Secretary of State Katherine Harris - who was also a high-ranking Republican Party official and cochair of the state Bush for President campaign - who approved the selective loosening of those search parameters (Lantigua 2001). Because the purge was extended with such deliberate selectiveness despite the concerns raised by DBT contractors, and because it was a partisan official who approved the match parameters, I am led to conclude that the purge was intentionally molded to maximize impact on likely (black) Democratic voters but leave likely (Hispanic) Republican voters untouched.

Not surprisingly, pinpointing the number of wrongly purged voters has become a contentious partisan issue. On one extreme, some liberals put the number in the tens of thousands (see, for instance, Raskin 2005, 15). On the other extreme, a conservative journalist maintained that "no one has yet identified a single eligible voter who was actually and finally kept from voting by the purge" (Carney 2001). Perhaps the most judicious analysis to date was conducted by the *Palm Beach Post*. It put the number at a little over 1,100: 108 wrongly identified nonfelons, plus 996 out-of-state felons who should have been allowed to vote.¹¹ It is also noteworthy that the purge left an even greater number of ineligible felons on the voter rolls, largely because some twenty of sixty-seven county election supervisors refused to use the error-plagued purge lists. About 5,600 of these ineligible felons voted in 2000.¹² The raw numbers may not appear large, but they were enough to potentially alter the outcome of an ever-so-tight presidential race, won in the state by a margin of only 537 votes.

While much of the responsibility for the exclusion of eligible voters lies squarely on the shoulders of election officials who implemented the new anti-vote-fraud law, that exclusion was facilitated by lawmakers. The law, after all, placed the burden on county supervisors to determine whether any eligible voters were incorrectly included on the list:

If the supervisor *does not* determine that the information provided by the division is *incorrect*, the supervisor must remove from the registration books by the next subsequent

¹⁰ "State Knew of Felon-list Flaw," *Sarasota Herald-Tribune*, July 20, 2004.

¹¹ "Felon Purge Sacrificed Innocent Voters," *Palm Beach Post*, May 27, 2001.

¹² "Thousands of Felons Voted Despite the Purge," *Palm Beach Post*, May 28, 2001; Stuart (2004, 461-62).

election the name of any person who is deceased, convicted of a felony, or adjudicated mentally incapacitated with respect to voting. (Fla. Stat. ch. 98.0975{4}[1999], emphasis added)

Underfunded county supervisors simply did not have the capacity to do what the law required, especially given the large number of names and false positives contained in the list. For this reason, supervisors in some twenty counties ended up ignoring the list, but supervisors in more than forty other counties did not. Eligible voters who were wrongfully placed on the list in one of these forty or so counties and failed to appeal were removed.¹³

Whatever latent defects the law contained, the secretary of state and the director of the Division of Elections still had broad authority under Florida law to anticipate or redress problems of electoral administration. Katherine Harris and Clay Roberts (who succeeded Ethel Baxter in October 1999 as Division of Elections director) could have, among other things, not circumvented Florida law regarding the voting rights of out-of-state felons. They could also have given narrower search criteria to DBT or at a minimum disseminated the purposively overinclusive purge lists in a more cautious manner. Election officials, not lawmakers, were most heavily and directly responsible for the wrongful purging of eligible voters.

Within a year of the 2000 election, state lawmakers passed legislation to reform the purge process. The new law mandated that the state no longer contract out the task of matching names to private companies and placed the burden instead on county election supervisors. Supervisors, under the new law, were also required to verify that a voter was ineligible before removing his or her name from the voter rolls (whereas before they were required to remove anyone whose eligibility they could not verify). The CCR was left unimpressed by these changes. In its assessment, “the same sweeping efforts to identify former felons that wrongfully purged eligible voters from the central voter file can be repeated” (2002). After the NAACP and other civil rights groups filed a federal voting rights lawsuit, the state made additional changes. As part of a settlement reached in 2002 it agreed to restore the names of people who had been improperly purged and to apply more stringent search criteria for the purge lists.

But even with this settlement, all was not well. In preparation for the 2004 elections, Florida Secretary of State Glenda Hood produced a list of 47,763 possible felons and ordered county election supervisors to verify the convictions and remove all confirmed felons from the voters’ database. And bolstered by a 2001 law passed by Florida’s Republican-controlled legislature to limit the public’s access to purge lists, her office refused to disclose the names on the new list. Despite the assurances of Jenny Nash, spokeswoman for Hood, that “we feel confident that the same mistakes made in 2000 will not be repeated,” many news organizations and watchdog groups expressed concern that the purge list might again be used for partisan purposes.¹⁴ CNN went a step further and sued the state to abolish the 2001 statute and obtain a copy of the new purge list.

When a judge ruled that the statute was indeed unconstitutional and ordered the state to make the list public, the *Miami Herald* quickly discovered that it included the names of at least 2,119 Florida felons

¹³ CCR (2001, 43); “Thousands of Felons Voted”; Stuart (2004, 461-62).

¹⁴ Quoted in “State Wants Felons Purged from Voter List,” Associated Press, May 6, 2004.

who had already had their voting rights restored through clemency.¹⁵ Hood's immediate response was to justify their removal on the grounds that they had registered before they were granted clemency. But when the American Civil Liberties Union and the Florida Justice Institute threatened to sue and the controversy was picked up by news organizations around the country, Hood backtracked and allowed their names to be included on the voter rolls. Aggressive investigation and reporting by news organizations, in this case, helped prevent a new round of discriminatory exclusion.

The Invalidation of Ballots in Quebec

Manipulation does not always require the knowing participation of election administrators, as odd as that may sound. During the counting of ballots in the 1995 Quebec sovereignty referendum, poll workers unwittingly participated in a strategy of manipulation devised by partisan operatives.

The referendum was to decide the constitutional future of Quebec. Support for separation from Canada came largely from portions of the Francophone community, while support for the federal union was strongest among ethnic minorities (i.e., English speakers and other non-Francophones). In the end, the federalists won, though by a slim margin of 54,288 votes, only 1 percent of the vote total.

Election returns showed an unusually high number of rejected ballots in three electoral districts (called "ridings" in Canada). In the riding of Chomedey, 11.6 percent of the ballots were rejected, in Marguerite-Bourgeoys 5.5 percent, and in Laurier-Dorion 3.6 percent. Excluding these three ridings, the average rate of rejection for the rest of Quebec was less than 1.7 percent. In 1992, when a similar sovereignty question was voted upon, the rejection rate for Chomedey was only 1.5 percent, and for Marguerite-Bourgeoys it was merely 1.4 percent (Laurier-Dorion did not yet exist).

Suspicion of foul play was aroused since support for continued union with Canada was most concentrated in ethnic minority communities, and the ridings of Chomedey (located in the city of Laval), Marguerite-Bourgeoys (in the city of LaSalle), and Laurier-Dorion (in the city of Montreal) all had high concentrations of non-French speakers. A disproportionate share of rejected ballots, furthermore, came from ethnic minority enclaves within these ridings. In Laurier-Dorion, for instance, 49 percent of the rejected ballots came from just 56 polling stations in Park Extension, a strongly federalist ethnic enclave (the riding had a total of 197 polling stations). Ballot rejection rates in certain polling stations within the three ridings were stunningly high, reaching more than 50 percent.¹⁶

In Quebec, ballots are counted (or determined to be invalid and thus rejected) by the deputy returning officer presiding in each polling station. There is also a poll clerk whose duty it is to "assist" the deputy returning officer. For regular elections, the deputy returning officer is appointed on the recommendation of the leading party in each riding, while the poll clerk is appointed on the recommendation of the second-placed party. In the case of a referendum, the deputy returning officer is appointed on the recommendation of the official delegate of the national committee that has the greatest number of members in the provincial assembly (called the National Assembly of Quebec, or NAQ for short). The poll clerk, in turn, is appointed on the recommendation of the official delegate of the national committee

¹⁵ "Thousands of Eligible Voters Are on Felon List," *Miami Herald*, July 2, 2004.

¹⁶ "Yes-Side Organizer Known for Hard Line," *Gazette*, November 25, 1995; DGEQ (1996, 29-38).

that has the second greatest number of members in the NAQ. Thus in the 1995 referendum it was the prosovereignty Yes National Committee, dominated by the governing Parti Québécois, that recommended individuals for appointment as deputy returning officers, while the federalist Committee of Quebecers for the NO, led by the Quebec Liberal Party, recommended individuals for appointment as poll clerks.

This party-based method of appointing polling station officials dates to 1936 (Bernard and Laforte 1969, 148). It was among the first pieces of legislation passed into law by the new administration of Quebec Prime Minister Maurice Duplessis. Duplessis was head of a newly formed party, the Union Nationale, which won the election of 1936 and put an end to thirty-nine years of Liberal Party rule.

Prior to 1936, poll workers often manipulated electoral procedures to favor the party in power. They would give voters known to be opposition supporters quill pens with slow-drying ink. When the voter folded the ballot, the still wet ink would make a second “x” on the ballot, thereby annulling it. Other forms of fraud, from voter impersonation to intimidation to ballot box theft, were also committed with the complicity of poll workers (Hamelin and Hamelin 1962, 96-97; Quinn 1979, 64).

The motive for the 1936 reform was, in the words of Duplessis himself, to assure “the impartiality of election officials” (Debates of the Legislative Assembly, October 22, 1936). While certain provisions of the new election bill were debated fiercely, the section on appointing polling station officials was passed without comment by either Union Nationale or Liberal Party legislators. At a time when neither party could predict its electoral future (indeed the Union Nationale would lose the next election, in 1939, only to regain power again in 1944), deputies from both parties may have found bipartisanship at the polling station, and the impartiality it promised, to be reassuring and uncontroversial.

By the 1950s, as the Union Nationale consolidated its hold on power, expectations of impartiality eroded. Deputy returning officers presiding in strongly Liberal ridings would intentionally invalidate ballots by initialing them improperly, while in ridings supportive of the Union Nationale, ballot boxes were stuffed with ballots properly initialed (Quinn 1979, 149-50). The presence of poll clerks named by the Liberal Party did little to prevent these abuses. As one historian explained:

Many of these [Liberal] representatives were housewives and other political amateurs whose main concern was making a few extra dollars for the day. They had no knowledge of the detailed procedures and technical aspects of an election and were easily hoodwinked and intimidated by the deputy returning officer in charge of the poll. Some of these representatives, for instance, were easily lured away on the pretext that they were needed immediately at Liberal headquarters. (Quinn 1979, 150)

In later decades, and after the demise of the Union Nationale, the overt partisanship of poll workers seems to have declined. But well into the 1990s, many deputy returning officers were, like the Liberal poll clerks of the 1950s, political amateurs. Take the example of Mathieu Lefebvre, the deputy returning officer for a Chomedey polling district who rejected 53 percent of the ballots cast in the 1995 referendum. Lefebvre, eighteen years old, had no prior experience as a poll official, did not belong to any political party, and took the job only to earn some extra cash.¹⁷

¹⁷ “First 1995 Vote Fraud Case Ends in Acquittal,” *Gazette*, November 5, 1997.

This inexperience proved key to the manipulation strategy devised by local Yes National Committee officials for the 1995 referendum. In preparation for the referendum vote, deputy returning officers received training from local representatives of both the Yes National Committee and the chief electoral officer. While chief electoral officer trainers directed all deputy returning officers to exercise good judgment in accepting ballots with any markings accepted by law (x, cross, check, or dash), Yes National Committee trainers in Chomedey, Marguerite-Bourgeoys, and Laurier-Dorion (and in a few other ethnic enclaves, but not elsewhere) gave new and more detailed instructions about various markings that, they said, “had” to be rejected.

Detailed ballot rejection rules are, in themselves, necessary for vote integrity. A fair and accurate tallying of votes is premised, after all, on correctly discerning voter intent and applying consistent rules in ambiguous cases. Such rules are also needed to thwart voter intimidation and vote buying. Idiosyncratically marked ballots, after all, can be used to identify the voters who cast them. And the new rejection instructions disseminated by the local Yes officials were, if anything, detailed. Included with them were some one to two hundred photocopied examples of ballots that, the trainers asserted, had been rejected by a Quebec judge named Roland Robillard during a judicial recount requested by a losing candidate in the electoral division of Vimont following the 1994 provincial election.

There were, however, two problems with the actions of the Yes National Committee trainers. First, they gave these new, stricter instructions only to deputy returning officers serving in non-Francophone ridings. Second, their representation of what had happened in the Vimont case was false. Robillard had never rejected any ballots or rendered any legal decision, since the losing candidate had dropped his challenge. Furthermore, when, after the referendum vote, Robillard was shown the photocopied markings distributed by the Yes National Committee, he stated that in his judgment many were in fact perfectly valid.¹⁸

As a result of a subsequent investigation conducted by the chief electoral officer, prosecutors filed charges of fraud against twenty-eight deputy returning officers and charges of aiding and abetting against two Yes National Committee trainers. Only two deputy returning officers actually stood trial, and both were acquitted on the grounds that they were only following in good faith the instructions given to them by Yes National Committee trainers and thus did not intend to commit fraud. Ultimately, the chief electoral officer withdrew all charges against the remaining defendants since it was impossible to demonstrate that the deputy returning officers had fraudulent intentions, and since nobody was found guilty of fraud, there was no foundation in law to charge the trainers with aiding and abetting.

The high ballot rejection rate in ethnic, profederalist enclaves did not alter the outcome of the 1995 referendum, since the separatist option was rejected. Nevertheless, the narrow victory of the federalists and the shady circumstances surrounding the vote count left the issue of sovereignty unsettled and the legitimacy of the electoral system tarnished. Years after the referendum vote, federalist lawyers were still pressing in court to have all 86,501 rejected ballots released for public inspection. They suspected fraud was more widespread and had higher level authorization than revealed by the limited investigation of the chief electoral officer.¹⁹

¹⁸ “Scrutineers Say They Were Misled by Yes-Side,” *Gazette*, November 11, 1995; “Yes-Side Organizer Known for Hard Line”; DGEQ (1996, 31).

¹⁹ “Our Right to Transparent Democracy,” *Gazette*, August 5, 2000.

Conditions for Manipulation

Manipulation was a feasible strategy in both Florida and Quebec, in part, because partisans in both places held positions that allowed them to influence who could vote or whose vote would count. It was Republican control of the Florida Department of State that made an excessively enthusiastic purge possible, and it was Katherine Harris - cochair of the state Bush for President campaign - who approved the selective loosening of the search parameters. In Quebec, parties played a central role in appointing and training poll workers. The fact that it was a referendum vote further increased the opportunity for partisan meddling, since the Referendum Act gave the Yes National Committee the authority to recommend deputy returning officers for each polling station in the whole province. In elections (as opposed to referenda), the winning candidate in each riding recommends a deputy returning officer for that riding only. Thus in both the 1994 and 1998 elections, members of the Liberal Party recommended deputy returning officers in Chomedey and Marguerite-Bourgeoys. This difference between provincewide referendum appointments and ridingwide election appointments helps to explain why the administrative exclusion of Anglophone and allophone voters in these ridings appeared during a referendum vote and not during a regular election. Only during a referendum vote could the Parti Québécois recommend deputy returning officers to serve in ridings where the Liberal Party prevailed. It also helps explain why significant reports of manipulated vote depression have not surfaced at the federal level, in Ontario or in Prince Edward Island, where similar riding-level methods of partisan appointment are employed.

Virtually all democracies have safeguards in place to hold abusive or incompetent election officials accountable. Why, in the cases of Florida and Quebec, did those safeguards fail? Effective safeguards, students of institutions tell us, require both vigilant monitoring and vigorous enforcement. When either or both monitoring and enforcement are ineffective, abuses go unchecked.

To effectively monitor misconduct on the part of election officials and bodies, agents of accountability (courts, legislatures, civic associations, political parties, international observers) require information (Schedler 1999, 16, 22-25). To prevent or remedy abuses, timing is key. When information reaches agents of accountability too close to an election or after an election, the options available for redress are few. Manipulation usually involves a small number of individuals and the discreet bending of select procedures, it is thus hard to detect beforehand. In the cases of Florida and Quebec, the abuses did not come to light until after the proclamation of the election results. In both cases, redress was still being sought in the courts years later. Effective monitoring, in short, requires agents of accountability to be vigilant and electoral preparations to be transparent. Where political parties are positioned to quietly manipulate electoral procedures (as they were in Florida and Quebec), the dangers of opacity and abuse increase.

Vigorous enforcement requires strict rules to punish wrongdoers, both to stop their abuses and to deter others who might emulate them. Administrative abuses tend to occur and reoccur when sanctions are weak or the threat of sanctions is low. Sanctions can sometimes be made hollow by the partisan penetration of electoral bodies. Indeed, partisan interference with the enforcement of sanctions was high in both Florida (where the secretary of state is a partisan elected official) and Quebec (where the appointment of the chief electoral officer requires approval by two-thirds of the members of the NAQ, but because of recurrent deadlock between Parti Québécois and Liberal Party members, three of the past five chief electoral officers have been appointed on an interim basis by the Parti Québécois Prime Minister without the approval of the NAQ). In neither place were the individuals involved in perpetrating abuses sanctioned. In Florida, none of the election officials involved in the overzealous purge were fired

or reprimanded. In Quebec, successive chief electoral officers were reluctant to investigate thoroughly or prosecute energetically those involved in the ballot rejection scheme. After election officials flubbed the legal case against two deputy returning officers, interim chief electoral officer Francine Barry decided to drop all charges against the remaining defendants. Barry, not incidentally, had been appointed by the Parti Québécois Prime Minister after the NAQ stalemated.

A Remedy

Measures taken in both Florida and Quebec to (genuinely or ostensibly) clean up elections caused iatrogenic harm. To acknowledge that clean election reforms sometimes inflict damage should not, of course, be taken as an argument that such reforms should simply be abandoned. Left unchecked, fraud and error can compromise severely the quality of democracy. It would thus be a mistake to frame the issue too narrowly as a choice between elections that are “clean but exclusionary” on the one hand and “dirty and sloppy, but inclusive” on the other. Both vote depression and election fraud or error depreciate the quality of democracy. The real goal should be to make elections both as clean and as inclusive as possible.

There are many possible ways to remedy iatrogenic harm that deserve attention (Schaffer 2008, 150-90). Here I will focus only on the most obvious one to counteract manipulation: making electoral administration more impartial. The danger of partisanship, as we saw, was present in Quebec at the polling-station level, where the party-based method of appointing poll workers made possible the ballot invalidation scheme cooked up by party trainers, and at the highest level as well, insofar as the partisan interim appointment of successive chief electoral officers contributed to the tepid prosecution of these trainers. The danger of partisanship was also all too evident in Florida. The administrative exclusion of eligible voters in 2000 occurred as a result of a directive given by the Republican secretary of state - a directive, by all appearances, intended to help the Republican presidential candidate in a closely fought election. Indeed, the partisan direction of electoral administration is a widespread problem in the United States, where chief electoral officers in thirty-three states are selected through popular, partisan elections (Hasen 2005, 51). It is thus not surprising that election officials in several states wear two hats at election time. As one *Los Angeles Times* reporter noted weeks before the 2004 elections:

Ohio’s Republican Secretary of State J. Kenneth Blackwell is co-chairing the president’s reelection efforts there, while Republican Dean Heller of Nevada and Jan Brewer of Arizona are actively campaigning on Bush’s behalf while fulfilling voting duties as secretary of state. Joe Manchin III, West Virginia’s Democratic secretary of state, has pitched in to help Kerry, even while running for governor.²⁰

The potential for the kind of partisan manipulation we observed in Florida exists widely in the United States.

There are, thankfully, other models of electoral administration that may be less vulnerable to partisan meddling at the top. India, Canada, Australia, and Costa Rica, among other places, have nonpartisan electoral chiefs, while New York State has experimented with a bipartisan board of elections. Some of

²⁰ “Key States’ Ballot Officials Feel Glare of Critical Eyes,” *Los Angeles Times*, October 22, 2004.

these arrangements have worked better than others. In New York, bipartisanship has not been very successful, with deleterious consequences for the quality of elections. As a 2004 editorial in the *New York Times* explained:

The State Board of Elections is a case of noble intentions gone terribly awry. In an effort to put elections above politics, it was made bipartisan, with two Republican commissioners and two Democrats. But this has simply led to a constant war to subvert the structure and gain partisan advantage.

Gov. George Pataki recently waited eight months before reappointing one Democratic commissioner, a step that should be automatic. In the interim, his party had the upper hand. The board's top two staff positions are supposed to be split by the two parties. But the position of executive director has been kept vacant for a year, allowing the deputy executive director, a Republican, to run the agency. Democrats have not been blameless in this feud. They have tried to take advantage of a peculiar glitch in the law that allows Democratic chairmen of the board to hold their positions more than twice as long as Republicans.

When everybody's in place and the board has been truly bipartisan, the result has been deadlock. The four commissioners, bitterly divided along party lines, have been unable to adopt even basic policies. Under federal law, for instance, New York must adopt a list of acceptable forms of voter identification, but three months before the presidential election, the Democrats and Republicans on the board are still fighting over it. Local election officials, who have already started preparing election materials and training poll workers for November, are rightfully unhappy. There is a very real possibility that eligible voters will be turned away this year because of all the confusion.²¹

A bipartisan solution, at least one modeled on the New York Board of Elections, may well produce iatrogenic illnesses of its own.

Nonpartisan election administration, at least for federal elections in Canada, has experienced far fewer problems. Some analysts have even proposed the Canadian approach as a model for the United States to emulate (Pastor 2004, 586-87; Massicotte 2005). Jean-Pierre Kingsley (2004, 406), chief electoral officer of Canada from 1990 to 2007, explains how independence from partisan influence is achieved:

First, the Chief Electoral Officer is appointed by a resolution of the House of Commons. Although 50 percent plus one vote would be sufficient, all appointments since 1920 [the year the position was created] have been made by unanimous consent. . . . Once appointed, the Chief Electoral Officer reports directly to Parliament, and is thus completely independent of the government and political parties. He communicates with the Governor in Council (i.e., the Cabinet) through a designated Minister of Parliament and vice-versa. The normal term of office for the Chief Electoral Officer is until retirement at the age of 65. He can be removed from office only for cause - in other words, sufficient reason - by the Governor General following a joint address of the

²¹ "The Shame of New York," *New York Times*, August 10, 2004.

House and Senate. To preserve the non-partisan nature of the Office, the Chief Electoral Officer is not permitted to vote in any federal election, by-election, or referendum.

The track record of (at least nominally) nonpartisan electoral administrations around the world is not, however, uniformly good. The Philippine Commission on Elections (Comelec) is, on paper at least, independent and nonpartisan. Yet Comelec officials have acted less than impartially. In 2004, to give just one example, a Comelec commissioner orchestrated an extensive vote padding and shaving scheme - caught on secretly recorded telephone conversation - that may have altered the outcome of the presidential race.²² Not all “nonpartisan” (or “bipartisan”) electoral bodies are, then, equally independent and neutral. National differences in overall levels of government professionalism and the rule of law are certainly germane and may help explain why the chief electoral officer of Canada is more widely believed to be impartial than his counterpart in the Philippines, land of “goons, guns, and gold.”

Differences in institutional design are certainly also relevant. As we saw in New York, some designs may be simply ill conceived. In the wake of Florida 2000, American legal scholars and other stakeholders have proposed a variety of alternatives. Law professor Richard Hasen, for instance, has suggested the following setup to replace the current procedure of selecting the chief elections officer in California through partisan popular election:

California’s Constitution should be revised so that the chief elections officer (who may or may not be the secretary of state) is appointed to the position for a fixed term of, say, 10 years. He or she should be nominated by the governor and approved by a 75% majority of the Legislature. Such a supermajority requirement would ensure that only a consensus candidate who could achieve broad support from both parties would be chosen for the office. The Constitution should also guarantee some independence for the budget of the office and provide that the chief elections officer can be removed only through a difficult impeachment procedure. In addition, the Legislature should pass tough conflict-of-interest provisions.²³

Former California state senator Barry Keene (2005) fears that Hasen’s proposal will establish a “10-year dictatorship” and argues instead that “transparency and an unpaid bipartisan board, appointed by the Governor subject to Senate confirmation, for staggered terms, to select and oversee a chief elections officer that serves at the pleasure of a majority of the board is the intelligent way to go.”

Such proposals merit serious consideration and debate, a process that is only now beginning in the United States. This statement should not, however, be taken as an endorsement of either Hasen’s or Keene’s plan. To mention but one concern, the potential pitfalls of bipartisanship are all too evident in the experience of New York, while the quest for a supermajority can also result in deadlock, with similarly damaging consequences, as we saw in Quebec. Consider also the case of Venezuela. In 2003, as Kornblith (2005, 124-26) explains:

²² A transcript of the conversations, as well a reconstruction of how the fraud was perpetrated, can be found in the Philippine Center for Investigative Journalism (2005).

²³ Richard L. Hasen, “Taking the Politics Out of Elections,” *Los Angeles Times*, February 8, 2005.

The Supreme Court named a new person to fill each of the five seats on the CNE [National Electoral Council] board, following a long and tortuous process in which the National Assembly failed to secure the requisite two-thirds majority to confirm the nominations. Although the constitution and laws state that the CNE is to be an independent, apolitical body, three of the new board members were government sympathizers, while the other two were identified with the opposition.

With a majority of seats on the council, the pro-Chávez faction was able to bend the 2004 recall referendum rules to the president's advantage (Kornblith 2005, 127-28, 132-33). Perhaps one lesson here is that when it comes to appointments, a strong norm of consensus, as in Canada at the federal level, might provide a stronger guarantee of impartiality than a formal, mechanical, supermajority requirement.

Another lesson is that the ideal of neutrality must be balanced against the need for effectiveness. If groups with competing political interests cannot reach a consensus on a "neutral" chief election official (as in Venezuela and Quebec), or if members of an election committee are chosen to represent and balance out these competing interests (as in New York), there is a danger that the result will be not neutrality but stalemate and partisan jockeying. The mechanisms for ensuring neutrality cannot be so onerous or the balancing of partisan interests so even that the whole business of administering elections bogs down.

This treatment of competing imperatives is necessarily incomplete, and it, like the discussion leading up to it, focuses only on the impartiality of top-level electoral officers. It should not be forgotten that partisanship can also inhabit the lower echelons of an electoral administration. Even Elections Canada - that exemplar of impartiality - has problems when it comes to midlevel returning officers, who are appointed by the cabinet and are not entirely free of partisan commitments (Kingsley 2004, 411; Massicotte 2005). A more complete discussion of nonpartisan electoral administration would thus have to take into account the entire electoral management body from top to bottom. Indeed, it was the partisan appointment and training of officials at the lowest polling station level in Quebec that caused vote depression in the 1995 referendum.

Conclusion

How elections are conducted - how eligible voters make it onto the voter rolls, how voters cast their ballots, and how votes are counted - can fundamentally enhance or detract from the quality of democracy. The conduct of elections determines the degree to which people's preferences are expressed freely, weighed equally, and recorded accurately. The sad irony is that too often tinkering with these mechanics in the name of strengthening the integrity of the exercise damages the very democratic ideals the reforms are intended to promote. There are, happily, measures that various stakeholders can adopt to prevent or minimize such damage. While the specific remedy singled out for discussion in this paper - nonpartisan administration - is, to be sure, imperfect, it does show that people with a commitment to clean and inclusive elections are not powerless to make reform both effective and benign.

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