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# Overview of Current Electoral Law Developments in the United States

*Vier Jahre nach einer der knappsten und umstrittensten Wahlen in der Geschichte der USA waren die Wahlen zum Präsidenten, zum Senat und zum Repräsentantenhaus im November 2004 zwar ebenfalls von starken Auseinandersetzungen bestimmt, aber weit weniger dramatisch als 2000. Das knappe Wahlergebnis wie auch der Streit um die Stimmzetteln in Florida bei den Wahlen 2000 lösten eine Diskussion über das amerikanische Wahlrecht und Wahlverfahren aus. In der Folge kam es zu Änderungen des Wahlverfahrens und zu Debatten über eine Wahlreform in verschiedenen Bereichen. Dieser Artikel untersucht die umstrittensten Aspekte des amerikanischen Wahlrechts, beschreibt die Reformen der letzten Jahre und diskutiert weitere Änderungen. Der Schwerpunkt liegt auf Reformen im Bereich des Wahlverfahrens, des Wahlmännnergremiums, der Wahlkampffinanzierung, der Wahlkreiseinteilung und von zeitlichen Beschränkungen der Amtszeiten. Ich komme zum Schluss, dass es in Zukunft nur zu kleineren Änderungen des Wahlsystems kommen wird, weil die politischen Eliten zurückhaltend sind und die Kompetenzen für derartige Änderungen vor allem in den Händen der Einzelstaaten liegen.*

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## 1. Introduction

Four years after one of the closest and most controversial elections in United States history, the Presidential, Senate, and Congressional elections in November 2004 were also highly competitive, but did not result in the same drama. The overall closeness of the 2000 elections as well as the controversy over vote-tabulation in Florida have brought issues of election law and election procedure into the realm of public discussion, bringing about some changes in the area of voting procedure, and sparking additional debate in other areas. This paper will explore the most controversial aspects of election law and examine the changes that have taken place in recent years as well as some prospects for additional changes. It examines those aspects of electoral law reform which have generated the most public interest as well as those whose absence from public discussion is most noticeable. First, changes made in response to

the debacle of the 2000 election will be described with a particular eye toward technical reforms to the means of voting and the discussions of a change in the method of electing the President. Then, the paper will outline three areas of reform which were initiated before the 2000 election but which make up some of the most important developments of the past fifteen years: campaign finance reform, redistricting, and term limits. In addressing these changes, the paper will focus on two very broad themes with regard to changes in electoral law in the United States. The first will be the role played by the extreme closeness of recent elections, the so-called 50-50 nation, in highlighting long-existing problems and inconsistencies in electoral law and voting procedure throughout the United States. The second broad theme will be the relationship between popular interest in change and the interests of political parties and elites in either changing the system or maintaining the status quo.

For reasons of simplicity and length, this paper will deal primarily with elections for federal positions, and most examples pertain to the election of the President of the United States. Nevertheless, it will at all times be necessary to keep in mind that beyond the broad structure of elections, the majority of rules and regulations regarding elections are decided and implemented at the state and local level. There continue to be efforts to bring electoral practices in the various states up to a national standard; however, the primary responsibility for elections, according to the Constitution, falls squarely on the shoulders of the individual states.

According to the Constitution, the offices of the President and Vice President are elected according to a now infamous system whereby each state elects a panel of electors, by whichever means the state chooses. These electors, who are collectively called the Electoral College, then directly elect the President in a process that has largely become a formality. The structure of this system will be explored in more detail below. This system reflects a strong commitment in the Constitution to representation based on the states rather than on the population as a whole. This commitment is further reflected in the method of election for members of the Senate. Each of the Senate's one hundred members is elected by a popular vote in one of the states, with each state electing two Senators in separate elections. Originally, the Senators were elected by state legislatures, but the 17<sup>th</sup> Amendment to the Constitution provided that they be directly elected by a popular vote of the voters in the state they represent. The 465 members of the House of Representatives are apportioned to the states according to population, and in turn the states are divided into single-member districts which are approximately equal in population. Members of the House of Representatives are each elected from one such district. As will be discussed below, the means of dividing states into districts is an extremely important and controversial issue.

Election law change in the United States is best seen through the prism of the 2000 presidential election, which was infamously decided by a few hundred votes in Florida. The close-

ness of the race brought to the forefront a series of issues related to voting. There were widespread reports of invalid ballots or incorrectly tabulated ballots caused by malfunctioning voting machines (the notorious hanging chads) and confusing ballots, such as the butterfly ballot, which resulted in Al Gore receiving more than 2000 fewer votes in Florida than he should have received (Wand et al. 2001, 793). There were widespread problems with voter registration, especially the over-aggressive expunging of felons from ballot lists, resulting in legal voters being turned away from the polls. There were also very serious charges that election authorities disenfranchised African-American voters. In Florida, blacks were much more likely to have difficulty voting than other voters. This was due to two types of problems. Disenfranchisement occurred due to voting machine error or confusing ballots which was not any kind of deliberate disenfranchisement but which nevertheless affected black voters more heavily than white voters (Posner 2004, 20). Alongside unintentional disenfranchisement were reports of roadblocks preventing African-Americans from going to the polls, election officials requiring identification from black voters and not of white voters, and election officials preventing registered voters from voting because their names were the same or similar to convicted felons who had been legally disenfranchised (Bass 2004, 128-9). In addition to the irregularities on voting day, questions were raised by the fact that the person responsible for election procedures in Florida, as in most states, was an elected official with an interest in the success of one candidate over another. In the end, the election issues of which votes were to be counted and in what fashion was decided in the court system, culminating in the decision by the United States Supreme Court to halt recounts and thereby declare George W. Bush the victor in Florida and consequently also the victor in the overall election. In broader terms, the fact that the entire election was decided by a very small number of votes in Florida, even though Gore won the nationwide popular vote by some 500,000 votes, calls into question the wisdom of having an electoral college system rather than a direct popular vote.

## 2. The Response to the 2000 Election

While there was a substantial outcry for reform in the weeks and months following the 2000 election, there have been relatively few reforms in response to the problems highlighted by the debacle in Florida. Several factors are behind the slow pace of reforms, including the fact that most problems were the result of incorrectly applied laws rather than bad laws, the fact that the states hold almost all of the responsibility for election procedure, and an unwillingness to make drastic changes to the way that elections are carried out in the United States.

The most direct response to the problems in Florida is the Help America Vote Act of 2002 (HAVA), which was signed into law by President George W. Bush in October of 2002. HAVA is intended primarily to correct technical problems caused by outdated voting machines, confusing ballots, incorrect voter rolls, and other problems. To this end the bill established the Election Assistance Commission which is tasked with administering the bill and developing voluntary standards in an attempt to homogenize voting procedure in the states (HAVA 2002, II A 1: 202, 206, 207, 209).

In order to correct technical problems the bill requires that all states replace the punch card voting equipment which produced the so-called “hanging chads” with more modern, non-punch card equipment, and provides for funds to carry out this expensive process. Additionally, the bill provides guidelines for the types of replacement machines that should be used. New machines are required to be better suited for handicapped voters, have a means by which voters can verify their ballot before submitting it, provide a way for voters to correct errors, and the machines must leave a paper record of each vote that can be audited if there are problems with the normal vote tabulation procedure.

Many of these technical improvements are also intended to correct problems stemming from confusing ballots. Voters must be notified when they “misvote”, such as when voters vote twice in a single-candidate race and that “misvoting” will invalidate their ballot. Additionally, voters must be provided with sample

ballots before the election in order to alleviate confusion caused by ballot design.

Problems involving voters being denied access to the polls due to problems with the voter registration rolls are also addressed by HAVA. First, states are admonished to improve the methods by which they maintain voter lists and expunge voters who are either no longer residents or have lost the right to vote, as in the case of convicted felons. In future elections, voters whose registration status is in doubt will not be turned away from the polls, but will be allowed to cast a provisional ballot which will be valid if the voter is later determined to have the right to vote in that election.

Enforcement of HAVA is made more difficult by the fact that in the end state and local officials are responsible for implementing the details of the law, and state and local election regulations must be amended in order to comply. For example, the requirement that states allow voters to cast “provisional” ballots has not prevented valid votes from going uncounted. In several states provisional ballots must be submitted to the polling station where the voter should have been able to vote. This stipulation alone invalidated twenty percent of provisional ballots in Chicago, Illinois. Worse, forty percent of the provisional ballots in Chicago were rejected because the required paperwork was not correctly filled out (New York Times 2004b). Clearly, such problems are contrary to the spirit of the reform.

## 3. The Electoral College

HAVA also does not address what is the root cause of the focus on Florida, namely the Electoral College system which made it possible for a handful of votes or non-votes in Florida to decide an election in which over 100 million votes were cast. Under the Electoral College system in the United States, each state is assigned a number of electors equal to the number of members of the House of Representatives (determined by population) plus the number of Senators (two to each state). In a presidential election, the candidate with a plurality of votes in a given state receives all of the electors for

that state. Maine and Nebraska are exceptions to this rule, as they divide the electors proportionally among the candidates receiving votes. For a candidate to be elected President, he or she must win a majority of electors in the college. In the event that no candidate wins a majority, then the House of Representatives decides from among the leading candidates.

The history of the development of the Electoral College is fascinating and is part of the debate over its continued usefulness. The Electoral College was conceived out of concerns of both a practical and a philosophical nature. Most significant was the divide between large and small states, as the small states feared being overwhelmed at the polls by more populous states. Additionally there were concerns about the dangers of electing such a powerful position in a popular vote. In addition to concerns about the possibility that voters could be swayed by unworthy candidates was the concern that a directly elected President would be made too powerful by the fact that he would be the only government official elected by the entire body of the country (Longley/Peirce 1999, 19). These concerns must be considered within the political context of the United States at that time. Despite the relatively small size of the United States compared to its current state, there was hardly an "American" identity as we know it today. Additionally, communication over long distances was much more difficult. Both of these factors made politics an even more local matter than they are today. For these reasons, the framers of the Constitution expected for there to be substantial disagreement between the states over the candidates for President, and more importantly that any one candidate would find it difficult to build support in a majority of the states. The Electoral College could then be more of a nominating process which also served the purpose of having representatives making the final decision over the election of the President rather than the masses.

Longley and Peirce (1999, 20-1) argue that the Electoral College was an awkward compromise that was brought into being because of an inability to come to a consensus on any other method as well as the easy consensus on who would be the first occupant of the presidency.

George Washington was the obvious and unanimous candidate to be the first President, making the first two elections a largely formal gesture. The framers' assumptions about the way that later elections would be carried out, namely a nominating process of several candidates by means of the Electoral College, most frequently resulting in a final compromise solution in the House of Representatives, turned out to be incorrect. If the framers were wrong about the way the elections after George Washington would take place, they certainly could not have conceived of the large-scale media democracy of today. Accordingly, the Electoral College has a markedly different effect on presidential elections than originally intended.

The impact of the Electoral College is manifested in three ways. Firstly, there is the concern that the President is technically chosen by electors and not directly by the voters. It is possible that electors might vote for a candidate other than the one that won his or her own state. This fact is somewhat embarrassing for a leading democracy, and represents an aspect of the electoral system that would be discouraged in new democracies. However, no recent elections have been influenced by electors voting other than the way that they are supposed to vote, therefore this system is allowed to continue.

There are, however, very serious ways in which the Electoral College does influence the outcome of presidential elections, having to do with the way that electors are assigned to states and the way that electors are allocated to candidates. As mentioned above, each state is allocated a number of electors based on the members of the House of Representatives from that state and the number of Senators. This has the effect of increasing the voting power of voters from small states at the expense of larger states. For example, Wyoming, with a scant 500,000 inhabitants has three Electoral College delegates while California's more than 33 million inhabitants are represented by 54 delegates. Therefore, each delegate from Wyoming represents around 160,000 people while each delegate from California represents over 600,000 inhabitants. This is a clear abrogation of the principle of one person, one vote; however, this principle is ne-

glected in many elections in the United States, most notably the election of the Senate. This overrepresentation is intended to make certain that smaller states are not neglected in favor of more populous states, and that candidates receive a bonus for winning more states, not just more votes. While common wisdom holds this to be true, the way that states allocate their Electoral College delegates may have the opposite effect.

In all but two states, Nebraska and Maine, the candidate who receives the most votes in that state wins all of that state's Electoral College delegates. In Nebraska and Maine, the Electoral College delegates are divided up between the candidates receiving votes in that state. In most states, this means that receiving 51% (or less so long as a candidate receives a plurality) of the votes in a state is no different than winning all of the votes in that state. The most common result of this fact is that states in which a candidate has a safe majority lose importance during a campaign in favor of so-called "battleground states". More than half of the states are considered to be safely in one of the candidate's hands, meaning that voters in the minority in those states can be certain that their votes will not affect the outcome of the election in November. This also means that the parties and candidates can focus on those states where the outcome is more in question.

Lawrence D. Longley and Neal Peirce (1999, 153-4) argue that the winner-take-all nature of the Electoral College actually more than makes up for the added bonus for small states. They calculate the relative voting power of each state, which is based on the likelihood that a vote by a person in that state will influence the outcome of the election. According to their calculations, the winner-take-all system makes it more than two times more likely that a voter in California will change the outcome in the election than a voter in Montana, the state with the least relative voting power. Vincy Fon (2004, 68) argues for reform which keeps the Electoral College but which changes the way delegates are allocated. In examining the effects of the winner-take-all system used in most of the states, the district-system now used in Nebraska and Maine as well as systems using two

types of proportional allocation, he concludes that a proportional allocation system retains the focus on the states encouraged by the Constitution while more accurately reflecting the voter preference of each state.

Given these issues, it is alarming that there has been no serious effort to abolish the Electoral College or to change the way that delegates are allocated in order to make the process more equitable. There are several reasons why this has not taken place. It is worth noting that formal changes to the Constitution are difficult and rare in American history, requiring a two-thirds majority in the House of Representatives and the Senate as well as the approval of three-fourths of the fifty states. So long as popular wisdom continues to be that the Electoral College favors small states, those small states will block its abolition. However, Longley and Peirce (1999) argue that fully 44 states have below average voting power, and would thereby benefit from reform. However, it is unlikely that the issue will be brought before the states soon. Reform is unlikely because the political elites and the parties would likely not benefit from that reform. First, the current Electoral College system creates safe states and contested states, allowing candidates to focus their resources on relatively few states. Additionally, political elites are understandably resistant to any change away from the system with which they are familiar. Better to face the devil that you know than the devil that you do not know.

However, despite the fact that there has as yet been no coherent effort to abolish or reform the Electoral College, the debate is still active, as evidenced by prominent editorials in the *New York Times* (2004c) and other publications. There are few if any truly positive reasons to keep the Electoral College. Nevertheless, resistance to change away from the status quo, especially on the part of elites, makes change in the near future unlikely.

#### 4. Additional Electoral Reform

Beyond HAVA and the limited discussions about the future of the Electoral College, there



have been other significant developments in Electoral Law in the past 10 years. The most interesting of these are attempts to reform campaign financing, experiments with term limits, and problems surrounding the drawing of district boundaries in the states. These are not fundamental changes in the way that elections are run; however, they have a significant impact on the chance that incumbents have of being reelected to their offices and conversely on the chances for challengers to unseat established officeholders.

#### *4.1. Campaign Finance Reform*

The most visible effort at reform in the 1990s concerned the question about the way that campaigns and parties are financed. In a democracy where presidential candidates must appeal to more than a hundred million voters spread across the width of a continent, substantial media and party resources are required in order to run a successful campaign, and those costs increase with each passing campaign. Therefore, there are serious concerns regarding who provides the funds for parties and candidates seeking election, as well as what effect campaign spending and financing have on the outcome of elections and the behavior of elected officials. Candidates should compete for votes, thereby tying representatives to their constituencies. However, if candidates need money in order to win votes, it raises the question whether candidates might give preference to those who finance their campaigns at the expense of the people he or she is supposed to represent. As Yoav Dotan (2004, 955-6) writes, campaign spending is controversial because it is at the border between the political and the economic. While political equality is one of the fundamental tenets of democracy, it is accepted in society that there will be economic inequality. Political equality is seen as a way for economic inequality resulting from market forces to be counterbalanced. However, given that wealthier individuals and groups can afford to contribute more to campaigns, they also presumably can exercise greater political power, thereby bringing into question the impact of the economic sphere on the political.

Research regarding the effects of campaign finance focuses on two areas. The first is that money is necessary for politics, and increased spending should result in better-educated voters and higher voter turnout, as candidates are able to communicate their views more completely to a greater share of the electorate as well as develop organizations to encourage supporters to vote. The other side of the coin is the concern that money in politics has a corrupting effect (Mann 2003, 70). In part in response to the Watergate scandal and in part due to the rising cost of media-based campaigns, Congress adopted amendments to the previous campaign finance laws in 1974, which established a system by which presidential candidates could be publicly financed provided they limited their spending in general and especially media advertisements. The law placed limits on who could make contributions to candidates, how much money candidates could spend, how much could be given, and how much money parties could spend on candidates' election campaigns (Mann 2003, 71). Candidates were also required to disclose the amount and source of campaign contributions. In a court case in the same year, the Supreme Court upheld all aspects of the law other than the stipulation that limited the amount of money candidates could spend, arguing that campaign spending was a kind of free speech.

The precise effect of campaign financing and spending is a matter of debate among political scientists. Gary Jacobsen (1978, 489) argued that spending limits primarily effected challengers' ability to raise enough money to compete with incumbents. Political scientists also argued that campaign contributions to candidates did not result in biased representatives (Mann 2003, 72). In reaction to electoral reform, parties began to collect two types of money: so-called "hard money" which had to follow campaign finance laws and could be used directly for campaigning and so-called "soft money" which was unregulated but could not be used directly for campaigns. In the 1990's the use of soft money exploded, especially for issue advertisements which did not sponsor one candidate directly, but advocated an issue important to the campaign at hand (Mann 2003, 74). The number of

such advertisements and the amount of soft money being spent increased dramatically, resulting in a call for reform of the campaign finance system. In response Congress passed the Bipartisan Campaign Reform Act of 2002, which sought to eliminate so-called soft money and restricted issue advocacy spending in the weeks immediately before an election. The imposition of this law brought about legal challenges from those who held that these limits violated free speech in the same way as the limits on campaign spending from the first round of campaign finance which the Supreme Court had repealed. However, the law was upheld by the Court, leaving open the possibility for more comprehensive reforms in the future (Dotan 2004, 1015).

The effects of this law have been mitigated by continued efforts to use soft money in order to bypass hard money restrictions. The most famous instance regards the loop-hole in federal regulations allowing non-profit groups, so-called 527 groups, to continue to run issue advocacy advertisements. The most noteworthy in the 2004 presidential race is the Swiftboat Veterans for Truth, a group which has run advertisements refuting Democratic presidential candidate Senator John Kerry's war record in Vietnam (New York Times 2004d). Specifically, the ads claimed that John Kerry lied about his actions in the war that resulted in him being awarded several medals. Additionally they targeted Kerry's anti-war activities following the war. While the ads claimed to be sponsored by men who served with Kerry in Vietnam, the connection of the group's members to Kerry is in question. Such ads are hardly limited to Republican supporters who attacked Kerry, as left-leaning advocacy groups such as Moveon.org attacked President George W. Bush on a variety of issues, including his own military service. It remains to be seen whether the frequently negative and sometimes underhanded nature of these ads will lead to additional reform.

#### 4.2. Redistricting

Moving away from cases highlighting but not restricted to the election of the President,

we come to the issues surrounding the drawing of boundary lines between districts for delegates to the House of Representatives and state legislatures. There is a long history of controversy surrounding reapportionment of congressional districts at the state level. Most important is the historical use of congressional district boundaries to first disenfranchise African-Americans and later to ensure representation for that same group.

Redistricting is a process that takes place every ten years at the state level, according to processes decided on by the state legislatures but subject to a series of court rulings that strongly set guidelines for the drawing of district boundaries. *Baker vs. Carr* in 1962 and *Wesbury vs. Sanders* in 1964 established that all electoral districts should be of approximately the same size in terms of population. This reaffirmed that in the process of reapportionment, the principle of one person, one vote should be adhered to as much as possible. Since the Voting Rights Act of 1964 the second important criterion has been that districts must not be designed in order to disenfranchise minorities, and that they should, when possible, be used to ensure that significant minority populations gain representation. These are called majority-minority districts because they ensure that a large concentration of minority citizens is placed within a district in which they are the majority, thereby ensuring representation of the minority group. For almost two decades this was considered to be the second most important principle behind that of one person, one vote. However, the case of *Shaw vs. Reno* in 1993 established that excessive gerrymandering was not acceptable, even when done in an attempt to create a majority-minority district. The case involved the 12<sup>th</sup> district in North Carolina, the so-called I-85 district, which connected pockets of African-American voters by drawing the boundaries of the district down the middle of Interstate 85, thereby bypassing several predominantly white areas (Winburn/Wagner 2003, 5-6). In this case, the Supreme Court argued that a third condition, that of a compact, geographically sensible district could take precedence over considerations of racial fairness. Additionally, the wis-

dom of majority-minority districts has been called into question. While making African-Americans a majority in a given district has ensured that there are many more African-Americans in Congress than there otherwise might be, some argue that concentrating African-American voters, who overwhelmingly vote for the Democratic party, is actually hurting the Democratic Party's chances in other districts. This raises the question of substantive representation as opposed to descriptive representation. Is it better to concentrate all of the minority voters in a region into one district, or are they better served by leaving them in their "natural" districts where they might form a coalition with whites who have similar interests, thereby electing several Democratic candidates, who may or may not be minorities, but who substantively represent the minority in that area? Epstein and Holloran (1999, 394-5) argue that there is a delicate balance between these two concerns. The Harvard Law Review has argued that the changing nature of racial politics, most importantly the decline in racially polarized voting, has made majority-minority districts obsolete in many areas (Harvard Law Review 2003, 2229).

Most controversies with regard to electoral districts surround gerrymandering – the practice of drawing district lines for some sort of political reason. While most famously mentioned with regard to minority voters, gerrymandering is now frequently associated with attempts to change district boundaries in order to benefit one party or the other. This brings us to the second controversial aspect of redistricting: political redistricting by state legislatures. In each state, boundaries are redrawn after each census in order to adapt the boundaries to the new demographic realities of the state. Frequently this also involves adding new districts or subtracting districts according to increases or decreases in the states' populations.

In the spring of 2003, a bit of drama surrounding attempts to redraw district lines in Texas brought the issues of redistricting to national media attention. In a rare move, Republicans, under the leadership of Speaker of the House Tom "The Hammer" Delay, attempted to change the boundary lines in Texas after a

compromise solution had already been reached. Under the previous plan, Democrats held 17 of 32 House of Representatives seats despite the fact that all state-wide offices in Texas are held by Republicans. Delay claimed that the imbalance was due to the fact that the compromise solution, imposed by a panel of judges, was based on the plan adopted in 1990, when the Texas state legislature was dominated by Democrats (Hulse 2003).

The drama unfolded when Republican state legislators tried to pass legislation to redraw the lines. Unable to defeat the bill posed by the Republicans, some 50 Democrats left the legislature, thereby denying the proceedings a quorum and holding up any progress. The Republicans asked the state government to return the legislators to their duty, so the Texas Rangers were dispatched to arrest the Democrats who had fled. In order to avoid being arrested, the Democrats fled across state lines into Oklahoma, beyond the jurisdiction of the Texas authorities. Delay even made comments that the FBI should be used to bring the legislators back to the capitol (Barboza/Hulse 2003). The FBI was not called in, and the legislators returned to Austin after three days. Eventually, the plan proposed by Delay was passed despite the efforts of Democratic legislators. Some fear that the new plan is an example of the pattern mentioned above, where majority-minority districts actually may hurt the Democratic Party. Democrats claim that Republicans are attempting to paint the Democratic Party in Texas as a party for minorities, thereby alienating moderate white voters (Blumenthal 2003). The new arrangement helped the Republicans win an additional five seats in the House of Representatives, including assistance in the defeat of four incumbent Democrats. There were only seven incumbents unseated of the 465 who were up for reelection nationwide.

This anecdote illustrates one of the central issues in redistricting, namely that so long as it is controlled by state legislatures; the party with a majority in the state legislature will continue to draw boundaries to the benefit of its own candidates. State legislatures routinely engage in the practice described as "pack, crack, and pair",



meaning that district boundaries are drawn such that all opposition voters are either concentrated in one district, diluted across several districts so that they are a majority in none, or redrawn such that two opposition incumbents occupy the same district. Legislators in the majority party can now use advanced computer modeling programs to predict how boundary changes will affect the demographics of the resulting districts (New York Times 2004a).

Reform in the process of reapportionment is likely to take place along two veins: First will be the continued action by Federal and state courts to demand that all district boundaries conform to the guidelines mentioned above: equal size in terms of population, racial fairness, and that boundaries be as compact as possible. In recent years the courts have given added weight to the idea that districts should conform if possible to traditional divisions, thereby avoiding splitting cities and counties into separate districts (Winburn/Wagner 2003, 4-5). Continued efforts to require district boundaries to conform to these criteria will make partisan gerrymandering more difficult. However, the courts have largely declined to intervene in cases of partisan gerrymandering, citing the difficulty in developing standards which directly apply to partisan gerrymandering while recognizing the right of the states to regulate elections (Harvard Law Review 2004, 1198-9).

The second vein of reform is aimed at taking control of the redistricting process out of the hands of state legislatures and putting it in the hands of bi-partisan or non-partisan commissions. Dennis F. Thompson (2004, 53) argues that giving politicians the power to define their own districts violates a fundamental principle of democracy, that one election should not have a direct effect on the next election, so that the current majority succeeds the previous majority. He argues that allowing incumbents to in effect choose their constituency can result in less accountability between representatives and their constituencies. Further, the members of the legislature have an interest in maintaining their places in the legislature, thereby biasing districts against change that could result in their not being re-elected. The most common solution to

the problem is to establish independent commissions to draw district boundaries. Currently fourteen states have such commissions. However, the commissions are hardly apolitical, as the members of the commission are frequently appointed by the legislature, and therefore can be influenced by legislators (Thompson 2004, 56). Nevertheless, removing this power from the direct control of legislators is a step in the right direction.

A third option pursued in some states is to introduce multi-member districts. In some cases, it makes sense to create a multi-member district rather than to divide a geographic unit into several single-member districts. Multi-member districts are not allowed for the elections to the House of Representatives, however many state legislatures make use of some multi-member districts. It is not possible within the confines of this paper to describe the way that multi-member districts are used in each state, but it is useful to make a few comments. Multi-member districts have a controversial history in the United States, especially as they have been used to disenfranchise minority voters (USDOJ 2000; Bass 2004, 124). There is also a strong sense in which Americans are committed to the single-member district system and that political elites in the parties find it contrary to their interests to introduce any voting system that might result in the weakening of the two-party system. Broad resistance to a move away from single-member districts has not discouraged the existence of a small but vocal minority who continue to advocate multi-member districts and proportional representation as a solution to the problems created by single-member districts and the first-past-the-post system (see Guinier 1994 for an example). While these voices are clearly in the minority, their contributions still play a role in the discussion of electoral change. In the discussions surrounding a reform of the method for electing New York City and Cincinnati city councils, some have harkened back to the cities' experiments with proportional representation in the first half of the 20<sup>th</sup> Century (Lipsky 2004; Sherman 2004). These attempts at municipal reform are a far cry from changes in the way that the federal government is elected; how-

ever, these debates serve to reintroduce voters to alternatives to the majority system in America. The problem of district apportionment could be rendered largely moot through the use of proportional representation, and many of the worst effects of majority voting could be mitigated through the integration of certain aspects of proportionality within the framework of the current system.

#### 4.3. *Term Limits*

Although the movement that brought about term limits in many states has largely passed, the effects of this reform are still being felt in those states who adopted term limit legislation. Term limits are an example of a reform that took place despite it being against the best interest of incumbent politicians. Terms limits have a long history in the United States dating back to George Washington voluntarily ending his tenure in the White House after two terms. That tradition continued until Franklin D. Roosevelt ran for a third and fourth term. Since that time, the Constitution has been amended to formalize the rule that a President may only serve two elected terms. In the 1990's, however, there was a broad movement to impose term limits on federal and state legislators as a reaction against the professionalization of legislatures. Term limit laws that apply to state legislatures were passed in 21 states. Attempts to implement term limits for federal offices were declared unconstitutional, but term limits remain for state and local offices in many states, most of them western states. The vast majority of term limit laws were passed by way of ballot initiatives (Cain/Levin 1999, 165-6). In fact, such measures were passed in all states where the initiative process made it possible. The effects of term limit legislation are mixed. Legislators themselves report that term limits have caused problems with legislative leadership and ability as well as that term limits have caused legislators to be less civil with one another (Cain/Levin 1999, 179-84). Since the initial wave of initiatives in the early 1990's there have been no new states who have adopted term limit laws. However, the Idaho legislature shockingly went so far as to repeal the initiative

passed there, even over the objection of the governor, who is also subject to term limits. Eventually, a second initiative narrowly confirmed the legislature's decision to abolish the limits (Smith 2003, 216-7). The term limits movement seems clearly to have passed its prime. However, it does show that popular support for reform can supersede the interests of elected elites. The counter argument is that this popular measure has had unintended consequences that do more harm than good.

## 5. **Conclusion**

Returning to the themes mentioned in the introduction and the possibility for further reform, while the procedural reforms contained in HAVA, particularly funding for new voting machines and the requirement for provisional ballots, have increased confidence in voting procedure, there remain difficulties and irregularities which are troubling to many. George W. Bush's relatively comfortable margin of victory in 2004 has discouraged attempts to challenge the results of the election, but problems, especially those in the vital swing-state of Ohio, have resulted in demands for additional reform (Dao/Salvato 2004). Despite the enormous amount of attention paid to the procedures during the election, including "arm(ies) of lawyers" from both sides (Cannon 2004), there were still irregularities which will have to be addressed in the future, especially with regard to understaffed voting locations, malfunctioning voting machines, and extremely long lines in predominantly poor areas. Critics of the current procedures frame these problems as subtle forms of voter intimidation aimed at poorer, Democratic voters, and court challenges and legislation in response to these problems are likely in the coming months and years.

However, these problems have largely not resulted in increased calls for a more significant overhaul of the election system, particularly with regard to the election of the President. However, an increasing number of scholars and public figures are pushing for broader, structural changes in the way that the Presiden-

tial election is carried out. Timothy Noah (2004), a writer for the online magazine *Slate*, hypothesizes that a mirror result to what occurred in 2000, with George Bush winning the popular vote while John Kerry carried the Electoral College might have created a strong enough consensus among politicians in Washington to allow for the Constitution to be amended. However, this did not occur, and the result of the election is largely undisputed. The size and strength of any constituency for changing the Constitution is an open question. The reluctance of elites to change and the concentration of responsibility for elections at the state level are likely to result in only incremental change. An example of incremental change is the passing of HAVA. Another hypothetical example would be for some states to follow the example of Nebraska and Maine and distribute their Electoral College votes to more than one candidate according either to the proportionality principle or according to internal divisions; however, recent attempts in this direction have been unsuccessful. The advantage to this solution is that it would not require action by Congress but could instead be accomplished state by state. However, an attempt at exactly this kind of change was defeated in a referendum in Colorado, with the opponents arguing that states which chose to change the way their electoral votes were cast risked decreasing their influence if other states did not make the same change. At this point, a strong national movement to amend the Constitution and abolish the Electoral College is difficult to imagine. A knowledgeable observer of the American political system can expect for the majority of reform to continue to be only incremental in nature.

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