

**PERFECT IS THE ENEMY OF FAIR: AN ANALYSIS  
OF ELECTION DAY ERROR IN OHIO'S 2012  
GENERAL ELECTION THROUGH A DISCUSSION  
OF THE MATERIALITY PRINCIPLE, COMPLIANCE  
STANDARDS, AND THE DEMOCRACY CANON**

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#### I. INTRODUCTION

“As goes Ohio, so goes the nation.”<sup>1</sup> In recent years, significant attention has been paid to elections in Ohio. In 2004, the eyes of the world focused on Ohio as the presidential election nearly went to a recount reminiscent of Florida in 2000 because Ohio was unable to declare a winner. In 2008, not long after Ohio was called for then Senator Barack Obama, the television commentators recognized that Senator

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<sup>1</sup> The original phrase is in reference to another state: “As Maine goes, so goes the country.” ROBERT W. SPEEL, CHANGING PATTERNS OF VOTING IN THE NORTHERN UNITED STATES: ELECTORAL REALIGNMENT 1952-1996, at 19 (1998) (citing HENRY F. WOODS, AMERICAN SAYINGS 109 (1945)). Until 1960, Maine held its elections in September, two months before the rest of the country. Ken Rudin, *The Significance of the V.P. Pick*, WASHINGTONPOST.COM (July 14, 2000), <http://www.washingtonpost.com/wp-srv/politics/campaigns/junkie/archive/junkie071400.htm>. Therefore, the phrase only referred to the fact that Maine voted months before anyone else. *Id.* The Ohio-centric turn of phrase seems to have begun appearing during the 2004 presidential election as the outcome of that national election was completely dependent on the outcome of Ohio’s election. As Ohio has been a perpetual presidential swing state since the 2004 election, the phrase stuck. *See generally* Kate Snow, *As Ohio Goes, So Goes the Nation . . . Again*, ABC NEWS (Nov. 6, 2007), <http://abcnews.go.com/WN/Vote2008/story?id=3826822>; *As Ohio Goes, So Goes The Nation. Sometimes.*, WASHINGTONPOST.COM (Mar. 6, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/05/AR2008030503510.html>; Zak Lutz, *So Goes Ohio, So Goes the Nation*, HARVARD UNIV. INSTITUTE OF POLITICS (2012), <http://www.iop.harvard.edu/so-goes-ohio-so-goes-nation>.

John McCain would not be able to overcome Senator Obama's Electoral College lead, thereby projecting Senator Obama would win the presidency.<sup>2</sup> This pattern repeated in 2012 where, within seconds of calling Ohio for President Obama, the media declared he had won re-election.<sup>3</sup>

In all three elections, the country was able to avoid an electoral meltdown in part because Ohio was able to count votes in short order. However, each of the elections demonstrated to the world the susceptibility of elections that hinge upon the mechanisms and methods in place to determine what cast ballots are to be counted. Since the 2000 election, the mechanism of elections has been subject to review by scholars, lawmakers, advocates, and in many cases federal courts. The continual change in and review of election systems have not overcome the reality that elections systems, including Ohio's system, could not weather a close or controversial election without delay, litigation, or doubt as to the result.<sup>4</sup> If such a conflict would arise, the actions taken in polling places across the state could be critical in determining a victor within the state and possibly the nation.

Ohio, like many states, has responded to this circumstance with an incredibly technical and rule driven approach to election administration.<sup>5</sup> This approach to elections administration is deficient for two primary reasons: (1) it refuses to accept that mistakes happen, and (2) the only mistakes that are subject to scrutiny are those that leave a sufficient paper trail that they could be subject to litigation or post-election scrutiny. This Article presents an analysis of Election Day error in Ohio's 2012 general election through a discussion of the materiality principle, compliance standards, and the Democracy Canon, and suggests that a hybrid approach to election administration is necessary for Ohio's General Assembly and election administrators at every level to better identify those mistakes and incorporate real-time mistake remedies into Election Day procedures. Ultimately, the human factor of elections should be recognized as an opportunity for better voter understanding and participation rather than a barrier in the pursuit of a perfect Election Day.

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<sup>2</sup> Joe Scarborough, live on MSNBC after calling Ohio for Obama, stated, "[W]e don't want to call it. There are still people on the West Coast that have to vote, but I just don't see any pathway . . . [for McCain victory]." MSNBC television broadcast Nov. 4, 2008.

<sup>3</sup> Brett Baier, after declaring Ohio for President Obama, said, "That's the presidency . . . essentially, Barack Obama is re-elected." FOX News television broadcast Nov. 6, 2012. Rachel Maddow on MSNBC said, "[W]e have just learned that in the state of Ohio, NBC News has projected that President Obama has won the state of Ohio. President Obama has been re-elected for a second term." MSNBC television broadcast Nov. 6, 2012. Wolf Blitzer said, "CNN projects that Barack Obama will be re-elected President of the United States. He will remain in the White House for another four years because we project that he will carry the state of Ohio. By carrying Ohio, he wins the election for President of the United States." CNN television broadcast Nov. 6, 2012.

<sup>4</sup> Edward B. Foley, *Numbers Show Ohio at Unique Risk of Disputed Presidential Votes*, ELECTION LAW @ MORITZ (Dec. 17, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=10289>.

<sup>5</sup> For example, the Ohio Secretary of State provides training and manuals. *See Elections & Voting*, OHIO SECRETARY OF STATE, [http://www.sos.state.oh.us/SOS/elections/elections\\_officials/electOffPubs/general.aspx](http://www.sos.state.oh.us/SOS/elections/elections_officials/electOffPubs/general.aspx) (including, for example, a 998 page "Election Official Manual" and 58 directives issued in 2012).

## II. BACKGROUND

*A. A review of the Materiality Principle, compliance standards, and Democracy Canon are critical in order to propose an election system for Ohio in the wake of the November 2012 election that accounts for the Election Day experience.*

A review of literature on remediation of election error uncovers scholarship primarily addressing issues after elections and how to reduce the frequency and costs associated with recounts and litigation.<sup>6</sup> In order to address and accommodate the issues of election error and constructing a fairer system of addressing Election Day error, we must examine the concepts guiding election error generally and apply them to issues at the point of voting.

## 1. Materiality Principle

In *Resolving Election Error: Dynamic Assessment of Materiality*, Justin Levitt argues that “materiality” to voter eligibility should be the standard when determining whether a ballot should be rejected because of error.<sup>7</sup> The author notes two parts to materiality: (1) significant mistake to a requirement that is irrelevant to determining voter eligibility is not material, and (2) irrelevant mistake to provision necessary to determine voter eligibility is not material.<sup>8</sup> Materiality is dynamic: what is material today may be immaterial tomorrow, and what is immaterial today may be material tomorrow.<sup>9</sup> Under the materiality standard, votes should be counted so long as no reasonable decision maker would have a substantial question about either the voter's eligibility or the voter's ballot preference.<sup>10</sup> The Materiality Principle does not demand incremental procedures “to seek information bearing on the validity of a vote; it merely changes the standard by which votes are evaluated when there is cause to undertake an evaluation.”<sup>11</sup> Levitt argues that this standard is no more subject to substantial bias than any other standard that has been proposed or is in use.<sup>12</sup> Levitt notes both the legislatively created “election regulations are to be constructed liberally in favor of the voter” and the judicial “substantial compliance”

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<sup>6</sup> One exception to this general standard relates to ballot design. Election officials have shown a willingness to recognize and mitigate mistakes caused by how voters interact with a ballot. See Mary Beth Beazley, *Ballot Design as Fail-Safe: An Ounce of Rotation is Worth a Pound of Litigation*, 12 ELECTION L.J. 18 (2013). Attention to ballot design concerns is similar to pre- and post-election challenges in the existence of a clear evidentiary record and items that can be assessed and modified outside of the strict time limitations of Election Day.

<sup>7</sup> Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 103 (2012).

<sup>8</sup> See *id.* at 108.

<sup>9</sup> *Id.* at 113.

<sup>10</sup> *Id.* at 123.

<sup>11</sup> *Id.* at 123-24.

<sup>12</sup> *Id.* at 138.

approach as flexible standards that leave similar option for bias as the Materiality Principle.<sup>13</sup>

## 2. Compliance Standards

Edward Foley's *How Fair Can Be Faster: the Lessons of Coleman v. Franken*, examines the concept of fair elections and vote counting through the lens of the 2008 Minnesota Senate election and recount.<sup>14</sup> This Article proposes a model calendar for the duration of seven weeks for major election recounts, and describes the creation and implementation of an impartial tribunal.<sup>15</sup> It also argues that a fair tribunal/process is more important than having ideal rules for vote-counting.<sup>16</sup> Foley describes three vote-counting regimes, noting that constructive compliance seems intuitively superior to a harsh strict compliance regime.<sup>17</sup> First he discusses the strict compliance standard under which only ballots free from error and cast in strict compliance with election laws can be counted, even when the deviation from law is due to official error.<sup>18</sup> The second standard Foley explains is substantial compliance, wherein ballots with some errors can be counted, even if the errors are caused by the voter, because the ballot is in substantial compliance with the law.<sup>19</sup> Finally, he discusses the concept of constructive compliance, where a voter constructively complies with the law when she does everything she can to comply with the election laws, but an election official makes an error causing the ballot to no longer comply with the law.<sup>20</sup> These ballots may be counted, but ballots with voter-caused error may not.<sup>21</sup> Foley concludes that because state election laws and relevant case law are rarely clear on the choice between vote-counting regimes, an impartial tribunal to select the proper vote counting doctrine is more important to fairness than picking the 'correct' vote-counting method.<sup>22</sup>

## 3. The Democracy Canon and Alternatives

Richard Hasen, in *The Democracy Canon*, describes the Democracy Canon as a substantive canon of statutory interpretation that says ambiguous election laws should be liberally construed in favor of the voter.<sup>23</sup> The Canon has a longstanding

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<sup>13</sup> *Id.* at 99. In Ohio, this balancing approach is seen by both a general statement that a vote should count if intent is clear and in rulings in the *NEOCH v. Husted* case, discussed in detail below through use of a fault-based analysis.

<sup>14</sup> Edward Foley, *How Fair Can Be Faster: the Lessons of Coleman v. Franken*, 10 ELECTION L.J. 187 (2011), available at <http://moritzlaw.osu.edu/electionlaw/documents/hfcbf.pdf>.

<sup>15</sup> *Id.* at 187, 198-99.

<sup>16</sup> *Id.* at 216.

<sup>17</sup> *Id.* at 217.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 218.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 219.

<sup>23</sup> Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 77 (2009).

history in state courts when deciding vote counting cases in which ballots are disputed due to minor voter error, poll worker error, or a disputed reading of a statute.<sup>24</sup> Hasen shows that it applies when the election law is ambiguous, but probably does not apply when the language of the statute is clear.<sup>25</sup> The Democracy Canon is different from other substantive canons because it helps enforce the right to vote and, due to the political salience of elections policy, legislatures can overrule what they see to be incorrect decisions of the courts by clarifying the law via legislation (although this is only helpful to subsequent elections).<sup>26</sup> Hasen argues that the Democracy Canon is especially vulnerable to politicization, but consistent application and attempts to educate the public about the history of the canon should reduce the extent to which use of this canon is seen as a partisan move.<sup>27</sup>

The Democracy Canon has been subjected to significant critique. Christopher Elmendorf's *Refining the Democracy Canon*, is a direct response and critique of Hasen's *The Democracy Canon*. Elmendorf is skeptical of the Democracy Canon because of costs that may be associated with it.<sup>28</sup> These costs are: (1) an increase in the "partisan gap" in judicial rulings in election cases, undermining public confidence in the neutrality of courts and election results, (2) a potential for undermining incentives for bipartisan compromise on election issues, as thumbing the scale in favor of one position could make the other side fight for tighter language or prevent the legislation from passing, and (3) the possibility of displacing important, non-election matters from the legislature's agenda in order to correct a judicial interpretation that does not comport with the legislature's intention.<sup>29</sup>

Elmendorf proposes three other canons of interpretation that could be used in place of the Democracy Canon: the Effective Accountability Canon, the Carrington Canon, and the Neutrality Canon.<sup>30</sup> An Effective Accountability Canon would encompass a norm that says an election law, or suite of election laws, is unconstitutional if there are practicable alternatives that would result in substantially more effective accountability to the normative electorate at reasonable cost.<sup>31</sup> Elmendorf argues this norm is embodied in the 17th Amendment<sup>32</sup> and the

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<sup>24</sup> *Id.* at 76-80.

<sup>25</sup> *Id.* at 88.

<sup>26</sup> *Id.* at 97-102.

<sup>27</sup> *Id.* at 106.

<sup>28</sup> Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1056 (2010).

<sup>29</sup> *Id.* at 1057.

<sup>30</sup> *Id.* at 1055-56.

<sup>31</sup> *Id.* at 1076-77.

<sup>32</sup> The 17th Amendment of the U.S. Constitution states:

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, that the legislature of any State

Guarantee Clause<sup>33</sup> of the U.S. Constitution and that under this standard of interpretation, ambiguities in statutes should be resolved in favor of a reading that helps the result of an election capture what the public “wanted” the result to be.<sup>34</sup> The Carrington Canon<sup>35</sup> would interpret election statutes narrowly when they are passed on party lines and would remove or reverse the normal presumption of deference to administrative agencies if the agency is partisan in structure.<sup>36</sup> Finally, the Neutrality Canon would construe election laws to avoid finding a private right of action near the apex of an election cycle, convert vaguely worded statutory standards into clear judicially constructed doctrines, presume that agencies charged with administration of elections have authority to issue rules with the force of law, and treat a bipartisan or difference-splitting interpretation as presumptively correct.<sup>37</sup>

#### 4. Partisanship and Decentralization of Election Administration

The idea that rampant partisanship and a decentralization of election administration have only exacerbated instances of and ineffective responses to election error is discussed extensively in relevant literature.<sup>38</sup> In *Getting From Here to There in Election Reform*, Heather Gerken begins by describing numerous instances of electoral error, from erroneously discarded ballots and long voting lines to poorly trained poll workers and voting machine breakdowns. She also discusses why electoral reform should be easy: there is a consensus that a problem exists, numerous possible solutions have been proposed by legislators and academics,

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may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

U.S. CONST. amend. XVII. For Elmendorf, the requirement of direct election by the people requires a canon of interpretation that prioritizes and gives deference to the intent of the voting public. See Elmendorf, *supra* note 28, at 1077-78.

<sup>33</sup> Article IV, Section 4 of the U.S. Constitution states: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. CONST. art. IV, § 4. Elmendorf specifically argues that the Founding-era ideas of republican government specifically references a no monarchical government through a “filtered-majoritarian system of rule—one that provides for popular accountability while checking the citizenry’s passions and naked self-interest.” Elmendorf, *supra* note 28, at 1078.

<sup>34</sup> Elmendorf, *supra* note 28, at 1077-84.

<sup>35</sup> The Canon is named after the Supreme Court case *Carrington v. Rash*, 380 U.S. 89 (1965). In *Carrington*, the Court held that denying someone access to the ballot based purely upon the way they may vote is unconstitutional. *Id.* at 97.

<sup>36</sup> Elmendorf, *supra* note 28, at 1095-97.

<sup>37</sup> *Id.* at 1098-104.

<sup>38</sup> Ohio is not immune to this trend. One of several examples from recent years was the passage and later repeal of H.B. 194 (and the repealing act S.B. 224) during the 129th General Assembly. See David Eggert, *House Likely to Kill Elections Bill Targeted by Referendum*, COLUMBUS DISPATCH (Apr. 25, 2012), <http://www.dispatch.com/content/stories/local/2012/04/25/house-likely-to-kill-elections-bill-targeted-by-referendum.html>.

elections are a salient and important issue, and several “crises” (namely Florida in 2000 and Ohio in 2004) that elevated election problems to national prominence have occurred.<sup>39</sup> However, Gerken notes that despite this environment ripe for reform, little has been done because of partisan and decentralized control and administration of elections.<sup>40</sup> To overcome partisanship and localism, she suggests the creation and design of a Democracy Index, similar to the way US News and World Report ranks universities and colleges.<sup>41</sup> The Democracy Index would include data on a number of election issues: how many ballots were discarded, how long did voters wait in line, how common were machine breakdowns, and others.<sup>42</sup> This data-driven ranking would enable states to see where they stack up and undertake reform (because no one wants to be at the bottom), thus reducing impact of localism.<sup>43</sup> The Index would also enable voters to gauge the job the election officials in their state (including the Secretary of State) are doing—something that is very difficult for most voters without some sort of heuristic measure—thus reducing impact of partisan self-interest.<sup>44</sup> To some degree The Pew Charitable Trusts has implemented an index similar to what Gerken proposes. Their Election Performance Index measures states on 17 indicators to create an overall score; relevant to this Article, the indicators do not attempt to measure mistake, but some indicators capture the result of mistakes such as provisional ballots rejected, voting wait time, and disability- or illness-related voting problems.<sup>45</sup>

Richard Hasen also addresses the consequences of partisanship and decentralized elections administration in *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*. Due to hyper-partisanship, decentralized election administration with patchwork application of rules, administrator incompetence, technological advances, and voter error, the possibility of “electoral meltdown”<sup>46</sup> is becoming increasingly more likely.<sup>47</sup> Hasen proposes

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<sup>39</sup> Heather K. Gerken, *Getting From Here to There in Election Reform*, 34 OKLA. CITY U. L. REV. 33, 36-38 (2009).

<sup>40</sup> *Id.* at 38-39. Though neither squarely within Gerken’s analysis nor the scope of this Article, it is imperative to note that before any sustained reform could be attempted, political leaders need to reach some agreement as to the appropriate role of government in relation to voting. For the record, it is the position of the authors that government at every level has an obligation to not only regulate the franchise, but to encourage, promote, and protect exercise of the right to vote at every level.

<sup>41</sup> *Id.* at 39-40.

<sup>42</sup> *Id.* at 40.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 44.

<sup>45</sup> *Elections Performance Index*, PEW CHARITABLE TRUSTS, <http://www.pewstates.org/research/data-visualizations/measuring-state-elections-performance-85899446194>. Ohio ranked 40th at 64% for 2010 (the most recent data available). *Id.*

<sup>46</sup> Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 938 (2005). Hasen refers to the 2000 presidential election as the “first presidential meltdown” in recent memory. Even though he declines to specifically define what constitutes an “electoral meltdown,” his comments seem to suggest that a meltdown is characterized by vote totals within the margin of litigation, thereby sending the election into court and leaving the public

three reforms to reduce the risk of electoral meltdown: (1) registration reforms including universal registration coupled with a national voter identification program, (2) transition to nonpartisan election administration with nonpartisan chief elections officers, and (3) more court willingness to entertain pre-election challenges and less willingness with post-election litigation.<sup>48</sup> Hasen's registration reform proposal attempts to combine Republican policies (voter ID card with name, signature, photograph, and fingerprints) with Democrat policies (universal registration).<sup>49</sup> This proposed reform suggests the federal government should be responsible for implementing the voter identification cards and universal registration.<sup>50</sup> Hasen also proposes creating nonpartisan chief elections officers, appointed by the governor and confirmed by a supermajority of the legislature.<sup>51</sup> In order to ensure insulation from political pressure, the officer would have a single long term, be removable only by impeachment and be guaranteed sufficient funding in the state constitution.<sup>52</sup> Lastly, Hasen argues courts should be reluctant to hear post-election challenges when the issue was foreseeable prior to the election, and should be more open to pre-election challenges.<sup>53</sup>

*B. A rigidly technical approach to election administration and mistake is unnecessary since the Anderson-Burdick framework, as it has been applied within the 6th Circuit, supports flexibility in election administration.*

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court developed a balancing test which provides needed guidance and flexibility for evaluation of election regulation.<sup>54</sup> Any regulatory burden on the right to vote must be justified by balancing state interest. The balancing test established in *Anderson* requires a court to consider the nature and size of the alleged injury, identify and evaluate the state interests in the regulation, and determine “the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>55</sup> Applying this standard in *Burdick*, this Court found “the

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with an indeterminate outcome for a period of time. These actions severely undermine the public trust in election integrity, which create an “electoral meltdown” in a democratic society.

<sup>47</sup> *Id.* at 944.

<sup>48</sup> *Id.* at 945-46.

<sup>49</sup> *Id.* at 969-72.

<sup>50</sup> *Id.* at 972-73.

<sup>51</sup> *Id.* at 983-85.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 991.

<sup>54</sup> The following analysis of *Anderson* and *Burdick* is adapted from and expands on the amicus brief in favor of respondents filed by author Kearney and drafted in part by authors Parikh and Sanders, on behalf of the Senate Minority Caucus in *Husted v. Obama for America*, 133 S. Ct. 497 (2012).

<sup>55</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens . . . rights.”<sup>56</sup>

There is no question that voting is a fundamental right. Any restriction on the exercise of the franchise of voting “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”<sup>57</sup> States have an obligation to regulate elections and voting to facilitate the democratic process. “States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.”<sup>58</sup> As a result, states have developed complex election regulations and codes. The Court has acknowledged that

[e]ach provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. Nevertheless, the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.<sup>59</sup>

The *Anderson/Burdick* standard was relied upon and ultimately strengthened during litigation in the fall of 2012. It has been proposed, particularly by Richard Hasen that the use of *Bush v. Gore* in combination with the existing balancing framework “reflect a broader change in the circuit’s view of election administration cases and the precedential value of the controversial 2000 Supreme Court Case.”<sup>60</sup> This same type of voter focused balancing could be incredibly effective in approaching mistake.

As with all balanced based standards, the *Anderson/Burdick* balancing standard is flexible. Through not prescribing any one requirement, it supports a range of options for states for the management of the electoral process. The *Anderson/Burdick* standard is also compatible with the Democracy Canon and the Materiality Principle. The Democracy Canon supports facilitating voting, emphasizing the right to vote when weighing regulation against it. The Materiality Principle especially through its dynamic response to errors provides a means of regulating with the least possible restriction on the right to vote.<sup>61</sup> It rejects an overly technical approach, also embodied in the materiality principle, to election administration to the extent that such an approach unduly burdens voters compared to the state interest. Although it has not typically been applied in such a manner, the standard would permit an election administration mechanism that, in order to minimize a burden on the voter, permitted flexibility and avoided a search for perfection. Such flexibility was

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<sup>56</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

<sup>57</sup> *Crawford v Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

<sup>58</sup> *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (internal citations omitted).

<sup>59</sup> *Anderson*, 460 U.S. at 788.

<sup>60</sup> Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1893 (2012).

<sup>61</sup> In this respect the materiality principle is similar to Foley’s substantial compliance standard balancing regulatory need versus a human evaluation of whether a vote “should” count.

embraced as a tool to fight discrimination, such as through the Civil Rights Act it became unlawful to deny the right to vote in a federal election due to an immaterial mistake.<sup>62</sup> This standard could be utilized as a mechanism to establish Election Day procedures that do not rely solely on setting out the means of holding elections, but make an affirmative statement that the purpose of elections is to record and reflect the will of the voters.

*C. Past litigation reveals a clear record of mistakes on Election Day, which inconsistently affect ballot inclusion.*

Evidence from past litigation demonstrates that issues at the polls exist and have persisted from previous elections. A review of pleadings from election related litigation<sup>63</sup> shows 10 discreet types of error that have existed in Ohio election administration and for which there is no evidence to demonstrate the absence of these errors in the November 2012 election.<sup>64</sup> The 10 types of error are: (1) general poll worker error; (2) right location-wrong precinct error; (3) failure to record information; (4) failure to make accommodation for disabilities or health problems; (5) failure to direct voters at all; (6) failure to instruct voters properly on how to complete a ballot; (7) failure to correctly handle properly completed ballots; (8) general voter error; (9) error in poll workers' materials; and (10) errors in preparing election materials.

#### 1. General Poll Worker Error

In the March 2012 Primary Election, there was evidence of general poll worker error. According to the minutes of the Butler County Board of Elections, poll worker training was one of the issues:

The problems we saw on Election Day with our Provisional table were due to poll workers not being adequately trained on processing Provisional Voters on the Electronic Poll Books. . . . The suggestion was made to place an additional person at the Provisional Table to guide voters.<sup>65</sup>

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(2) No person acting under color of law shall—  
(B) deny the right of any individual to vote in any Federal election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election . . . .

Civil Rights Act of 1964, sec. 101, Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>63</sup> See, e.g., *Northeast Ohio Coalition for Homeless (NEOCH) v. Husted*, 696 F.3d 580 (6th Cir. 2012); *Serv. Emps. Int'l Union Local 1 (SEIU) v. Husted*, 698 F.3d 341 (6th Cir. 2012); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011).

<sup>64</sup> *Id.*

<sup>65</sup> *Butler County Board of Elections Board Meeting Minutes from Mar. 21, 2012*, at PageID No. 8738, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsA-M.pdf>, at 101.

In Franklin County in 2010, the Board recognized that given the structure of the administration of the elections on a poll location level, there were significant and pervasive errors undoubtedly due to poll worker error.<sup>66</sup> Even worse, after the March 2012 primary election in Trumbull County, the Board rejected all wrong precinct ballots, even though the Board noted that these errors were caused by poll workers.<sup>67</sup>

These errors were nothing new. In the November 2006 election, Dora Rose, the organizer of voter protection in Cuyahoga County for the Democratic Party, observed the vote count at the Cuyahoga County Board of Election.<sup>68</sup> She reported that provisional ballots with no birth dates were put into a rejected pile, ballots without addresses were put into a rejected pile, there were written instructions for workers to eliminate the 10 day return recourse for voters who could not remember the last four digits of their social security number, and no ballots were marked for a 10-day hold—all in violation of Ohio election law.<sup>69</sup> In 2008, the Scioto County Board of Elections “remade” 21 provisional ballots that were completed incorrectly due to poll worker error.<sup>70</sup> In 2010 in Hocking County, the Board of Elections acknowledged that some voters were given the wrong ballot because of poll worker error.<sup>71</sup> Despite efforts to train poll workers, errors continued to occur in the election process in Montgomery County. The Director of the Board of Elections stated that “even with training our pollworkers we have had many mistakes on Election Day with the provisional votes.”<sup>72</sup>

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<sup>66</sup> “[W]here there’s a single table and a single set of poll workers assigned to the task of provisional ballots for all the precincts in a location, it would be pretty difficult in this county to conceive of a situation where it would be a voter error.” Franklin County Board of Elections Special Meeting Transcript from Nov. 19, 2010, at PageID No. 8812, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsN-Z.pdf>, at 20.

<sup>67</sup> Trumbull County Board of Elections Board Meeting Minutes from Mar. 16, 2012, at PageID No. 9022, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsAA-MM.pdf>, at 1.

<sup>68</sup> Declaration of Dora Rose, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCH%20Motion%20to%20Enforce%20Consent%20Order%20Exhibit%20D.pdf>.

<sup>69</sup> *Id.*

<sup>70</sup> Scioto County Board of Elections Meeting Minutes from Nov. 4, 2008, at PageID No. 8959, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsAA-MM.pdf>, at 26.

<sup>71</sup> Hocking County Board of Elections Meeting Minutes from Nov. 18, 2010, at PageID No. 8916-17, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsN-Z.pdf>, at 119-20.

<sup>72</sup> Reply Declaration of Cathrine J. Harshman, at PageID No. 10506, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at [http://moritzlaw.osu.edu/electionlaw/litigation/documents/DeclarationofCathrineJHarshman\\_000.pdf](http://moritzlaw.osu.edu/electionlaw/litigation/documents/DeclarationofCathrineJHarshman_000.pdf), at 7 (quoting Montgomery County Board of Elections Meeting Minutes from Nov. 1, 2010).

## 2. Right Location, Wrong Precinct

One of the most prominent issues at the polls is the right location-wrong precinct problem. The problem can have many different causes, but some locations noticed significant issues due to poor staffing. During the 2010 election in Franklin County, Board of Elections staff explained that in at least one multi-precinct location, there “is a single table and a single set of poll workers assigned to the task of provisional ballots for all the precincts in a location [and] it would be pretty difficult in this county to conceive of a situation where it would be a voter error.”<sup>73</sup> Because there is only one poll worker for provisional ballots, if a provisional ballot is cast in the wrong precinct, then the poll worker is almost certainly blameworthy. In Hamilton County during the March 2012 election, a ballot contained a conflict in the voter’s address. However, one of the addresses was actually the poll worker’s address, and the address was handwritten in another color of ink. Despite this strong indication of poll worker error, the Board refused to find that there was poll worker error and the ballot was not counted.<sup>74</sup> In 2008 in Franklin County, a member of the Board of Elections described a specific instance of poll worker<sup>75</sup> error that he observed, when a poll worker told the voter to go to the wrong precinct:

I saw a woman that was in the right precinct but her driver’s license had a different address on it, and they told her to go to another precinct. And she went to the other precinct, and when she went to the other precinct they had her in the books there, but she said, I don’t live here. And so they said, well, you can vote here. And then she was smart enough to come back to the precinct that she was at, but had she not come back, she would have voted in the wrong precinct, and being directed to vote in the wrong precinct by our poll workers. So I see where this would be a situation that we ought to at least take into consideration.<sup>76</sup>

These right location-wrong precinct problems are legion, and have become even more common through consolidation of polling locations in recent years. In March 2012, the Ross County Board of Elections voted to reject three provisional ballots that were cast in the correct location, but the wrong precinct due clearly to poll

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<sup>73</sup> Franklin County Board of Elections Special Meeting Transcript from Nov. 19, 2010, at PageID No. 8812, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsN-Z.pdf>, at 20.

<sup>74</sup> Hamilton County Board of Elections Meeting Transcript from Apr. 25, 2012, at PageID No. 8864-65, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsN-Z.pdf>, at 67-68.

<sup>75</sup> Under Ohio law, precinct officials are formally called “judges of election” with the official in charge at a precinct titled the “presiding judge.” OHIO REV. CODE ANN. § 3501.22 (LexisNexis 2014). Increasingly, in manuals and training these workers are described as “precinct election officials” and a presiding judge often names a “voting location manager” for multiple-precinct locations. As is shown in the evidence and depositions reviewed in this section, the term “poll worker” is still commonly used and will be used throughout this Article, though there will also be references to a “presiding judge” where appropriate.

<sup>76</sup> Franklin County Board of Elections Special Meeting from Nov. 14, 2008, at PageID No. 8844-45, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsN-Z.pdf>, at 47-48.

worker error. The Board considered the fact that the ballot was cast in the wrong precinct, but the Board decided to reject the ballot anyway. Before the motion to reject the ballots was carried, one member explained:

[T]hese were done at the polling place and they actually went to the correct polling place but the polling place has maybe two or three different precincts in it. They went to the wrong table and the poll worker is not supposed to vote them unless they're in their book and if they're not in their book, they're supposed to call us to see what precinct to send them to. They didn't. They just voted them on a provisional ballot.

The Board then rejected the ballots.<sup>77</sup>

### 3. Failure to Record Information

In March 2012, Butler County Board of Elections noticed record keeping problems with provisional ballots as "there is no way to differentiate which poll worker . . . processed the provisional ballot. Each location had a minimum of one poll worker processing provisional ballots incorrectly . . ." <sup>78</sup> Record keeping issues were also prevalent in the November 2008 Election in Adams County, especially in Bratton and Winchester Townships.<sup>79</sup>

### 4. Failure to Make Accommodations for Disabilities or Health Problems

Poll workers are required to make certain reasonable accommodations to voters with disabilities or health problems.<sup>80</sup> However, these standards are not applied evenly or correctly. In the March 2012 election in Franklin County, if the Board of Elections determined that a signature voter's signature was different any notes or information from poll workers regarding any apparent illness or injury would be considered.<sup>81</sup> However, if the poll worker does not give the voter an opportunity to explain the reason for the change, then the Board of Elections will not make any

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<sup>77</sup> Ross County Board of Elections Board Meeting from Mar. 21, 2012, at PageID No. 8950, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsAA-MM.pdf>, at 17.

<sup>78</sup> Butler County Board of Elections Board Meeting Minutes from Mar. 19, 2012, at PageID No. 8747, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsA-M.pdf>, at 110.

<sup>79</sup> "Bratton Township books were not well maintained. The pollworkers did not document clearly how some voters chose to vote, whether paper or machine as well as did not do Provisionals correctly. Winchester Township pollworkers neglected to write down 11 voter names in the pollbook." Adams County Board of Elections Meeting Minutes from Nov. 19, 2008, at PageID No. 8718, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsA-M.pdf>, at 81.

<sup>80</sup> *Myths about Voting and Voters with Disabilities*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/SOS/elections/Voters/voterswithdisabilities/ADAMyths.aspx>.

<sup>81</sup> Franklin County Board of Elections Special Meeting Mar. 19, 2012, at PageID No. 8788, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsA-M.pdf>, at 151.

future contact with the voter to determine whether the change in signature was caused by a medical condition.<sup>82</sup>

#### 5. Failure to Direct Voters at All

Clinton and Clermont Counties' poll workers struggled with providing voters with even the most basic information at times. In 2010, the Clermont County Board of Elections noted that there were voters "going from precinct to precinct to find their locale with workers not checking [a] street guide."<sup>83</sup> In Clinton County in 2012, the Board of Elections noted multiple instances of deficient/erroneous signage at polling locations that led to significant confusion amongst voters.<sup>84</sup> Yet, this may have been seen as an improvement on Clinton County in 2008 where it was discovered that especially in multi-precinct locations there was a complete lack of overall instruction.<sup>85</sup>

#### 6. Failure to Instruct Voters Properly on How to Complete a Ballot

There are numerous examples of poll workers failing to complete provisional ballot paperwork correctly.<sup>86</sup> Throughout the state, poll workers placed provisional ballots in the wrong envelopes and failed to sign provisional ballot envelopes.<sup>87</sup> In Stark County in 2010, one precinct was described as "messed up" as "[p]oll workers had provisional voters fill out provisional envelope but placed voted ballot in a privacy envelope."<sup>88</sup>

#### 7. Failure to Handle Properly Completed Ballots

In Hamilton County in 2010, poll workers placed ballots in the wrong piles. Even though voters submitted ballots for the correct precinct, poll workers improperly put the ballots in the pile of "wrong precinct" ballots.<sup>89</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> Clermont County Record of Problem Sheet from Nov. 2, 2010, at PageID No. 9088, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsNN-PP.pdf>, at 49.

<sup>84</sup> Examples include: "Need a sign stating 2A voting Osborn Rm. w/ arrow pointing in right direction."; "Need a sign stating—1A Voting Community Rm."; "Want blue and white and table signs that say Village of Midland." Second Supplemental Reply Declaration of Daniel Miller, at PageID No. 5560, *SEIU v. Husted*, 698 F.3d 341 (6th Cir. 2012), No. 2:12-cv-00562, *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/SEIUSEcondSupplementalDeclarationofDanielBMiller.pdf>, at 5.

<sup>85</sup> *Id.*

<sup>86</sup> Declaration of Daniel B. Miller in Support of Motion to Modify, at PageID No. 8631-33, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/DeclarationofDanielBMillerinSupportofMotiontoModify.pdf>, at 32-34.

<sup>87</sup> *Id.* at 33.

<sup>88</sup> *Id.* at 34.

<sup>89</sup> Order Granting in Part and Denying in Part Plaintiffs' Motion to Enforce Preliminary Injunction, at PageID No. 1378, *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011), No. 1:10-cv-00820, *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Hunter-Order-1-12-11.pdf>, at 4.

### 8. General Voter Error

In March 2012, the Huron County Board of Elections actually rejected a ballot because the voter signed his or her name at the top of an envelope rather than printing the name. The Board rejected the provisional ballot “because the voter signed their name at the top of the envelope instead of printing it. The Director contacted the Secretary of State for an opinion on this error and was advised by them that it is a fatal error.”<sup>90</sup> In Mercer County, the Board of Elections rejected a provisional ballot because the voter voted in the wrong precinct, even though there was no indication that it was the voter’s fault.<sup>91</sup> Because there was no indication of poll worker error, the Board attributed the error to the voter.<sup>92</sup>

### 9. Error in Poll Workers’ Materials

In counties throughout the state, poll workers’ materials were deficient as well. In 2010 in Hamilton County, the Board of Elections found that poll workers struggled to use street lists correctly, especially when odd and even street numbers made the difference between precincts.<sup>93</sup> There are also numerous statewide examples of addresses not appearing in poll books<sup>94</sup>, streets being confusingly organized in poll books,<sup>95</sup> and electronic polls books with deficient designations of precincts.<sup>96</sup>

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<sup>90</sup> Huron County Board of Election Meeting Minutes of Mar. 20, 2012, at PageID No. 8919, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsN-Z.pdf>, at 122.

<sup>91</sup> The authors reject the notion that fault should be the measure by which ballots are evaluated, as will be explained more thoroughly below, but reference here to the purported “fault” was considered appropriate as it framed the decision of the Board at the time.

<sup>92</sup> Supplemental Reply Declaration of Daniel B. Miller, at PageID No. 4234 ¶ 12, *SEIU v. Husted*, 698 F.3d 341 (6th Cir. 2012), No. 2:12-cv-00562, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/SEIUAffidavitofDanielBMiller.pdf>, at 5 (citing Mercer County Board of Election Meeting Minutes from Mar. 20, 2012, Exhibit H at 2).

<sup>93</sup> Order Granting in Part and Denying in Part Plaintiffs’ Motion to Enforce Preliminary Injunction, at PageID No. 1378, *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011), No. 1:10-cv-00820, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Hunter-Order-1-12-11.pdf>, at 4.

<sup>94</sup> “Voter’s ‘new address is not listed in book of street guide[.]’ (Franklin County 2011) (Ex. SS at 13).” Declaration of Daniel B. Miller, at PageID No. 8628, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/DeclarationofDanielBMillerinSupportofMotiontoModify.pdf>, at 29.

<sup>95</sup> “‘Voter’s address did not appear in the proper place in the CWSRG. ‘East Maple’ address in on[e] range was listed under ‘E’. Neighboring addresses were under ‘M[.]’ [P]w[er]s were able to locate the address using another Precinct’s EP unit.’ (Stark County 2012) (Ex. WW at 3).” *Id.*

<sup>96</sup> “‘The E-Books (computer) indicates voters’ Precinct as ‘3’ only, & does not specify ‘A’ or ‘B.’ Both HUB-3A and HUB-3B are in the same polling location. We’ve found that voters’ names are appearing on Both computers.’ (Montgomery County 2012) (Ex. UU at 3).” *Id.*

## 10. Errors in Preparing Election Materials

During the March 2012 Primary Election in Lorain County, the Board of Elections minutes described the decision to reject ballots that were not properly completed regardless of error. New ballot envelopes put out by the Secretary of State required information on two sides of the form, but

[t]he Secretary of State's office has confirmed that required information, printed name, identification and a signature must be placed on the front of the provisional envelope. If this information is missing on the front of the envelope, but appears on the back of the envelope, where a voter registration form is provided, it cannot be counted.<sup>97</sup>

*D. Public record and supplied data from Election Day show significant presence of error at many levels.*

### 1. Methodology and Sources of Data (Including Limitations)

The Boards of Elections were contacted in twenty-six Ohio counties to obtain information regarding their acceptance of absentee and provisional ballots in an effort to determine whether there were observable patterns in the evaluation of these ballots by the county boards for the 2012 November Election.<sup>98</sup> These twenty-six counties were chosen to show a cross-section of Ohio as they represent the ten counties with the highest rate of provisional vote acceptance,<sup>99</sup> the ten counties with the lowest rate of provisional vote acceptance,<sup>100</sup> the three most populous counties,<sup>101</sup> the three least populous counties,<sup>102</sup> and four counties representing the median population of the counties.<sup>103</sup> There was overlap between the counties chosen by population and those chosen by provisional acceptance rate resulting in a total of twenty-six counties.<sup>104</sup>

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<sup>97</sup> Lorain County Board of Elections Meeting Minutes from Mar. 15, 2012, at PageID No. 8935, *NEOCH v. Husted*, 696 F.3d 580 (6th Cir. 2012), No. 2:06-cv-00896, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitsAA-MM.pdf>, at 2.

<sup>98</sup> Those counties were Carroll, Clark, Cuyahoga, Erie, Franklin, Gallia, Hamilton, Hancock, Harrison, Hocking, Huron, Knox, Monroe, Morgan, Noble, Paulding, Pickaway, Pike, Putnam, Richland, Seneca, Tuscarawas, Van Wert, Vinton, Wood, and Wyandot.

<sup>99</sup> Those counties were Harrison, Hancock, Putnam, Erie, Van Wert, Tuscarawas, Pike, Noble, Richland, and Wyandot. *Provisional Ballot Report: November 6, 2012 General Election*, OHIO SECRETARY OF STATE (2012), available at <http://www.sos.state.oh.us/sos/upload/elections/2012/gen/provisional.xlsx>.

<sup>100</sup> Those counties were Morgan, Hocking, Hamilton, Carroll, Gallia, Wood, Paulding, Franklin, Vinton, and Clark. *Id.*

<sup>101</sup> Those counties were Cuyahoga, Franklin, and Hamilton. *Population Projections: County Totals*, OHIO DEVELOPMENT SERVICES AGENCY (2013), available at <http://development.ohio.gov/files/research/P6090.pdf>.

<sup>102</sup> Those counties were Vinton, Monroe, and Noble. *Id.*

<sup>103</sup> Those counties were Pickaway, Seneca, Huron, and Knox. *Id.*

<sup>104</sup> Franklin, Hamilton, Noble, and Vinton Counties overlapped. Franklin and Hamilton overlapped between the highest population and lowest provisional acceptance rate. Vinton

The initial request to the county boards was for “the minutes of meetings wherein [boards] determined how to process provisional ballots that may have included incomplete or conflicting information as well as the minutes of meetings in which it discussed how to process these ballots. Additionally . . . any memoranda or other documents produced by the Board regarding the processing of these ballots or voting irregularities (or on the interpretation of Secretary Husted's directive 2012-54)” were requested.<sup>105</sup> Any county that was non-responsive to the first request was contacted again for the same request. All counties were generally responsive, with the exception of Gallia County. The Gallia County Board of Elections never responded to the public records requests made on February 12, 2013, March 6, 2013, and March 26, 2013.<sup>106</sup> In addition, Tuscarawas County was subject to an election challenge so the records had been put under seal and therefore were not provided.<sup>107</sup> Further, the forms submitted for absentee and provisional certifications were not requested from the following counties: Clark, Erie, Hamilton, Huron, Knox, Monroe, Noble, Paulding, Pike, Richland, Seneca, Tuscarawas, Van Wert, Wood, and Wyandot and were therefore not received.<sup>108</sup> Each county separately adjudicates why ballots are rejected, there are differences in process and decision-making style between counties regarding disqualification or acceptance of ballots as discussed below. Nonetheless, the records were reviewed and the reasons for acceptance or rejection of ballots were placed into a database to be analyzed.

In addition to requests to the Boards of Elections, requests were made to the Secretary of State's Office for incident information from voter protection/information hotlines in operation on Election Day. Election Protection managed by the Lawyers' Committee for Civil Rights Under Law, a nonprofit nonpartisan organization provided their Ohio call-in data as well.<sup>109</sup>

## 2. Evidence Collected from Governmental and Non-Partisan Voter Protection Mechanisms

Call logs from the Ohio Secretary of State's voter hotline and the non-partisan Election Protection voter hotline yield valuable insight into the types of complaints and issues that arise on Election Day while also highlighting the significant gaps in available information. This information is significant as it reflects the breadth of questions and concerns faced by voters, poll observers, and elections officials. It is important to note the limited utility of this data as it is reported through self-selected individuals who choose to call in without any means of verification, follow-up, or contextual analysis.

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overlapped between the lowest population and lowest provisional acceptance rate. Noble overlapped between the lowest population and highest provisional acceptance rate. *Id.*

<sup>105</sup> Copies of all requests and received information are maintained by the author.

<sup>106</sup> Copies of these requests are maintained by the author.

<sup>107</sup> A copy of the Tuscarawas County explanation of refusal is maintained by the author.

<sup>108</sup> Copies of all requests and received information are maintained by the author.

<sup>109</sup> A copy of this information is maintained by the author. Election Protection also makes significant data available at <http://www.866ourvote.org>.

*i. Ohio Secretary of State Call Sheets*

The Ohio Secretary of State maintained a voter hotline beginning on October 2, 2012 (the first day of early voting) and continuing through the day after Election Day, November 7, 2012. Call center statistics compiled by the Secretary's office report a total of 16,929 calls received with 2,669 of those coming on Election Day.<sup>110</sup> The line was staffed with Secretary of State employees on Election Day from 6 a.m. until 8 p.m. For most of the day there were 12 staff members receiving calls at any one time though it dipped as low as 10 during the lunch hour with only 6 from 7:30 p.m. to 8 p.m.<sup>111</sup> The hotline staffers tracked call information on tally sheets. Twenty-one tally sheets reflect calls received on Election Day and include a total of 2,219 calls.<sup>112</sup>

Calls could be recorded in one of nine categories: absentee ballot; registration; polling location; fraud concerns; issues, candidates, etc.; UOCAVA (referring to the Uniform and Overseas Citizens Absentee Voting Act); Provisional ballot; campaign finance; and Other.<sup>113</sup> Only the "Other" section includes a prompt to specify the nature of the call which is done by brief notes on the sheet itself. Occasionally, additional notes are found on the tally sheets. The overall breakdown of calls is reflected in Table 1 below.

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<sup>110</sup> "Call Center Statistics 2012 Presidential Election" created and released by the Ohio Secretary of State's Office, November 2012. A copy is maintained by the author.

<sup>111</sup> These numbers are found on the call line schedule received by the authors in response to a public records request to the Secretary of State. A copy is maintained by the author.

<sup>112</sup> These tally sheets were received by the authors in response to a public records request of the Secretary's office. A copy is maintained by the author. No effort is made to determine the discrepancy between the reported number of 2,669 reported calls and 2,219 calls reflected on the tally sheets. It seems possible that certain elementary questions were not always recorded or the reported total number includes individuals who called in but ultimately hung up. In the end, such a determination is irrelevant to the overall analysis.

<sup>113</sup> The authors requested any guidance, manuals, or special training that supported the hotline work and was referred to the *Precinct Election Official Quick Reference Guide for November 2012*, OHIO SECRETARY OF STATE (July 2012), available at <http://www.sos.state.oh.us/SOS/Upload/elections/EOresources/peoTraining/PEOFIphchart-2012General.pdf>.

Table 1: Ohio Secretary of State November 2012 Election Day Call Data

Category	Number of Calls	Percentage of Calls
Absentee Ballot	95	4.3%
Registration	588	26.5%
Polling Location	561	25.3%
Fraud Concerns	126	5.7%
Issues, Candidates, etc.	19	0.9%
UOCAVA	34	1.5%
Provisional Ballot	424	19.1%
Campaign Finance	7	0.3%
Other	365	16.4%
Totals	2219	100% <sup>114</sup>

The three highest categories of registration, polling location, and provisional ballots are not surprising for a voter line operating on Election Day. Some of the notes regarding the “other calls” are particularly relevant to concerns regarding Election Day mistakes. They include calls with notations “forced to vote prov.[provisional],” “Upset about being asked for ID—or not asked,” and “poll worker error.”<sup>115</sup> Further, there was a notation on a call tallied in the “fraud” section which stated “observer pulled voter—told to go to old location.”<sup>116</sup> Without context or follow-up it is impossible to assess whether or not these calls reflect actual or simply perceived errors, but they do highlight the scope of Election Day questions.

*ii. Election Protection Call Data*

Election Protection is a nonpartisan coalition “formed to ensure that all voters have an equal opportunity to participate in the political process.”<sup>117</sup> Election Protection runs the nationwide 1-866-OUR-VOTE hotline with the Lawyers’ Committee for Civil Rights Under Law. This is a national operation, which includes local volunteers who are trained and given access to materials to take calls, track data, and respond to voter concerns leading up to and on Election Day.<sup>118</sup> In response to request from the authors, Election Protection provided a spreadsheet of call information collected in Ohio during the 2012 election cycle.<sup>119</sup> This section examines the calls received on Election Day.

<sup>114</sup> Note: due to rounding, the percentages are not exact, but happened to add up to 100%.

<sup>115</sup> “11/6/2012 General Election Tally Sheet” 11/6/2012, Lisa Grotzky (note regarding forced provisional) “11/6/2012 General Election Call Tally Sheet”, 11/6/2012, Heather Kash (note regarding identification). “11/6/2012 General Election Call Tally Sheet” 11/6/12 Kathy Spinelli (note regarding poll worker error). Copies are maintained by the author.

<sup>116</sup> “11/6/2012 General Election Call Tally Sheet” 11/6/12 Kathy Spinelli. A copy is maintained by the author.

<sup>117</sup> *About Us*, ELECTION PROTECTION, <http://www.866ourvote.org/about>.

<sup>118</sup> For more information on Election Protection, administered by the Lawyers’ Committee for Civil Rights Under Law, visit <http://www.866ourvote.org>.

<sup>119</sup> A copy of the spreadsheet is maintained by the author.

The spreadsheet from Election Protection contains 717 Election Day calls. In addition to some basic demographic and caller information, the log includes a subset label and a description. While 123 of the calls had no subset indicated, many of them also had multiple subsets included. In order to appropriately represent the proportion of concerns raised by callers, Table 2 below reflects the total number of times a subset was included with any call record and the percentage of calls that included a particular subset.

Table 2: Election Protection November 2012 Election Day Ohio Call Data

<b>Subset Label</b>	<b>Number of Mentions</b>	<b>Percentage of Calls which include subset</b>
Absentee Voting Inquiry	11	1.5%
Absentee Voting Problem	30	4.2%
Accessibility Problem	2	0.3%
Criminal Status Related Inquiry	7	1.0%
Electioneering Problem	3	0.4%
ID Problem	38	5.3%
None/Other	123	17.2%
Polling Place Inquiry	303	42.3%
Polling Place Problem	52	7.3%
Poll worker Problem	37	5.2%
Provisional Ballot Concern	42	5.9%
Registration Inquiry	129	18.0%
Registration Problem	48	6.7%
Student Voting Problem	3	0.4%
Voter Intimidation Problem	16	2.2%
Voting Equipment Problem	31	4.3%

In addition to the statistical analysis, the description that is included for almost every call is illustrative of the range of calls and the types of problems that occur. While a majority of the calls are inquiry based, a significant number raise red flags indicative of substantial error by poll workers. In one instance, a voter inadvertently cast an over vote (i.e. the voter selected more than one candidate for a race, but when the in-precinct scanner gave the option to recast, the poll worker selected “no” on behalf of the voter. There was a report of ballots being given out without proper security or verification of registration status. Complaints included poll workers requiring photo identification. A voter reported being turned away because he had the same name as his father who had already voted. One voter reported having cast a regular ballot, but not signing the poll book until she returned later in the day to sign.

More than one report had voters being sent to multiple potential polling locations. It is impossible to determine how these reported incidents impacted voters.<sup>120</sup>

There is also a clear trend in the data that in some cases, voters call in to report an alleged wrongdoing that actually reflects the voter misunderstanding Ohio law. More than one caller expressed concern about a passport being rejected as identification, but that is correct under Ohio's identification requirement. One report said voters in a long line were given provisional ballots, but it's possible that the precinct was using regular paper ballots in addition to DREs to speed the line as they are required to do. Election day friction and the perception of voters are regarding the accuracy and effectiveness of election policy could be improved not only by better-informed poll workers, but by more aggressive outreach and education of voters.<sup>121</sup>

The Election Protection hotline data reveals that while most Election Day calls were simple inquiries, those that discuss election procedure failures highlight the significant occurrence of Election Day mistakes.

3. Review of handling of provisional and absentee ballots county by county as it pertains to Election Day procedure (evidence of voter or poll worker error).

As described in the methodology section above, information was requested from 26 counties. Twenty-five counties responded, and the information was reviewed for evidence of Election Day errors and to determine some of the good, the bad, and the ugly of how potential problems are reviewed and resolved. Several important observations revealed throughout the course of this review are discussed here. Related recommendations are considered in a later section.

*i. Issues at the Polls*

There is no formal mechanism in place to capture the reasons why voters were given provisional ballots in the first place,<sup>122</sup> especially when provisional acceptance rates are very high.<sup>123</sup> These high rates may indicate that counties are correctly steering voters to cast provisional ballots—for example, if they have moved and have appeared to vote in their new polling location. Alternately, it could be indicative of counties steering too many voters to provisional ballots when a regular ballot would have been appropriate in the first place.<sup>124</sup> Without more context, there is no way to definitively understand the vast difference between these two outcomes by looking at the acceptance rate.

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<sup>120</sup> These examples are all taken from the Election Protection Ohio spreadsheet, a copy of which is on file with the author.

<sup>121</sup> *Id.*

<sup>122</sup> The formal data collection mechanisms lack a reason for most provisional ballots as will be highlighted in Part III.D.4, *infra*.

<sup>123</sup> Counties that were very high include: Harrison County, with a provisional acceptance rate of 97.54%; Putnam County, with a provisional acceptance rate of 95.26%; and Hancock County, with a provisional acceptance rate of 95.26%. *See County Certification and SoS Data*, on file with the author.

<sup>124</sup> The review of county records did not reveal instances of an individual being given a provisional ballot who should have been given a regular ballot.

Similarly sized counties can vary widely in number of provisional ballots cast.<sup>125</sup> In Franklin County where there were 808,578 registered voters for the 2012 general election (total population 1.19 million, source: 2012 Quickfacts Census) there were 29,840 provisional ballots cast. In slightly more populous Cuyahoga County, where there were 927,996 registered voters for the 2012 general election (total population 1.27 million, source: Quickfacts Census) there were nearly 3,000 fewer provisional ballots cast (26,990), amounting to about a 10% difference.<sup>126</sup> This variation is further reflected in the rate of provisional ballots accepted. Franklin County had a provisional rejection rate of 20.55% whereas Cuyahoga had a provisional rejection rate of 15.27%.<sup>127</sup>

There have been numerous efforts to evaluate the overall functionality of provisional balloting systems including through litigation and this paper does not attempt to build on them. This effort initially intended to evaluate the role of Election Day error and make recommendations. That the reason for provisional ballots being issued is not part of the data collection process highlights what has become a primary conclusion of the authors: that we need to collect more and better data. Until such data exists it is difficult to draw further conclusions about any error rate that may exist in the issuance of provisional ballots.

#### *ii. Issues of Interpretation*

For those board minutes where we can read through boards' discussions on whether to accept ballots, they are generally consistent in their interpretations, citing the Secretary of State's directives and common sense (e.g., Pickaway County referred to Secretary of State's directive to address 'double-bubble' issue). Further, where there was a question, as with the Franklin County Board which requested advice from the Secretary of State to resolve an issue of voters who had signed the poll book *and* voted provisionally.<sup>128</sup> Boards do not appear to wantonly throw away

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<sup>125</sup> This problem is not new, by any means. In the November 2006 election, "Ohio's eighty-eight Boards of Elections applied widely different and unequal standards to provisional ballots cast." Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, at 1, *NEOCH v. Brunner*, (S.D. Ohio 2008), No. C2-06-896 *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCH-MotionforPI-10-14-08.pdf>, at 3. The data from that election describes significant variation: the average rejection rate of provisional ballots in Ohio was 18.1%, but the rejection rate varied from 0.85% (Coshocton County) to 43.1% (Belmont County). *Id.* at Exhibit C. Five Boards of Elections had a rejection rate of more than 30% and six Boards of Elections had a rejection rate of less than 5%. Twenty-six Boards of Elections rejected 459 ballots because the voter was determined to be ineligible—Belmont County Board of Elections rejected 12.4% of its provisional ballots on this basis, while 62 Boards of Elections, including Lucas, Hamilton, Montgomery, and Stark, did not reject any ballots on this basis. Sixty-four Boards of Elections rejected 2726 provisional ballots because the voter did not provide the required information.

<sup>126</sup> *Official Results for 2012 General Election*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/sos/upload/elections/2012/gen/FinalResults.xlsx>; *Provisional Ballot Report for 2012 General Election*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/sos/upload/elections/2012/gen/provisional.xlsx>.

<sup>127</sup> *Id.*

<sup>128</sup> Franklin County Meeting Minutes from Nov. 20, 2012, at 33-34 (Decision to make request of Secretary of State's office for clarification on proper course of action when the poll book was signed and a provisional ballot was cast.); Franklin County Meeting Minutes from

ballots or reject ballots that should clearly be accepted. Most boards act unanimously in rejecting or accepting ballots. Very few board decisions were or 3-1 and no votes in the selected counties were 2-2, which would have required a tiebreak by the Secretary of State.<sup>129</sup>

*iii. Recordkeeping Concerns*

County boards' minutes are often inconsistent regarding the number of ballots they evaluate and what is reported to the Secretary of State.<sup>130</sup> In some instances, there is a progression over time where county boards only process a certain number of provisional ballots at each meeting or sometimes more provisional ballots are found at a later date<sup>131</sup> There is also a concern that within board minutes themselves, sometimes the numbers do not add up correctly.<sup>132</sup>

With respect to board minutes, the minutes of some counties reported the same numbers of acceptance and rejections as their later certifications and the resulting

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Nov. 21, 2012, at 4-5 (feedback for Secretary of State and decision to exclude ballots). Copies of both minutes on file with author.

<sup>129</sup> Most decisions were unanimous. *See, e.g.*, Wood County Meeting Minutes from Nov. 21, 2012 (all decisions on provisional ballots were made unanimously). In contrast, Hamilton County had some 3-1 votes. Hamilton County Board of Elections Minutes from Nov. 20, 2012, at 43 (3-1 vote on counting wrong location ballots given to voters during early in-person voting). There were no tie votes on the counting of provisional ballots submitted to the Secretary of State. *See 2012 Tie Votes*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/SOS/elections/electionsofficials/Rules/2012tievotes.aspx>.

<sup>130</sup> *See, e.g.*, Franklin County Board of Elections Minutes from Nov. 20, 2012, Nov. 21, 2012, and Nov. 26, 2012 (numerous revisions made to the number of ballots in different categories make it impossible to track final totals through the minutes); Clark County Board of Elections Meeting Transcript from Nov. 26, 2012, at 94; Monroe County Board of Elections Minutes from Nov. 19, 2012, at 2. Copies maintained by the author.

<sup>131</sup> Franklin County Board of Elections Minutes from Dec. 6, 2012, at 4-5 (33 provisional ballots were found after certification had been made), at 5-6 (14 paper ballots found after certification); Cuyahoga County Board of Election Minutes from Nov. 20, 2012 and Nov. 27, 2012. Copies maintained by the author.

<sup>132</sup> Cuyahoga County Board of Elections Minutes from Nov. 20, 2012 and Nov. 27, 2012; Franklin County Board of Elections Minutes from Nov. 20, 2012, Nov. 21, 2012, and Nov. 26, 2012 (numerous revisions made to the number of ballots in different categories make it impossible to track final totals through the minutes); Monroe County Board of Elections Minutes from Nov. 19, 2012, at 1-3 Through correspondence on records between the author and the Secretary of States office, it was learned that through the formal canvass process and processing by the Secretary of State for final certification some counts are adjusted or clarified, but that the counties do not necessarily file updated reports. Record on file with author. This could explain the discrepancies, but in any case the final official canvass becomes the count. Although better records are always something to strive for, it would be contradictory for the authors to simultaneously advocate for recognition and tolerance of error by voter and poll workers and a knee jerk condemnation of record irregularities. Copies of relevant documents are on file with the author. *See also Provisional Ballot Report for 2012 General Election*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results.aspx>.

Secretary of State's totals.<sup>133</sup> Some county board minutes partially matched their later certifications and the resulting Secretary of State's totals.<sup>134</sup> Cuyahoga County's minutes did not match their later certification or the resulting Secretary of State's totals.<sup>135</sup> Franklin County's certification matched the total rejections and acceptances declared in the Board minutes. However, within the Board minutes themselves, those totals did not result from adding the subgroups of rejected and accepted provisional ballots.<sup>136</sup>

In larger counties, the Boards of Elections tends to vote to accept or reject provisional and absentee ballots based on staff recommendations and they process groups of ballots over multiple meetings.<sup>137</sup> Several counties included no discussion of why ballots were rejected in their board minutes,<sup>138</sup> whereas other counties include an exhaustive discussion.<sup>139</sup> Other county minutes have groups of ballots

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<sup>133</sup> Carroll County Board of Elections Special Meeting—Official Canvas Nov. 19, 2012, at 5, Official Certification for Absentee Ballots Nov. 6, 2012, General Election and Official Certification for Provisional Ballots Nov. 6, 2012; Harrison County Board of Elections Meeting Minutes Nov. 19, 2012, at 5, Official Certification for Absentee Ballots Nov. 6, 2012; Morgan County Provisional Ballot Certification for Nov. 2012 Election and Minutes Dec. 3, 2012; Putnam County Board of Elections Minutes Nov. 19, 2012, at 188-89; Vinton County Board of Elections Minutes Nov. 19, 2012, Certification of Provisional Ballots for the Nov. 2012 Election. Copies of relevant documents are on file with the author. *See also Provisional Ballot Report for 2012 General Election*, OHIO SECRETARY OF STATE, <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results.aspx>.

<sup>134</sup> Hancock County Board of Elections Minutes from Nov. 26, 2012, at 24; Hocking County Board of Elections Minutes from Nov. 26, 2012; Pickaway County Board of Elections Minutes from Nov. 19, 2012, at 3-4. Copies of relevant documents are on file with the author.

<sup>135</sup> Cuyahoga County Board of Elections Minutes from Nov. 20, 2012 and Nov. 27, 2012. Copies maintained by the author.

<sup>136</sup> Franklin County Board of Elections Minutes from Nov. 20, 2012, Nov. 21, 2012, and Nov. 26, 2012 (numerous revisions made to the number of ballots in different categories make it impossible to track final totals through the minutes). Copies of relevant documents are on file with the author.

<sup>137</sup> Cuyahoga County Board of Elections Minutes from Nov. 20, 2012 and Nov. 27, 2012; Franklin County Board of Elections Minutes from Nov. 20, 2012, Nov. 21, 2012, and Nov. 26, 2012 (numerous revisions made to the number of ballots in different categories make it impossible to track final totals through the minutes). Copies of relevant documents are on file with the author.

<sup>138</sup> Monroe County Board of Elections Minutes from Nov. 19, 2012, at 1-2; Morgan County Board of Elections Provisional Ballot Policy and Board Minutes from Dec. 3, 2012; Pike County Board of Elections Minutes from Nov. 20, 2012, at 1; Van Wert County Board of Elections Minutes from Nov. 21, 2012, at 2; Wood County Board of Elections Minutes from Nov. 26, 2012; Wyandot County Board of Elections Minutes from Nov. 21, 2012. Copies of relevant documents are on file with the author.

<sup>139</sup> *See, e.g.*, Carroll County Board of Elections Special Meeting—Official Canvas Nov. 19, 2012, at 2-4; Clark County Board of Elections Meeting Transcript from Nov. 26, 2012, at 12-94; Hamilton County Board of Elections Minutes from Nov. 26, 2012, at 5-15; Pickaway County Board of Elections Minutes from Nov. 19, 2012, at 2-4. The detail maintained significantly increases when a County uses a transcript of the board hearing as minutes rather than a separate summary document. Copies of relevant documents are on file with the author.

recommended for rejection or acceptance for specific reasons but do not include totals of provisional ballots accepted or rejected.<sup>140</sup>

For counties whose minutes do not detail reasons for provisional acceptance or rejection, there is no indication from any board as to where the data is stored or why details that emerge in the Secretary of State filings (“certifications”) are not present in the board minutes themselves. No organized system for cataloging election-day errors exists in Ohio or on a national level so it is difficult, if not impossible, to identify common problems that occur in a quantitative or trackable way.<sup>141</sup> This information would be helpful in analyzing recurrent problems and identifying solutions when the problems do occur (see “Franklin County Data” spreadsheet for a call log tally and brief description of common problems).

In Carroll County there was an internal policy for precinct officials to call the Board of Elections prior to issuing a provisional ballot. Some locations did not follow the policy, resulting in provisional ballots that were not counted due to “voting in an incorrect precinct/location”<sup>142</sup>

In general, there was an attempt made to use provisional ballot numbers and processing information as a proxy for the overall quality of elections in a particular county and to give evidence of the nature of Election Day errors at the polls. This review has in fact revealed that our current provisional ballot issuing and evaluation mechanisms vary county to county and do not provide sufficient indication of the underlying cause or issue that resulted in a provisional ballot being cast. This Article does not attempt to determine which boards have the “better” mechanism for ballot evaluation and recognizes that the needs of boards are likely to differ with population and number of ballots cast. The significant variation and discrepancy is relevant on its own face as reflective of the imperfect system which every election inherently is.

#### 4. Review of incidents recorded either at or through calls from precincts on Election Day.

In Ohio, all precincts maintain notes or incidents for events occurring at the polling place on Election Day. There are forms promulgated by the Secretary of State’s office (Forms 450 and 475) or counties can use their own system. Frequently there is a separate collection process for machine, poll book, and other Election Day

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<sup>140</sup> Hancock County Board of Elections Minutes from Nov. 26, 2012, at 24; Hocking County Board of Elections Minutes from Nov. 26, 2012. Copies of relevant documents are on file with the author.

<sup>141</sup> New Mexico has made particular headway in this area by explicitly allowing for academic election observers who can create both reports for election officials and peer reviewed articles on their findings. N.M. STAT. ANN. § 1-1-3.2 (2011). As used in the Election Code, “election observer” means a person registered with the United States Department of State as an international election observer or a person registered with the New Mexico Secretary of State who is an academic engaged in research on elections and the election process. *Id.*

<sup>142</sup> Carroll County Incident Logs from Nov. 6, 2012; Carroll County Board of Elections Special Meeting—Official Canvass from Nov. 19, 2012, at 3-4. Copies maintained by the author.

problems.<sup>143</sup> Through public records requests these documents from the November 2012 election were collected from 24 of the 26 target counties. The volume of information varied greatly county to county from no incident sheets reported to more than 2,000 pages of information.<sup>144</sup> Review of these documents emphasizes limitations in the way Election Day information is collected, but also themes of where errors occur.<sup>145</sup> These areas are: general ballot handling, incomplete or improper offering or processing of provisional ballots, improper voter processing by poll workers, and mistakes created by voters.

First a note about the records themselves: these are handwritten documents completed under the pressure and rush of Election Day. The Form 450 asks for identifying information and the resolution, but there is little guidance for voters and the form is often incomplete. Entries such as “voter error” occurring in one precinct five times without further explanation are common and prevent analysis.<sup>146</sup> Even looser are the logs without any prompt to provide a solution or identifying information and items like Wood County’s general comment page. At times potentially relevant data is obscured through bad handwriting or poor copy quality.<sup>147</sup> These limitations make a quantitative analysis of precinct reports from November 2012 virtually impossible. This is an area where significant improvement could occur if standardized reporting mechanisms were developed which would balance the flexibility needed to accommodate the range of election experience against the desire to have quantifiable reporting.

General ballot handling concerns include reports of what may be either machine or human error, failure to properly distribute and then recollect paper ballots, and occasionally provisional ballot control problems. This includes accounting for

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<sup>143</sup> The Ohio Secretary of State has promulgated Form 450, “Election Day Precinct Event Log,” for Election Day incidents and Form 475, “Voting Unit Event Log,” for machine error. Both forms are available at <http://www.sos.state.oh.us/SOS/elections/electionsofficials/forms.aspx>. Different counties have created and maintained their own systems. For example, Wood County has both targeted forms and a general comments section, while Franklin County has problems and corrections options within the signature poll books and separate event logs as part of a precinct workbook. The forms for both counties for the November 2012 election are on file with the author.

<sup>144</sup> No incidents were reported by Harrison, Monroe, Morgan, Pickaway, or Putnam Counties. Copies of the confirming correspondence are on file with the author. Cuyahoga County supplied a file of more than 2,000 pages of precinct level logs, though that included blank sheets and some precincts with nothing to report. A copy is maintained by the author.

<sup>145</sup> For twenty-one of the twenty-four counties, every record was examined. For Cuyahoga, Franklin, and Hamilton counties, the volume of records made this impractical and of limited benefit to the scope of this Article. Applying a list of random numbers (generated by <http://www.random.org>) to either the page or stamped indexing numbers of the documents supplied from the counties, a 10% sample from each county was selected for review.

<sup>146</sup> Election Day Precinct Incident Log Record #1038 from Cuyahoga County, Precinct East Cleveland 04 E (Nov. 6, 2012) (on file with the author).

<sup>147</sup> See, e.g., Election Day Precinct Incident Log Record # Unknown from Precinct Sandusky H, Erie County (Nov. 6, 2012) (form cannot be read). A copy is maintained by the author.

ballots at the end of the day revealing discrepancies.<sup>148</sup> When a ballot-scanning machine in Cuyahoga County was offline, it was the policy for the poll workers to collect the ballots and scan them through at the end of the evening or when the machine came back online and was available.<sup>149</sup> In Clark County, among others, a provisional voter sent his ballot through the scanner and into the ballot box instead of placing it in the provisional ballot envelope.<sup>150</sup> The use of ballot stubs (removable processing sections of paper ballots) was a source of problems. Provisional ballot stubs were improperly removed<sup>151</sup> and occasionally voters were able to process regular ballots with stubs when they should have been removed. Certain machines appear likely to “time out” with notations of such votes being cancelled, but it is impossible to tell from reports if the ballot was reissued or the voter was ultimately unable to vote.<sup>152</sup>

Provisional ballots are a known area of concern and that is reflected in these reports. Erie County Board of Elections’ decision to institute a call-in approval

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<sup>148</sup> For example, in Election Day Precinct Incident Log Record #181 from Cuyahoga County, Precinct Brook Park 01 C (Nov. 6, 2012), the final count was missing four ballots. Similarly, in Election Day Precinct Incident Log Record #337 from Cuyahoga County, Precinct Southeast Seventh Day Adventist (Nov. 6, 2012), a voter in an electric wheelchair was given a ballot and told to return to the poll worker after completing it for placement in an envelope (whether a provisional or disability envelope was not mentioned), but the voter left without turning the ballot in. Copies maintained by the author.

<sup>149</sup> See Election Day Precinct Incident Log Record #962 from Cuyahoga County, Precinct Cleveland Heights 03 C (Nov. 6, 2012) (“Ballots from 04E and 03E was mistakenly scanned in 03C and placed in the gray ballot box until the end of day and scanned the correct precinct at the end.”). This policy is troubling due to differences in how ballots are considered when scanned at the precinct compared to those counted at a central location. When a voter scans her ballot, she has the option to check for over and under votes and make corrections and must confirm the casting or risk the ballot being canceled as a fleeing voter. In contrast, when the voter does not scan his own ballot it should be centrally scanned such that over and under votes can be evaluated for voter intent. Under a current Secretary of State directive and proposed legislation, when a voter selects but also writes in a candidate, the vote is only counted if the ballot is centrally processed. The bulk scanning of ballots by poll workers at the precinct undermines the primary support for the disparate treatment—that the voter could correct problems with and in-precinct over vote. A copy is maintained by the author.

<sup>150</sup> Election Day Precinct Incident Log Record # Unknown from Clark County, Precinct T4 (Nov. 6, 2012) (copy on file with author); see also Election Day Precinct Incident Report Record #234 from Cuyahoga County, Precinct Cleveland 01 B (Nov. 6, 2012) (voter filled out provisional ballot but then ran ballot through scanner without knowledge of workers); see also Election Day Precinct Incident Log Record #220 from Cuyahoga County, Luis Munoz Marin Middle School (Nov. 6, 2012) (machine accepted such a ballot).

<sup>151</sup> See, e.g., Election Day Precinct Incident Logs from Carroll County, Lou Township Harlem Springs (Nov. 6, 2012) (copy on file with author) (reported a judge tearing off the stubs and as correction placing them in the envelope with the ballot); Election Day Incident Log Record #167 from Cuyahoga County (Nov. 6, 2012) (stubs were removed before sealing of a provisional ballot, stubs sealed with ballot); Election Day Incident Log from Hamilton County, Precinct Cincinnati 4-G (Nov. 6, 2012) (voter scanned a provisional ballot).

<sup>152</sup> See, e.g., Election Day Precinct Incident Log from Carroll County, Precinct Carr B (Nov. 6, 2012) (copy on file with author) (“Machine Time Out Vote Cancelled.”).

requirement was highly problematic based on these reports.<sup>153</sup> The call in system failed to alleviate disparate treatment of voters as in one precinct a voter with a different name in the book than what she offered verbally and on her identification was permitted to vote a regular ballot with another precinct where a voter who had a middle name listed on his drivers license but not in the poll book was required to cast a provisional ballot.<sup>154</sup> In many cases there is enough information to conclude a provisional ballot should have been offered, but no assurance that it was. In a Franklin County Precinct, the poll workers report finding a name in the supplemental poll book after the voter already voted provisionally,<sup>155</sup> this voter should have voted a regular ballot, but was at risk of disenfranchisement if there is a technical error in his provisional ballot form. Though many of the reports reflect a problem in processing a provisional vote;<sup>156</sup> there are also notations where a regular ballot was cast which should have been provisional.<sup>157</sup> There are also discrepancies between

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<sup>153</sup> This policy was adopted by Erie County based on the incident reports in addition to Carroll County discussed in the provisional balloting section. Numerous precincts have incidents that reflect long wait times for provisional ballots, voters leaving without casting a ballot, and general problems in reaching the Board of Elections for approval. Even more problematic, the approval process included a search for the voter's registration information. Though not clear, it appears that if the Board reported a voter as not registered, he or she was not given a provisional ballot. Such on-demand registration evaluation undercuts the purpose of provisional ballots, which are to protect voters who are not listed in a poll book, but assert their eligibility to vote. The entire Erie County incident file is illustrative of this problem. A copy is on file with the author.

<sup>154</sup> Election Day Precinct Incident Log Record Mar #1 from Erie County, Precinct Martin P4 (Nov. 6, 2012) (copies on file with author).

<sup>155</sup> LID #5005 from Franklin County, Precinct I-L Zone #1 (Nov. 6, 2012). A copy is maintained by the author.

<sup>156</sup> See, e.g., Provisional Pink Memo 4-P from Cuyahoga County, Addison Square Apartments (Nov. 6, 2012) ("wrong date, voter putting address in wrong place, missing ballot number"). These types of flaws on the provisional ballot form could easily result in a vote being rejected even if the voter is otherwise qualified. See also Provisional Notes from Hamilton County, Cincinnati Anderson CC (Nov. 6, 2012) (three voters were instructed to sign the wrong side of the provisional envelope and the error was called into the Board); Provisional Pink Memo 73-P from Cuyahoga County, Cleveland Korean Presb. Church (Nov. 6, 2012) (a number of voters are referenced as "not signing" but it is unclear if this refers to the provisional log, which is a county level accounting mechanism, or the provisional envelope, where a lack of signature will result in the vote being rejected); LID #2152 from Franklin County, Precinct Workbook Zone #2 Saint Stephen's Community House (Nov. 6, 2012) (judge used handicapped rather than provisional envelopes for paper ballots for the first three hours of the—it is unclear how these errors would impact the ultimate counting of the votes, but it would result in voter accounting discrepancies as handicapped voters do sign the poll book whereas provisional voters do not). Copies are maintained by the author.

<sup>157</sup> Election Day Precinct Incident Log from Carroll County, Augusta Precinct (Nov. 6, 2012) ("[Name withheld from publication] voted electronic should have been prov." Why the vote should have been provisional is not included); see also Election Day Precinct Incident Log Record #380 from Cuyahoga County, Cleveland 04M (Nov. 6, 2012) ("should have voted Absentee He voted regular ballot"); Provisional Notes from Hamilton County, Cincinnati Anderson A (Nov. 6, 2012) (discovered at the end of the day that a voter listed as having received an absentee ballot voted a regular ballot); Form 450 from Hamilton County, Cincinnati 13D (Nov. 6, 2012) (through misreading of instructions five voters were given a

precincts and counties on when a provisional ballot is required. An apparent typo in a name or address could result in either a voter receiving a regular or provisional ballot depending on the county or precinct in which a voter resided.<sup>158</sup> In one case a voter with a name change was able to cast a regular ballot by showing a marriage license as an additional form of identification.<sup>159</sup> Though ultimately an election that requires fewer provisional ballots would be ideal, limiting—on Election Day—access to provisional ballots when a regular ballot is impermissible undermines the last line of defense for voters who without access to a provisional ballot would be wrongly disenfranchised.

There is some evidence of poll worker mistake in generally applying the standards or guiding voters. Depending on the circumstances seemingly harmless error, such as a board rover insisting only black pens are used can cause delay and confusion, such as when only blue pens are provided.<sup>160</sup> Some errors don't affect a voter's ballot access on Election Day, but could complicate audits if there is a future problem.<sup>161</sup> Concerns poll workers share represent broader logistical hurdles, such as when a cell phone will not work within a polling location so a poll worker must go to the sidewalk to call in an issue.<sup>162</sup> One report showed a fundamental misunderstanding, at least at first, of the importance of the poll book when a poll

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regular ballot who should have voted provisionally, attempts to call the Board for resolution were made but it was difficult to get through). Copies maintained by the author.

<sup>158</sup> See, e.g., LID #2114 Problems and Correction Section O-Z, 1 from Franklin County (Nov. 6, 2012) "BOE mistyped first name 'Mark' and 'Mary'—voted as regular voter on machine—please correct name showed voter card from BOE with 'Mary' + proper ID with Mark & correct address."); cf. Notes from Hamilton County, Precinct Cincinnati 5-G (Nov. 6, 2012) ("[V]oter name is misspelled (one letter typo) voted provisionally because name in wrong alphabetical location was not seen." In the same precinct a voter on the supplemental list voted provisionally.). Copies maintained by the author.

<sup>159</sup> Election Day Precinct Incident Log Record #37 from Cuyahoga County, Beachwood Ward 00 Precinct G (Nov. 6, 2012). A voter with a different last name from the poll book voted a regular ballot by showing a marriage license with the changed name. In the same precinct, a voter who was not in the poll book, but was on the lists of names and addresses that are periodically posted was permitted to vote a regular ballot. This precinct took a very voter-oriented approach that used available information and not a strict adherence to procedure in determining whether a voter should have a provisional or regular ballot. A copy is maintained by the author.

<sup>160</sup> Election Day Precinct Incident Log Record #51 from Cuyahoga County, Bedford 02B (Nov. 6, 2012) (Blue or black ink can be read by the optical scanning equipment.). A copy is maintained by the author.

<sup>161</sup> See Election Day Precinct Incident Log Record #13J from Cuyahoga County (Nov. 6, 2012) ("five ballot numbers forgetting to be written down"); Election Day Precinct Incident Log Record #1507 from Cuyahoga County, North Olmstead 03 G (Nov. 6, 2012) ("We were so busy—stub numbers before 60 were not recorded, 1 person short at our table."); see also LID #1211 from Franklin County, Precinct Workbook Zone #1 Columbus Firehouse Number Thirty One (Nov. 6, 2012) ("the morning balancing was difficult due to failure to maintain separate tally and mixing of old and new authority to vote slips, high volume of voters contributed."). Copies maintained by the author.

<sup>162</sup> Election Day Precinct Incident Log Record # 349 from Cuyahoga County, Cleveland 03S (Nov. 6, 2012). A copy is maintained by the author.

worker had two voters who were not in the book just sign at the bottom of the page before being corrected by another worker.<sup>163</sup> Some reports reflect trouble with interaction between poll workers,<sup>164</sup> which would certainly hinder the Election Day process and reduce voter confidence. These items, in addition to the poll workers' actions regarding ballot handling and provisional processing reflect the complex job facing precinct level election administrators especially given frequent election law changes, long hours, and the inexperience of workers and voters.

Finally, though not as common as some other themes, the reports do reflect errors by voters of varying degrees of severity. This can be as simple as a voter signing on the wrong line<sup>165</sup> to as severe as someone who has moved providing and voting as if they still lived at the prior address.<sup>166</sup> Some reports show voters who escalate conflict with poll workers for a perceived or actual problem.<sup>167</sup> These mistakes by voters add to potential post-election verification problems and increase the administrative burden on poll workers. Further, open conflicts between voters and poll workers hinder the voting process and reduce confidence for everyone.

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<sup>163</sup> Election Day Precinct Incident Log from Erie County, Pert #4 (Nov. 6, 2012). A copy is maintained by the author.

<sup>164</sup> Notes from Hamilton County, Cincinnati, Delhi B (November 6, 2012) (Reflects repeated attempts to contact the Board of Elections and a concern that the presiding judge was over-reliant on the Board given the long wait times. The presiding judge is reported to have said in response to this concern, "I worked the polls for 30 years and I am calling the BOE."); Election Day Precinct Incident Log from Hamilton County, Cincinnati 26-E (Nov. 6, 2012) (Included a long narrative regarding conflict between the poll workers including, for example, one poll worker misapplying the identification standard. The presiding judge referred to general chaos and "getting cursed out at least 3 times."). Copies are maintained by the author.

<sup>165</sup> This happens and is reported quite frequently. For example, in a precinct with a linked signature and voting system, a woman voted as her husband due to poll worker error, but it was subsequently adjusted when the husband voted as his wife. Election Day Precinct Incident Log from Richland County, Mad A, McElroy Church of Christ (November 6, 2012) (copy on file with author); *see also* Election Day Precinct Incident Log Record #167 from Cuyahoga County, Broadview Heights 03 D (Nov. 6, 2012); Election Day Precinct Incident Log Record #171 from Cuyahoga County, Broadview Heights 04B (Nov. 6, 2012); LID# 1069 from Franklin County, Zone #2 A-K (Nov. 6, 2012). Copies maintained by the author.

<sup>166</sup> *See, e.g.*, Election Day Precinct Incident Log from Clark County, Mfld-7 Northridge UMC (Nov. 6, 2012) (voter voted as registered, but subsequently when his wife came to vote it was discovered they had moved and he should have gone to the new precinct). It should be noted this type of incident is the type of voter error that some would call "fraud," but for the purposes of this Article unless intent of voter fraud can be discerned from available records such actions will be considered mistakes. A copy is maintained by the author.

<sup>167</sup> *See* Election Day Precinct Incident Log from Hamilton County, Symmes F (Nov. 6, 2012) (voter ultimately cast a ballot, but had conflict with poll workers on presenting the proper form of ID and not being asked for an alternative). The report reflects the voter was told "could not vote." *See also* Election Day Precinct Incident Log from Hamilton County, Sycamore N (Nov. 6, 2012) (Voter with a registration card was not found in the poll book and angrily refused to vote provisionally. Voter left but upon return after a long hold with the Board of Elections the voter was found in the supplemental list. The voter loudly demanded apologies and was angry throughout the interaction.). In these examples, though the poll worker committed error in processing the voter, the action of the voters hindered resolution of the issue. Copies are maintained by the author.

Through evaluating precinct incident logs a picture emerges of what can happen in a precinct on Election Day. These reports highlight the near infinite number of variables that are part of any election. They also make clear that ultimately elections are run by fallible people whose judgment will inevitably affect the voting rights of some of the voters they serve on any given day. Steps should be taken to both improve this data and to adapt elections systems to guide poll workers toward voter-favored decision making.

### III. ANALYSIS AND RECOMMENDATIONS

#### *A. Collect and use better data for Election Day functionality<sup>168</sup> with a goal of creating real time Due Process protection for Election Day concerns.*

As the research and writing for this piece occurred, it became clear little scholarly work has focused on Election Day problems themselves because the evidence available is piecemeal and too often anecdotal. By focusing on Ohio, we were able to create a limited scope that made data collection a still difficult but achievable goal. Somewhat ironically, we were also aided by the volume of litigation and attention that has been paid to Ohio's election process. Though the cases<sup>169</sup> focus on the counting of provisional ballots utilize a fault based framework that this research shows could be problematic, the evidence collected is incredibly valuable in understanding Election Day functionality.

This conclusion is also reflected in "The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration" January 2014.<sup>170</sup> The report focuses a great deal on the need for better planning, preparation, and use of customer services and engineering practices in managing elections. The report does reflect that part of why Election Day itself cannot be better managed is due to a lack of data. "Despite the fact that elections drown in data, and political campaigns have transformed American politics by gathering and analyzing data about their supporters, election administration has largely escaped this data revolution."<sup>171</sup> In its recommendation the Commission advised collection and reporting of "transaction data" in order to improve the "voter experience."<sup>172</sup> This Article's examination of available information even at a transactional level supports this conclusion.

It is therefore critical to find a mechanism to better capture both the perceived and actual functioning of polling places on Election Day. The work of groups like

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<sup>168</sup> For the purpose of this Article, Election Day functionality would reflect the highest percentage of voters being efficiently and correctly processed in a manner that allows for after-the-fact verification that decisions on regular versus provisional ballots and counting versus rejecting those provisional ballots was correct.

<sup>169</sup> *NEOCH v. Husted*, No. 12-4354, 2012 U.S. App. LEXIS 26926 (6th Cir. Nov. 16, 2012), available at <http://www.gpo.gov/fdsys/pkg/USCOURTS-ca6-12-04354>; *SEIU v. Husted*, 698 F.3d 341 (6th Cir. 2012).

<sup>170</sup> PRESIDENTIAL COMM. ON ELECTION ADMIN., *THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION* 68 (Jan. 2014), available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

Election Protection and calls staffed by governmental and non-governmental entities is valuable but is too small scale and lacks routine follow up and analysis. In addition, reliance on call center data too heavily will skew any result towards areas or issues where people report problems while unfairly ignoring the many precincts and elections where there are minimal if any concerns or reports. On the other hand, in order for a problem to be reported someone—an observer, a voter, or a poll worker—must recognize it as a problem. The call logs reveal a lack of understanding of what is or is not permitted in Ohio law. A voter who fails to properly sign a provisional ballot will be unknowingly disenfranchised. In contrast, complaints of rejection of the use of a passport as identification misunderstand that a passport is not considered proper identification under Ohio law.

The volume of reports and the increased awareness of the potential for Election Day problems could and should be harnessed to improve both the actual and perceived functioning of elections. Poll workers should be encouraged to discuss any concern with voters. The incident reports include notations of voters who left without casting a provisional ballot who could have become frustrated with the process. Voters who become angry with poll workers could also be aided by a more open dialogue process. This combined with the high number of calls to the Secretary of State and Election Protection officials reflect an increasingly engaged yet wary voter mentality. If voters understand why something has been done it will improve their confidence in the outcome. Simultaneously, precinct officials who explain and discuss their actions will deepen their own understanding of the requirements allowing for goal oriented rather than technocratic application of Election Day procedures. Voters should be empowered to ask necessary questions and have a mechanism to report both what works and what doesn't work about their election experience.

Too much of our understanding of what might go wrong at a polling place on Election Day stems from litigation where review of the facts occurs only in a highly charged and adversarial process. It is impossible to remedy wrongs when there is limited unbiased data to improve a complex electoral system. The goal of such improvement would be to minimize any unnecessary provisional ballots and ensure that Election Day error does not result in actual disenfranchisement, perceived disenfranchisement, or a lack of confidence in the election result.<sup>173</sup> This could ultimately narrow the litigation margin and reduce the reliance on litigation to adjust electoral standards.

*B. Ohio should manage elections and related disputes through legislative adoption of policies incorporating the materiality principle and the Democracy Canon.*

The Ohio General Assembly, as with other state legislative bodies, is in a unique position to bring alive a principled approach to mistake and ambiguity in ways that would facilitate elections and minimize the need for continuous administrative and judicial interpretations of election laws. The 2012 election and the litigation that has

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<sup>173</sup> Reducing the number of unnecessary provisional ballots should not be achieved by limiting provisional ballot access for voters who are unable to cast a regular ballot—any such attempt undermines the very purpose of provisional ballots. Counties that had a call-in policy for provisional ballot access should reevaluate such requirements as it was a drain on resources and negates the opportunity for the post-election analysis provisional ballots were intended to allow.

been continuing in Ohio for years highlight the impossibility of creating an election system sufficiently detailed to avoid any gaps. However, inclusion in election code at a state level language like the materiality protection in the Civil Rights Act and a catchall standard that ambiguities should be decided in favor of voters will anticipate and guide unexpected election concerns. Existing statutes and standards should be evaluated and reformed in response to existing federal law on materiality and the need for a guiding principle.

By necessity, all election systems will rely upon the actions of millions of individuals for the offering, casting, collection, and counting of ballots. As is reflected in the pleadings, public data, and hotline reports, the potential for mistakes to be made by voters or election officials operating in good faith with the best of intentions are inevitable. Thankfully, the *Anderson/Burdick* standard does not require overly technical or rigid responses to such errors, but looks to balance the reality of election regulation against the experience of human operators.<sup>174</sup> Though designed for analysis of election schemes in a litigation framework both the materiality principle and Democracy Canon can provide guidance for needed flexibility to promote rather than endanger fairness and electoral confidence.

The Materiality Principle and the Democracy Canon should be immediately incorporated into judicial analysis of election disputes in Ohio. The Ohio General Assembly needs to include these analytical approaches as bedrock principles by enacting the *Anderson/Burdick* balancing standard in statutory regulation of elections. This should include, at minimum, instruction to consider errors based on whether or not they matter rather than through a fault-based analysis that has so often been used in Ohio.<sup>175</sup> This could be especially beneficial in provisional balloting standards: if it was part of the record why a provisional ballot was offered, it could be determined that a voter should have had a regular ballot at which point any analysis should cease and the vote should be counted. This type of evaluation better balances the rights and obligations of provisional voters against those who perhaps should have been provisional voters but erroneously cast a regular ballot. This standard should be taught and emphasized at every level of election administration to facilitate the goal of counting ballots in contrast to the current overly process-oriented election procedures.

The materiality principle is at its core a reasonableness doctrine, applying a reasonable person standard to election discrepancies. This can be the beginning, but cannot be the end, of guidance for voters and election officials, as there still needs to be a guiding principle over areas where reasonable minds could differ. That principle can and should be taken from the Democracy Canon: ambiguities should be decided in favor of the voter. If this balanced standard was then embraced by legislative entities, it could serve as a safety net within existing election regulation—a guided reasonableness requirement for when human error or unforeseen circumstances require the exercise of judgment on Election Day.

Through such a process the need for pre- and post-election litigation could be minimized, but even when required such litigation would have stronger backing in the representative process. Ohio could and should legislatively create a pre-

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<sup>174</sup> See *supra* notes 53-61.

<sup>175</sup> See generally *NEOCH v. Husted*, No. 12-4354, 2012 U.S. App. LEXIS 26926 (6th Cir. Nov. 16, 2012), available at <http://www.gpo.gov/fdsys/pkg/USCOURTS-ca6-12-04354>; *SEIU v. Husted*, 698 F.3d 341 (6th Cir. 2012).

determined standard for how to balance the competing interests of voters and the state. Such a standard recognizing the role of mistake and requiring ambiguities be decided in favor of voters would guide election officials, from the Secretary of State down to each poll worker, and as needed guide judges to decide election disputes on principles from within rather than beyond Ohio law.

*C. The Election Assistance Commission and federal support for election review and analysis are strongly recommended.*

The need for better data collection and analysis cannot be met without federal support both on a policy and monetary level. The Federal Elections Assistance Commission, which is currently without any commissioners,<sup>176</sup> was established as a clearinghouse for information and best practices. As states pursue divergent solutions to evolving electoral systems challenges, an ability to comparatively evaluate their experiences is needed for continued improvement in election systems. Further, the EAC could evaluate and certify voting equipment to the states which would free up additional state resources.<sup>177</sup>

There also needs to be federal support for maintenance of voting machines under requirements enacted as part of the Help America Vote Act. Even if Ohio wished to invest in better poll worker training and data collection, it would be difficult to do so given the financial burden aging voting machines place on state and local resources.<sup>178</sup> Since current voting machines were purchased for use at the same time to meet federal requirements, Ohio, along with other states faces a significant financial burden to repair and replace the equipment which is all aging out at the same time.

At both a state and federal level an investment is needed, not just in the physical mechanics of voting, but in pursuing an understanding of what is and is not working in modern election systems. This is especially true of an understanding of the events of Election Day at a polling place level where systematic study has not occurred. If fully functional, the EAC could recommend best practices for Election Day monitoring and evaluation from which to build future investment. Significant data collection and investment in analysis of that data is necessary to develop a quantitative and statistically significant understanding of the Election Day experience of voters and election officials alike.

#### IV. CONCLUSION

Analyzing the administration of the 2012 General Election in Ohio with the background of other recent elections shows that both luck and margins of victory were as responsible as election administration for avoidance of electoral meltdown.

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<sup>176</sup> The commission is not entirely defunct, though it lacks commissioners. See *Commissioners*, U.S. ELECTION ASSISTANCE COMMISSION, [http://www.eac.gov/about\\_the\\_eac/commissioners.aspx](http://www.eac.gov/about_the_eac/commissioners.aspx) (last visited Apr. 12, 2014). It still maintains some staff that continue the mission of the EAC as authorized. See Dan Tokaji, *The EAC Marches On*, ELECTION LAW BLOG, <http://electionlawblog.org/?p=54056> (Aug. 7, 2013).

<sup>177</sup> The Presidential Commission reached similar conclusions. PRESIDENTIAL COMM. ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 64-65 (Jan. 2014).

<sup>178</sup> *Id.* at 62-63; see also Barry M. Horstman, *Husted Makes Case for Funding Ohio Voting Machines*, CINCINNATI ENQUIRER, (Dec. 11, 2012).

As a state, Ohio is woefully unprepared for increased scrutiny of its practices, particularly within the context of a judicial intervention in an election. Ohio has ignored the existence of simple human error when crafting its laws and standards.

The most straightforward requirement is the need to collect better information of what happens on Election Day. Through examining litigation documents and public records, it is evident that record keeping is deficient, at best. From the individual poll worker through to the Secretary of State, records collection and retention must be improved. In order to truly understand and address systemic problems, better data is needed to quantify the experience of voters and election officials.

The laws of the state of Ohio must recognize that perfection is impossible in elections administration and error exists without malicious intent. A principled approach to election administration where ambiguity should be resolved for the voter can fill gaps in the law as it is impossible to legislate every aspect of the millions of individual actions which go in to each election. Voter error is not voter fraud, poll worker error is not intended to be voter suppression, but both can have such effects when election officials are not empowered to use common sense in furtherance and protection of the most fundamental right to vote.

In any system within which humans interact, there will always be a degree of error. Currently, the only effective remediation is pre- and post-election litigation. This is unacceptable.

By implementing a system that only invalidates ballots for material error, that accepts substantial or constructive compliance of completed ballots and uses the Democracy Canon to guide pre- and post-election litigation and administrative remedies, we would create a system that is far superior to current law, respects each voter's intention, and reveres each individual vote. Perfection is not an option for election administration, but common sense reforms and voter-oriented principles can make Election Day perfectly reasonable and most importantly, fair.