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Joshua A. Douglas

University of Kentucky College of Law, joshuadouglas@uky.edu

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To HAVA, and Beyond!

Joshua A. Douglas

Martha Kropf and David C. Kimball, *Helping America Vote: The Limits of Election Reform*. New York, NY: Routledge, 2012, 154 pp., \$41.95 (paperback).

WE HAVE MADE SOME PROGRESS in improving election administration, but our elections are still not as fair or accurate as they could be. That's the main premise of an interesting and pithy new book, *Helping America Vote*, by political scientists Martha Kropf and David C. Kimball. By looking at the perceived problems stemming from the Florida 2000 presidential election, and uncovering how the definition of the problem affected the choice of reforms, Kropf and Kimball identify both positive and negative aspects of how elections are run. The book provides a cogent glimpse at Congress's efforts in election reform ten years after the passage of the Help America Vote Act (HAVA), presenting a wealth of data to explain HAVA's achievements but also highlighting its deficiencies in, well, helping America vote.

WHAT WAS THE PERCEIVED PROBLEM, AND HOW DID WE RESPOND?

Kropf and Kimball start out by exploring the impetus for congressional passage of HAVA, the largest-ever federal reform in elections. In sum, after *Bush v. Gore* ended the 2000 presidential election, the widely held belief was that our voting technology was outdated. The storyline after Florida 2000 was that the use of certain kinds of voting

machines, and in particular, punch card ballots, compromised accuracy. In addition, voter registration database errors contributed to confusion as to who had access to the ballot. Finally, there were concerns about voter fraud, particularly in Missouri.

The definition of the problem, particularly as it related to voting technology, affected the solution, as Kropf and Kimball demonstrate in Chapter 2. Outdated voting equipment seemed to be the "obvious" culprit in Florida 2000, so modernizing voting technology was the "obvious" fix. The most important aspect of HAVA was the authorization of significant federal funds for states to replace old voting equipment. In particular, the law encouraged states to replace lever and punch card machines with optical scan and electronic equipment. In addition, HAVA required that jurisdictions allow voters who showed up at the polls but were not on the voter list, for whatever reason, to cast a provisional ballot. HAVA also created the Election Assistance Commission, a federal board designed to oversee HAVA's implementation. But the "major thrust" of HAVA, in Kropf and Kimball's view, was the allocation of money for states to buy new voting equipment (p. 28).

The legislation worked, at least in modernizing election machines. Kropf and Kimball collected data from every state and county regarding the kind of voting machines jurisdictions used in the general election from 2000 through 2010. They found that "roughly 70 percent of counties have switched to new voting equipment since the 2000 election" (p. 33).

EVIDENCE-BASED ASSESSMENTS OF HAVA

After setting the foundation that the 2000 election crisis led many jurisdictions to focus on

Joshua A. Douglas is an assistant professor of law at the University of Kentucky College of Law in Lexington, KY.

modernizing voting machines, the remainder of the book synthesizes a vast array of data the authors collected regarding both the intended and unintended consequences of these changes. Indeed, the main benefit of Kropf and Kimball's work is the presentation of evidence-based assessments of HAVA-initiated reforms to election administration.

First, in Chapter 3, Kropf and Kimball show that elections in the aggregate are more "accurate," but that there are still inequities among jurisdictions that use different kinds of voting machines. To measure accuracy, Kropf and Kimball looked at the residual vote rate in presidential elections in 2000, 2004, and 2008 by type of voting equipment. Residual votes comprise both "overvotes," where a voter selects more than one candidate, and "undervotes," where the ballot records no selection for that race. In essence, the authors sought to determine whether the new voting machines produced fewer "mistakes" in voting. Kropf and Kimball find that, overall, the residual vote rate dropped from 1.8 percent in 2000 to 1.1 percent in 2004 and 2008, signifying a positive improvement that represents almost one million fewer residual votes.

But not all voting equipment is created equal. The authors find that the residual vote rate varies by type of voting machine. Machines with an error prevention feature, which notifies voters when they select multiple candidates for a single office or fail to vote at all for a particular office, significantly reduce residual votes. In particular, precinct-count optical scan systems (in which the ballots are scanned at the voting precinct) and electronic voting machines (often referred to as DRE or direct recording electronic machines) produce low residual vote counts. Kropf and Kimball conclude that replacing old voting equipment, and most significantly, shifting from voting technologies without error prevention features to those that notify a voter of overvotes or undervotes before the voter finalizes the ballot, have had a positive effect on election accuracy by counting more votes. Kropf and Kimball's data allows us to say with some confidence that HAVA achieved its goal of modernizing voting technology, producing more accurate election results. In addition, newer machines with error prevention capabilities have reduced the disparity in residual votes among racial minorities and low-income voters.

Although they do not say it explicitly, Kropf and Kimball's evidence on voting machines suggests

obvious policy implications: states and counties should continue shifting to newer voting equipment that includes error prevention mechanisms. But, as Kropf and Kimball show, election administrators who select voting machines must be cognizant of unintended consequences, even of "modern" technologies such as electronic voting machines. For example, some DRE machines use a full-face layout and list every office, while others scroll and have one or two offices per screen. Using actual election data from recent elections, Kropf and Kimball explain that full-face DREs tend to produce more residual votes in down-ballot races. Accordingly, although the authors do not spell this out, the implication of their data is that a jurisdiction that decides to shift to DRE machines should consider carefully the implementation of that technology so as not to produce an adverse result on certain races.

The good news from HAVA is that voting machines were updated. The bad news is the unintended consequences of the law, as well as what the law failed to accomplish. As to unintended consequences, Chapter 4 discusses several concerns: security issues surrounding electronic voting machines; finding the scarce resources needed to change voting equipment, especially for those jurisdictions such as Florida that altered their voting technology several times during the decade; and the consolidation of polling places in the face of budget concerns due to the cost of buying additional machines, which had the corollary effect of reducing voter turnout in 2008. Kropf and Kimball lament the rush to mandate the replacement of voting equipment after the 2000 election without a more considered analysis of the unintended costs the new machines might impose. Their work fills this evidentiary gap by quantifying the effects of switching to newer machines.

Beyond focusing on voting technology, Kropf and Kimball posit that post-2000 reforms could have done much more. First, the authors note in Chapter 5 that HAVA failed entirely to consider ballot design, which also can lead to lost votes. For example, the authors present data on the residual vote rate for jurisdictions that used the infamous "butterfly" ballot, showing that ballot design had a greater impact than did voting machines on the residual vote rate in Florida in 2000. Moreover, poor ballot design has a disproportionate effect in disadvantaged communities. But besides eliminating the butterfly ballot, jurisdictions failed to

consider the layout or design features of their ballots. “Our results indicate that ballot design has a significant impact on the ability of people to record their votes. Yet, beyond the butterfly, it seems that ballot design did not receive attention as a policy ‘problem’ that lawmakers needed to expend significant resources to address” (p. 75). Once again, Kropf and Kimball highlight how the perceived problem from Florida 2000 affected the choice of reforms: policymakers failed to recognize ballot design as an issue even though poorly structured ballots led to lost votes.

Kropf and Kimball identify several features of ballot design that can result in residual votes. Using research regarding best practices for public opinion surveys, the authors created a list of desirable ballot features that can produce more accurate results. The authors then examined ballots from the 2002 and 2004 general elections to determine if the ballots contained these features. They found that the average ballot for their sample included only half of the desirable characteristics. Kropf and Kimball use this evidence to explain how ballot design can affect the residual vote rate. For example, ballots that list candidates for the same office in multiple columns, or ballots that require voters to “complete the arrow” to vote for a candidate, significantly increase the residual vote rate (p. 77). By contrast, ballots that contain a “straight-party” option reduce residual vote rates at the top of the ballot but increase the residual vote rate for down-ballot referenda.

In Chapter 6, Kropf and Kimball examine the impact of partisanship among local election officials, another problem with election administration that HAVA ignored. The authors note that local election officials—many of whom must run for office themselves—have a great amount of discretion in running elections. Because these election officials are often partisan, ideology may taint their decisions regarding election administration. Even if the officials themselves do not act in partisan ways, the public might perceive their actions as ideological. None of these observations, however, are new.¹ Kropf and Kimball’s addition is an evidence-based assessment of how partisan election administrators act. For example, Kropf and Kimball look at the rate in which jurisdictions ultimately count provisional ballots, which is often subject to the discretion of the local election officials who must determine whether the individuals who voted

provisionally are actually eligible to vote. They show that when the overall political leaning of voters in a jurisdiction and the party affiliation of the election official for that jurisdiction align, the jurisdiction counts more provisional ballots—because doing so would likely increase the vote count for that side. That is, Democratic election officials tend to include more provisional ballots in the final count in heavily Democratic jurisdictions as compared to a jurisdiction that is politically neutral or leans Republican, as mathematically those provisional ballots are likely to skew for the Democratic candidates. Republican election officials act in the same manner, using their discretion to help their side. In sum, Kropf and Kimball provide empirical evidence to show that the actions of partisan election administrators can lead to differences in election policies, which can impact which votes are counted and the final result. HAVA, however, did nothing to address this concern.

HAVA WAS ABOUT MORE THAN JUST VOTING MACHINES

As noted earlier, Kropf and Kimball’s book starts with the premise that the genesis for HAVA was the perceived problems stemming from the Florida 2000 election debacle. With *Bush v. Gore* as the “triggering” event, and concerns about voting technology dominating the post-*Bush v. Gore* conversation, it is no wonder that Congress focused mainly on updating voting machines in HAVA.

But this leaves out a significant part of HAVA’s impact: provisional voting. HAVA requires all jurisdictions administering federal elections to allow anyone arriving at the polls who is not on the registration list to cast a provisional ballot.² After the election, the jurisdiction must determine if that person was eligible to vote, and if so, count the provisional ballot.³ To be sure, Kropf and Kimball acknowledge that provisional voting “appears to be a meaningful election reform” (p. 103). They also note that in 2004 1.9 million voters cast provisional ballots, and jurisdictions counted more than

¹See, e.g., Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125 (2009).

²HAVA § 302(a), 42 U.S.C. § 15482(a).

³42 U.S.C. § 15482(a)(4).

1.2 million of them. But the authors discuss provisional voting solely in the context of the discretion of local election officials in deciding whether to count them, lamenting the variation in the number of provisional votes counted across jurisdictions.

This glosses over a broader and more fundamental point: HAVA's mandate of provisional balloting has led to more voters being able to cast a ballot. Before HAVA, local election officials simply turned away voters who showed up at the polls but were not on the registration list, at least in those jurisdictions that had not adopted provisional voting as a matter of state law. Now, all voters who believe they are validly registered have a chance to cast a ballot on Election Day. If eventually the jurisdiction deems the voter eligible to vote, officials must count the ballot. This has the potential to result in the inclusion of many additional votes in the count.

Provisional voting has changed election outcomes. In Hamilton County, Ohio, the result of a Juvenile Court Judge race turned on whether to count several hundred "right church, wrong pew" provisional ballots cast at the correct polling place but wrong precinct within that polling location (as a single polling place often contains multiple precincts at different tables).⁴ Before HAVA, there would have been no dispute—and the County would have declared the wrong candidate the winner. This is because Ohio's provisional balloting law before HAVA was much narrower, applying only to those voters who had recently moved.⁵ Under Ohio's newer provisional voting law in the wake of HAVA, however, Hamilton County had to give these voters who arrived at the "wrong" precinct a provisional ballot.⁶ Ultimately, a federal court required the County to count these ballots, which changed the result of the election.⁷

The Hamilton County Juvenile Court Judge race is perhaps the most poignant example of the importance of provisional voting because the result actually turned on the provisional ballots, but it is not the only instance in which provisional ballots may have made a difference. For example, the margin of victory in a 2008 mayoral race in Palm Beach, Florida was a mere 3 votes, and yet 14 voters had cast provisional ballots.⁸ Moreover, even if provisional ballots do not alter election outcomes, they still provide a fail-safe mechanism for voters to feel that they had the opportunity to take part in the democratic process. The increased ability of voters to rely on provisional voting is a positive reform

in election administration stemming from HAVA, and one that we should not overlook.

To be sure, there are inequalities with respect to provisional balloting. Some states have a much higher rate of provisional ballots cast,⁹ which suggests underlying problems in their electoral mechanisms because they are turning away more voters initially. Provisional balloting can lead to post-election litigation, especially in battleground states such as Ohio.¹⁰ Further, as Kropf and Kimball show, whether to count a provisional ballot might turn in part on the partisanship of both the local electorate and the local election official. But these concerns notwithstanding, provisional balloting is still a positive development because it at least gives more voters a chance to cast a ballot and have it counted. By focusing so much on HAVA's mandate for new voting machines, Kropf and Kimball overlook this other crucial aspect of HAVA's reforms.

WHERE DO WE GO FROM HERE?

Kropf and Kimball's book is high on evidence of the current state of election administration, but unfortunately low on next steps for using their data. Their empirical analysis provides a valuable snapshot of the good and the bad from post-2000 reforms, showing how jurisdictions have updated voting machines but ignored problems with ballot design and partisan election officials. But what Kropf and Kimball do not tell us, at least explicitly, is what to do with their assessments. As political scientists, the authors do yeoman's work in identifying

⁴Hunter v. Hamilton County Bd. of Elections, 635 F.3d 219 (6th Cir. 2011).

⁵See OHIO REV. CODE ANN. § 3503.16 (Anderson 2001); DANIEL TOKAJI, PROVISIONAL VOTING: FEDERAL LAW AND OHIO PRACTICE, Election Law @ Moritz, July 20, 2004, <http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_rules01.html>.

⁶See OHIO REV. CODE ANN. § 3505.181.

⁷Hunter v. Hamilton County Bd. of Elections, 850 F. Supp. 2d 795 (S.D. Ohio 2012).

⁸Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 116 n.155 (2012).

⁹See, e.g., Edward B. Foley, *Electoral Dispute Resolution: The Need for a New Sub-Specialty*, 27 OHIO ST. J. ON DISP. RESOL. 281, 285 (2012) (noting that in 2008 Ohio voters cast more provisional ballots than voters in most other states).

¹⁰See, e.g., Hunter, 635 F.3d 219; Ohio ex rel. Skaggs v. Bruner, 900 N.E.2d 982 (Ohio 2008).

the problems, but the legal scholar in me wishes for normative solutions to these issues.

For example, Kropf and Kimball provide evidence that voting machines with error prevention features, such as precinct-count optical scan machines and electronic voting equipment, produce fewer residual votes. Moreover, scrolling DREs, which list only one or two races per screen, are better for down-ballot races than full-face DREs. But what are we to do with this evidence? Should all jurisdictions move to precinct-count optical scan machines or DREs? Which one is better between the two? Do we need uniformity in voting machines nationwide? Statewide? Countywide? The authors do not tell us, requiring the reader to make his or her own conclusions.

Similarly, Kropf and Kimball analyze various features of ballot design, but they fail to provide concrete policy recommendations on how jurisdictions should structure their ballots. Instead, they offer a ballot index, comprised of a list of desirable ballot features, and they measure the residual vote rate in recent elections as tied to the frequency of these ballot features. This analysis is valuable, but it omits the final, yet crucial, step: what features should (or must) ballots include? The authors strongly imply that ballots should list candidates in one column and stay away from a connect-the-arrow format, but it is unclear why they are equivocal in making this a firm policy proposal. It would be more helpful had Kropf and Kimball actually provided guidance on precisely which features are most important in designing a new ballot, perhaps with examples of jurisdictions that have good ballots under the authors' metric. The authors explain that the federal government released a 2007 report on ballot design, *Effective Designs for the Administration of Federal Elections*, but lament that the suggested standards from that report are voluntary. Would Kropf and Kimball alter the guidelines from the federal report? Should the reforms in the report simply be mandatory? What are the next steps in improving ballot design? Kropf and Kimball unfortunately leave the reader hanging.

A similar concern weaves its way through the final election administration variable Kropf and Kimball examine, partisanship among local election officials. Here, the authors sound a more fatalistic tone. They mention a few previously-proposed reforms for removing partisanship in who runs

elections, but reject them, saying that it is “futile” to eliminate political biases from election officials. They also find proposals to achieve either bipartisan or independent control unrealistic or at least difficult to achieve. But why? As I (and others) have discussed in relation to post-election disputes about the correct winner, a panel that contains an equal number of “partisan” operatives might improve both the actual and perceived legitimacy of the decision maker.¹¹ Kropf and Kimball's empirical evidence is crucial in demonstrating that partisan election officials do make a difference, but they fail to suggest anything to rectify this problem. Indeed, they conclude by saying that “without defining at least part of the problem of elections as a lack of oversight over officials who have partisan attitudes that affect administration, any solution to problems in election administration is only a partial solution” (p. 111). But, beyond redefining the problem, it is unclear what they would do about it.

WHY YOU SHOULD READ THIS BOOK

Kropf and Kimball's book provides important evidence on the state of our elections, which should inform the debate for years to come. Instead of undertaking reforms blindly based simply on perceived problems, Kropf and Kimball's analysis can better equip policymakers in understanding how to improve our election systems. The main value in this book is its synthesis of a wealth of data on how elections actually operate. Kropf and Kimball pack a large amount of information in this short book; this book review touches upon only the highlights. The charts are easy to read and understand. The information is readily digestible, and at only 118 pages (before the notes) and seven chapters, it is a quick read. Anyone interested in assessing how the “routine” aspects of voting mechanics—voting machines, ballot design, and local oversight—affect the right to vote will find value in Kropf and Kimball's analysis.

The significance of the information in this book outweighs its few deficiencies. Although Kropf

¹¹See Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L. J. 1, 49–54 (2013); Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 471, 477 (2010).

and Kimball should have acknowledged the positive effect of more universal provisional voting and provided concrete policy proposals based on their data, these drawbacks do not diminish the importance of their work. Kropf and Kimball give us hard evidence on the consequences of election reform. This book thus provides a good starting place for a discussion of how to improve our electoral systems. The challenge will be in moving forward

with their data to achieve practical election reforms and truly help America vote.

Address correspondence to:

Joshua A. Douglas

University of Kentucky College of Law

620 S. Limestone

Lexington, KY 40506

E-mail: joshuadouglas@uky.edu