

## ESSAY

# The 2012 Voting Wars, Judicial Backstops, and the Resurrection of *Bush v. Gore*

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### ABSTRACT

*Fights over election administration have become the “new normal” in the United States since the disputed presidential election of 2000, which culminated in the Supreme Court’s controversial decision in Bush v. Gore. During the 2012 elections, the “voting wars” which had ensued since 2000 manifested themselves in a host of restrictive election rule changes passed mostly by Republican legislatures and implemented by Republican election administrators in the name of fraud prevention and administrative convenience. Democrats, the Department of Justice, and reform groups resisted the overreach, litigating over many of these changes. The results of this litigation were a mixed bag. For example, courts approved some voter identification laws, rejected others, and put Pennsylvania’s and Wisconsin’s laws on hold for the 2012 election. Overall, it appeared that in the most egregious cases of partisan overreach, courts were serving, often with surprising unanimity, as a judicial backstop. In Ohio, one of the twin epicenters (alongside Florida) of the 2012 voting wars, two important cases relied in part on Bush v. Gore to expand voting rights. The story of the 2012 voting wars is a story of Republican legislative, and to some extent administrative, overreach to contract voting*

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*rights, followed by a judicial and public backlash. The public backlash was somewhat expected—Democrats predictably made “voter suppression” a key talking point of the campaign. The judicial backlash and the resurrection of Bush v. Gore in the Sixth Circuit, however, were not. The judicial reaction from both liberal and conservative judges, often on a unanimous basis, suggests that courts may now be more willing to act as backstops to prevent egregious cutbacks in voting rights and perhaps to do even more to assure greater equality and fairness in voting. However, it is too early to know for certain.*

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#### INTRODUCTION

A few days after the United States Supreme Court decided *Bush v. Gore*,<sup>1</sup> ending the Florida 2000 election dispute by handing Florida’s electoral votes and therefore the presidency to George W. Bush,<sup>2</sup> election law professor Samuel Issacharoff penned a *New York Times* op-ed.<sup>3</sup> In it, he opined that the Court’s controversial equal protection holding that the state could not arbitrarily value one person’s vote over that of another might be used to force states to improve

<sup>1</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>2</sup> See Samuel Issacharoff, Op-Ed., *The Court’s Legacy for Voting Rights*, N.Y. TIMES, Dec. 14, 2000, at A39.

<sup>3</sup> *Id.*

their election processes through litigation.<sup>4</sup> It would be lemonade from lemons.<sup>5</sup>

In the ensuing years, *Bush v. Gore* did not fulfill that promise. Even though scholars debated when, if ever, the case could apply beyond the narrow facts of a statewide recount with inconsistent counting standards,<sup>6</sup> the courts seemed uninterested. Until 2013, the Supreme Court failed to cite the case for any proposition,<sup>7</sup> and the few lower courts that relied upon the case as precedent to create better and fairer voting conditions were overturned or limited.<sup>8</sup> By 2007, even I lamented the “untimely death” of *Bush v. Gore*.<sup>9</sup>

A funny thing happened in 2012. The voting wars that had ensued since 2000<sup>10</sup> manifested themselves in a host of restrictive election rule changes passed mostly by Republican legislatures and implemented by Republican election administrators in the name of fraud prevention and administrative convenience.<sup>11</sup> Democrats, the Department of Justice (“DOJ”), and reform groups resisted the over-

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<sup>4</sup> *Id.* Issacharoff wrote that the Court has “asserted a new constitutional requirement to avoid disparate and unfair treatment of voters. And this obligation obviously cannot be limited to the recount process alone. . . . The court’s new standard may create a more robust constitutional examination of voting practices.” *Id.*; see also HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 198 (2001) (“[T]hose who remain resentful [about *Bush v. Gore*] . . . are the most likely to feel tempted into supporting the equal protection rationale of the decision. . . . [A] classic example of making political lemonade out of lemons . . . .”); Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert Bush v. Gore into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL’Y 357, 369–72 (2002); Cass R. Sunstein, *The Equal Chance to Have One’s Vote Count*, 21 LAW & PHIL. 121, 133 (2002).

<sup>5</sup> See GILLMAN, *supra* note 4, at 198; Mulroy, *supra* note 4, at 369–72.

<sup>6</sup> See, e.g., Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925, 991–98 (2007); Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 386–87 (2001) [hereinafter Hasen, *Bush v. Gore and the Future of Equal Protection*]; Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007, 1026–27 (2007); Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1263–65 (2002); Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1068–72 (2007).

<sup>7</sup> Richard L. Hasen, *Teaching Bush v. Gore as History*, 56 ST. LOUIS U. L.J. 665, 671 & n.32 (2012); Chad Flanders, *Please Don’t Cite This Case! The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 144 (2006), <http://yalelawjournal.org/images/pdfs/75.pdf>. Justice Thomas finally cited *Bush v. Gore* in a 2013 concurring opinion involving the Elections Clause on an issue having nothing to do with *Bush v. Gore*’s equal protection holding. *Arizona v. Inter Tribal Council*, 133 S. Ct. 2247, 2268 n.2 (2013) (Thomas, J., concurring).

<sup>8</sup> See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 9–15 (2007) [hereinafter Hasen, *Untimely Death*].

<sup>9</sup> See RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 136–41 (2012); Hasen, *Untimely Death*, *supra* note 8, at 3.

<sup>10</sup> On the voting wars since 2000, see generally HASEN, *supra* note 9.

<sup>11</sup> See BRENNAN CTR. FOR JUSTICE, 2012 VOTING LAW CHANGES: PASSED AND PENDING

reach, litigating over many of these changes.<sup>12</sup> The results of this litigation were a mixed bag. For example, courts approved some voter identification laws,<sup>13</sup> rejected others,<sup>14</sup> and put Pennsylvania's<sup>15</sup> and Wisconsin's<sup>16</sup> laws on hold for this election season but perhaps not beyond that. Overall, it appeared that in the most egregious cases of partisan overreach, courts were serving, often with surprising unanimity, as a judicial backstop.<sup>17</sup>

In Ohio, one of the twin epicenters (alongside Florida) of the 2012 voting wars, two important cases relied in part on *Bush v. Gore* to expand voting rights. In one case, a conservative panel of the United States Court of Appeals for the Sixth Circuit—a court which had shown itself bitterly divided along party and ideological lines on election issues in 2008<sup>18</sup>—unanimously held that Ohio's disenfranchisement of voters for voting in the wrong polling location because of poll worker error likely violated the Equal Protection Clause.<sup>19</sup> In the other case, the Obama campaign argued that Ohio's contraction of the early voting period to exclude the weekend before the election for all voters except certain military voters violated the Equal Protection Clause under *Bush v. Gore*.<sup>20</sup> The campaign made this argument despite the fact that Ohio provided twenty-three days of early voting and had for the first time sent all Ohio voters a no-excuse absentee ballot application.<sup>21</sup>

Issacharoff, who was a member of the Obama 2012 reelection campaign's legal team along with other noted election law scholars, bet a dinner against Bob Bauer, the campaign's general counsel, that courts would not accept the argument that the partial contraction of

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LEGISLATION THAT HAS THE POTENTIAL TO SUPPRESS THE VOTE (2012), available at [http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Passed\\_Pending\\_Legislation.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Passed_Pending_Legislation.pdf).

<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211, at \*8 (Pa. Commw. Ct. Oct. 2, 2012).

<sup>16</sup> *Milwaukee Branch of the NAACP v. Walker*, No. 2012AP557-LV, 2012 WL 1020254, at \*5 (Wis. Ct. App. Mar. 28, 2012), *cert. denied*, 811 N.W.2d 821 (Wis. 2012); *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, 2012 WL 763586, at \*7–8 (Wis. Cir. Mar. 12, 2012), *cert. denied*, 811 N.W.2d 821 (Wis. 2012).

<sup>17</sup> See *infra* Part II.

<sup>18</sup> See HASEN, *supra* note 9, at 113–15 (discussing *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Cir. 2008) (en banc), *rev'd*, 555 U.S. 5 (2008) (per curiam)).

<sup>19</sup> *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597–98 (6th Cir. 2012).

<sup>20</sup> *Obama for Am. v. Husted*, 697 F.3d 423, 428–29, 436–37 (6th Cir. 2012).

<sup>21</sup> See *infra* notes 115–17 and accompanying text.

early voting violated *Bush v. Gore*'s equal protection guarantees.<sup>22</sup> Despite his optimism in 2000,<sup>23</sup> Issacharoff was not alone in being skeptical of the theory applied to Ohio early voting in 2012. Professor Ned Foley, director of the Ohio State University's Election Law @ Moritz program, believed the campaign's argument was a loser,<sup>24</sup> and I charitably called it "a major stretch."<sup>25</sup> Others on the Obama legal team, however, were more optimistic than Issacharoff about the lawsuit's chances, including Issacharoff's frequent co-author, Professor Rick Pildes.<sup>26</sup>

Bauer won his dinner.<sup>27</sup> A federal district judge agreed with the Obama campaign and restored early voting on equal protection grounds.<sup>28</sup> A Sixth Circuit panel affirmed, with one of the judges suggesting, under a theory completely unconnected to the campaign's theory of the case, that Ohio had an equal protection obligation to restore early voting to avoid the long lines which appeared in 2004 but had shrunk in 2008 thanks to early voting.<sup>29</sup> It was a dramatic, though perhaps ephemeral, expansion of *Bush v. Gore*'s equal protection guarantees. The Supreme Court then declined to get involved.<sup>30</sup>

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<sup>22</sup> Jeffrey Toobin, *Annals of Law: Right to Vote*, NEW YORKER, Nov. 19, 2012, at 29, 30.

<sup>23</sup> Issacharoff, *supra* note 2, at A39.

<sup>24</sup> Edward B. Foley, *Analyzing a "Voting Wars" Trifecta*, ELECTION L. @ MORITZ (Aug. 16, 2012) [hereinafter Foley, *Trifecta*], <http://moritzlaw.osu.edu/electionlaw/freerair/index.php?ID=9579>; Edward B. Foley, *Two Big Cases Ready for Major Appellate Rulings*, ELECTION L. @ MORITZ (Sept. 30, 2012) [hereinafter Foley, *Two Big Cases*], <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9779>.

<sup>25</sup> Richard L. Hasen, *Is the Supreme Court About to Swing Another Presidential Election?*, SLATE (Oct. 15, 2012, 3:52 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/10/if\\_the\\_supreme\\_court\\_cuts\\_early\\_voting\\_in\\_ohio\\_it\\_could\\_swing\\_the\\_state.html](http://www.slate.com/articles/news_and_politics/politics/2012/10/if_the_supreme_court_cuts_early_voting_in_ohio_it_could_swing_the_state.html).

<sup>26</sup> Richard Pildes, *Early Voting and Constitutional Law*, ELECTION L. BLOG (Nov. 27, 2012, 4:25 PM), <http://electionlawblog.org/?p=44801> ("I did not comment or blog about this case or any other matters during the election because I was working as a Senior Legal Advisor to the Obama campaign and considered it inappropriate to write as an academic expert when I was directly involved in these matters. But now that the election is over and I'm free to write, I want to make the point that once you conclude that the best way to understand [early voting] is that it is an extension of election-day voting earlier in time—which is what the federal courts concluded and which is how, I would venture to say, voters overwhelmingly understand [early voting]—it is easy to understand why the courts would have held it unconstitutional for a state to open its doors to some voters but not others. That is why I also thought the constitutional challenge to Ohio's selective access to early voting would be successful and why I think most federal judges, not just those who sat on the case, would be likely to come out the same way.").

<sup>27</sup> See Toobin, *supra* note 22, at 30.

<sup>28</sup> *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 907–10 (S.D. Ohio 2012).

<sup>29</sup> *Obama for Am. v. Husted*, 697 F.3d 423, 441–42 (6th Cir. 2012).

<sup>30</sup> *Husted v. Obama for Am.*, 133 S. Ct. 497, 497 (2012) (denying application for stay); Adam Liptak, *Justices Clear the Way for Early Voting in Ohio*, N.Y. TIMES, Oct. 17, 2012, at A15.

The story of the 2012 voting wars is a story of Republican legislative, and to some extent administrative, overreach to contract voting rights, followed by a judicial and public backlash.<sup>31</sup> The public backlash was somewhat expected—Democrats predictably made “voter suppression” a key talking point of the campaign.<sup>32</sup> The judicial backlash, and the resurrection of *Bush v. Gore* in the Sixth Circuit, was not.<sup>33</sup> The judicial reaction, from both liberal and conservative judges, often on a unanimous basis, suggests that courts may now be more willing to act as backstops to prevent egregious cutbacks in voting rights and perhaps to do even more to assure greater equality and fairness in voting.<sup>34</sup> The lemonade may be late in arriving and in short supply, but it is still refreshing.

### I. A BRIEF LOOK BACK AT THE 2012 VOTING WARS

In some ways, the 2012 voting wars look much like the voting wars of the last decade:<sup>35</sup> Republicans alleged that voter fraud was a major problem,<sup>36</sup> Democrats alleged that voter suppression was a major problem,<sup>37</sup> turf wars broke out between state and local election administrators,<sup>38</sup> parties fought over newly drafted election laws and new voting technology,<sup>39</sup> the public’s confidence in the fairness of the election process was low,<sup>40</sup> and there was election law litigation. Lots of it.

I have been tracking the rise of litigation since 2000, and the 2011–2012 period fits comfortably into the general rise of litigation

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<sup>31</sup> See *infra* Part II.

<sup>32</sup> See HASEN, *supra* note 9, at 75–105 (describing Democratic responses to claims of voter suppression).

<sup>33</sup> See *supra* notes 28–29 and accompanying text.

<sup>34</sup> See *infra* Part IV.

<sup>35</sup> For a description of the fights during the last decade, see generally HASEN, *supra* note 9.

<sup>36</sup> See, e.g., *id.* at 88; Emily Deruy, *Wisconsin Governor Opposes Same-Day Voter Registration*, ABC NEWS (Nov. 20, 2012), [http://abcnews.go.com/ABC\\_Univision/Politics/wisconsin-gov-scott-walker-opposes-day-voter-registration/story?id=17767738#.UK19doXOalg](http://abcnews.go.com/ABC_Univision/Politics/wisconsin-gov-scott-walker-opposes-day-voter-registration/story?id=17767738#.UK19doXOalg).

<sup>37</sup> See, e.g., HASEN, *supra* note 9, at 91–92; Mackenzie Weinger, *Al Gore: Voter Suppression Like ‘Racist Jim Crow Tactics,’* POLITICO (Nov. 6, 2012, 9:53 PM), <http://www.politico.com/blogs/media/2012/11/al-gore-voter-suppression-like-racist-jim-crow-tactics-148722.html>.

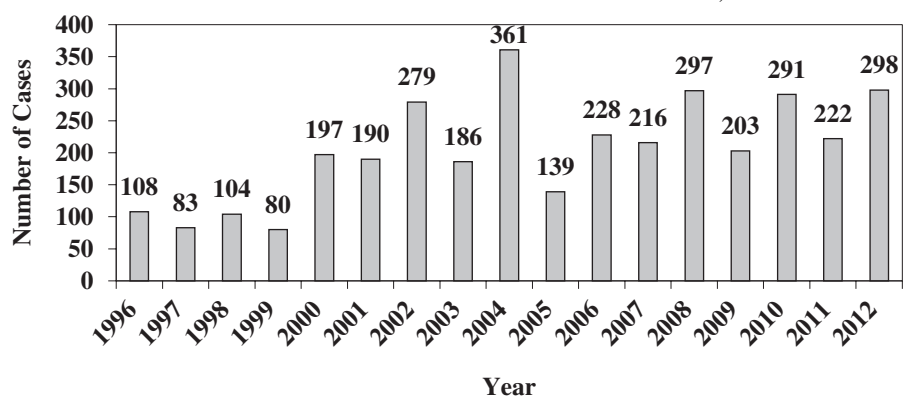
<sup>38</sup> See, e.g., Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2314–15 (2005); Doug Chapin, *Who’s the Boss? Arkansas, Florida Debate State Power to Discipline Local Election Officials*, ELECTION ACAD. (Apr. 25, 2013), [http://blog.lib.umn.edu/cspg/electionacademy/2013/04/whos\\_the\\_boss\\_arkansas\\_florida.php](http://blog.lib.umn.edu/cspg/electionacademy/2013/04/whos_the_boss_arkansas_florida.php).

<sup>39</sup> See HASEN, *supra* note 9, at 135; *infra* notes 45–55 and accompanying text.

<sup>40</sup> See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 769 (2013) (“Unfortunately, the American approach [to elections] is linked to higher partisan bias, lower electoral responsiveness, and reduced public confidence in the electoral system.”).

since 2000.<sup>41</sup> The country saw an average of ninety-four cases per year in the 1996–1999 period.<sup>42</sup> As the figure illustrates, I count 222 election-related cases in 2011 and 298 cases in 2012.<sup>43</sup> Before the 2011–2012 season, the average post-2000 figure was 239 cases per year.<sup>44</sup> Including the 2011–2012 season, the average rises modestly to 242.5 cases per year. High litigation rates surely have become the new normal.

FIGURE. “ELECTION CHALLENGE” CASES BY YEAR, 1996–2012



Although the amount of litigation has remained at its high post-2000 levels, the topic of litigation shifts in each election in response to changes in election laws, the political climate, and the adoption of new voting technology and procedures. In 2004, for example, Democrats and others brought suits to keep Ralph Nader off the ballot as a third party presidential candidate in as many states as possible.<sup>45</sup> Many 2004 lawsuits considered disputes over counting new provisional ballots, which the federal Help America Vote Act (“HAVA”)<sup>46</sup> mandated be offered to voters found ineligible to cast a regular ballot.<sup>47</sup> The

<sup>41</sup> For the data through 2010, and the methodology used to compute these figures, see Richard L. Hasen, *The Supreme Court’s Shrinking Election Law Docket, 2001–2010: A Legacy of Bush v. Gore or Fear of the Roberts Court?*, 10 ELECTION L.J. 325, 327 & n.9, 329 fig. 3 (2011).

<sup>42</sup> See *id.* at 327.

<sup>43</sup> For a list of the 2011–2012 cases, see Richard L. Hasen, *2011–2012 Election Challenge Update*, ELECTION L. BLOG (Jan. 29, 2013), <http://electionlawblog.org/wp-content/uploads/2011-12-election-challenge-update.xlsx>.

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

<sup>45</sup> See generally Kyle C. Kopko, *Partisanship Suppressed: Judicial Decision-Making in Ralph Nader’s 2004 Ballot Access Litigation*, 7 ELECTION L.J. 301 (2008) (analyzing the Nader litigation).

<sup>46</sup> Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (2006).

<sup>47</sup> See 42 U.S.C. § 15482; EAGLETON INST. OF POLITICS, REPORT TO THE U.S. ELECTION ASSISTANCE COMMISSION ON BEST PRACTICES TO IMPROVE PROVISIONAL VOTING PURSUANT

2008 election saw new HAVA disputes, including one which went all the way to the Supreme Court over whether state election officers must match voter databases against motor vehicle department records in order to find ineligible voters.<sup>48</sup>

The most prominent of the 2012 disputes that resulted in litigation concerned a raft of new election laws that were passed by Republican-controlled legislatures and administrative actions taken mostly by Republican secretaries of state.<sup>49</sup> Democrats and voting rights groups charged that these new laws and procedures made it harder for voters to register and cast their ballots.<sup>50</sup>

Much of the public attention and litigation focused on state voter identification requirements. Following the Supreme Court's rejection of a facial constitutional challenge to Indiana's voter identification law in the 2008 case *Crawford v. Marion County Elections Board*,<sup>51</sup> Republican legislatures, with encouragement and support from the pro-business American Legislative Exchange Council, considered, and in many instances passed, tough new voter identification laws.<sup>52</sup> Texas's law was among the toughest in the nation, and it passed in 2011 after years of Democratic procedural maneuvers to block it.<sup>53</sup> Under

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TO THE HELP AMERICA VOTE ACT OF 2002, at app. C (2006), available at [http://www.eagleton.rutgers.edu/research/documents/Best\\_Practices\\_to\\_Improve\\_Provisional\\_Voting.pdf](http://www.eagleton.rutgers.edu/research/documents/Best_Practices_to_Improve_Provisional_Voting.pdf).

<sup>48</sup> *Ohio Republican Party v. Brunner*, 544 F.3d 711, 713–21 (6th Cir. 2008) (en banc), *rev'd*, 555 U.S. 5 (2008) (per curiam).

<sup>49</sup> I do not intend this discussion to be a comprehensive examination of all the election litigation related to the 2012 election. Instead, I focus on some of the important and most salient cases. I also leave aside in this Article significant recent campaign finance litigation in light of the Supreme Court's 2010 decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), allowing for unlimited corporate and labor union spending in candidate elections. *Id.*

<sup>50</sup> See Toobin, *supra* note 22.

<sup>51</sup> *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

<sup>52</sup> Ethan Magoc, *Many States' Voter-ID Laws, Including Pennsylvania's, Appear to Have Tie to Same U.S. Group*, PHILA. INQUIRER (Aug. 15, 2012), [http://articles.philly.com/2012-08-15/news/33201719\\_1\\_voter-id-laws-acceptable-photo-strict-photo-id](http://articles.philly.com/2012-08-15/news/33201719_1_voter-id-laws-acceptable-photo-strict-photo-id). The one exception to the pattern of Republicans supporting and Democrats opposing these laws has been Rhode Island. For a detailed analysis of the Rhode Island political situation, which led to the passage of the state's voter identification law, see David Scharfenberg, *Who Passed Voter ID?*, PROVIDENCE PHOENIX (May 16, 2012), <http://providence.thephoenix.com/news/138781-who-passed-voter-id/?page=1#TOPCONTENT>. Rhode Island's law also was less strict than many of the voter identification laws passed by Republican legislatures. See Justin Levitt, *Rhode Island Voter ID Followup*, ELECTION L. BLOG (May 23, 2012, 2:38 PM), <http://electionlawblog.org/?p=34694>.

<sup>53</sup> See HASEN, *supra* note 9, at 41–43; Jason Embry, *Voter ID Fight Took Unexpected Turns*, STATESMAN.COM (Nov. 13, 2009, 11:41 AM), <http://www.statesman.com/news/news/state-regional-govt-politics/voter-id-fight-took-unexpected-turns-1/nRRYz/>; R.G. Ratcliffe & Peggy Fikac, *Voter ID Fight Stalls Other Major Issues in the Texas House*, HOUS. CHRON. (May 23, 2009), <http://www.chron.com/news/houston-texas/article/Voter-ID-fight-stalls-other-major-issues-in-the-1748512.php>.

Texas's law, student identification cards were unacceptable, but concealed weapons permits were acceptable forms of identification.<sup>54</sup> Voters in rural areas might have to travel up to 250 miles round-trip at their own expense to obtain a "free" identification card to be used for voting.<sup>55</sup>

The 2012 litigation over voter identification followed two tracks. In those states that were subject to Section 5 of the Voting Rights Act,<sup>56</sup> the DOJ blocked the tougher laws in Texas<sup>57</sup> and South Carolina<sup>58</sup> and approved the more lenient laws in Virginia<sup>59</sup> and New Hampshire<sup>60</sup>. A three-judge court comprised of two Democratic appointees and one Republican appointee<sup>61</sup> agreed with the DOJ that Texas's law would probably leave minority voters worse off because poor people are less likely to have the right identification<sup>62</sup> and poor voters in Texas disproportionately come from minority populations.<sup>63</sup> The court blocked the law<sup>64</sup> and Texas appealed that decision to the United States Supreme Court. The Court vacated the judgment and remanded the case to the district court for further consideration in light of its June 2013 decision in *Shelby County v. Holder*,<sup>65</sup> which held the current preclearance regime unconstitutional.<sup>66</sup>

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<sup>54</sup> *Texas v. Holder*, 888 F. Supp. 2d 113, 115, 128 (D.D.C. 2012).

<sup>55</sup> *Id.* at 140.

<sup>56</sup> Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

<sup>57</sup> *Texas v. Holder*, 888 F. Supp. 2d at 140.

<sup>58</sup> *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012) (blocking the law for the 2012 election).

<sup>59</sup> Laura Vozzella, *Justice Department Upholds Va. Voter ID Law, Governor Says*, WASH. POST (Aug. 20, 2012, 10:30 PM), [http://www.washingtonpost.com/blogs/virginia-politics/post/justice-department-upholds-virginia-voter-id-law/2012/08/20/76d609f6-eb2a-11e1-a80b-9f898562d010\\_blog.html](http://www.washingtonpost.com/blogs/virginia-politics/post/justice-department-upholds-virginia-voter-id-law/2012/08/20/76d609f6-eb2a-11e1-a80b-9f898562d010_blog.html).

<sup>60</sup> Terry Frieden, *Justice Department OKs New Hampshire Voter ID Law*, CNN (Sept. 5, 2012, 5:04 PM), <http://www.cnn.com/2012/09/05/justice/new-hampshire-voter-id/index.html>.

<sup>61</sup> Judges Tatel and Wilkins were appointed by Democratic presidents. See *David S. Tatel*, U.S. CT. APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/content/VL++Judges++DST> (last visited Sep. 29, 2013); *District Judge Robert L. Wilkins*, U.S. DISTRICT CT. D.C., <http://www.dcd.uscourts.gov/dcd/wilkins> (last visited Sep. 29, 2013). Judge Collyer was appointed by a Republican president. See *District Judge Rosemary M. Collyer*, U.S. DISTRICT CT. D.C., <http://www.dcd.uscourts.gov/dcd/collyer> (last visited Sep. 29, 2013).

<sup>62</sup> *Texas v. Holder*, 888 F. Supp. 2d at 124.

<sup>63</sup> *Id.* at 140.

<sup>64</sup> *Id.* at 144.

<sup>65</sup> *Texas v. Holder*, 133 S. Ct. 2886 (2013) (remanding the case for further consideration in light of *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)).

<sup>66</sup> *Shelby County*, 133 S. Ct. at 2627–31 (striking down the Voting Rights Act coverage formula); see also Richard L. Hasen, *Shelby County and the Illusion of Minimalism* (Univ. of Cal. Irvine School of Law, Research Paper No. 2013-116, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2291612](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291612).

In the course of federal litigation, South Carolina made changes to its new voter identification law to make it easier for voters to claim an exemption from the law by claiming they faced a “reasonable impediment” to obtaining the identification.<sup>67</sup> The three-judge court comprised of two Republicans<sup>68</sup> and a Democrat<sup>69</sup> approved the law, but given the short time before the election, blocked its use in the 2012 elections.<sup>70</sup> Two of the judges on the panel noted that the law, as implemented administratively and as modified during litigation, was considerably more lenient than the law South Carolina originally had passed, and cautioned that the law’s implementation could still be found to violate section 5 of the Voting Rights Act at some point in the future.<sup>71</sup>

The other track for voter identification litigation was in state court, raising state constitutional law claims because the United States Supreme Court’s *Crawford* decision interpreting the United States Constitution was not binding in state constitutional adjudication.<sup>72</sup> In Pennsylvania, a state court judge initially denied an injunction in a state constitutional challenge to the voter identification law, following *Crawford* as persuasive authority and rejecting the argument that the law imposed severe burdens on voters.<sup>73</sup> The court declined to issue the preliminary injunction blocking Pennsylvania’s law pending a trial on the merits.<sup>74</sup>

The Pennsylvania Supreme Court sent the case back to the trial court with a strong suggestion that the trial court temporarily block the law because there was compelling evidence that the State would not be able to get free identification cards to all the voters who wanted them before the election.<sup>75</sup> The trial judge then blocked the State from requiring voters to show identification before being al-

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<sup>67</sup> *South Carolina v. United States*, 898 F. Supp. 2d 30, 36–38 (D.D.C. 2012).

<sup>68</sup> Judges Kavanaugh and Bates were appointed by President George W. Bush. See *Brett M. Kavanaugh*, U.S. CT. APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Judges+-+BMK> (last visited Oct. 2, 2013); *District Judge John D. Bates*, U.S. DISTRICT CT. D.C., <http://www.dcd.uscourts.gov/dcd/bates> (last visited Oct. 2, 2013).

<sup>69</sup> Judge Kollar-Kotelly was nominated by President Bill Clinton. See *District Judge Colleen Kollar-Kotelly*, U.S. DISTRICT CT. D.C., <http://www.dcd.uscourts.gov/dcd/kollar-kotelly> (last visited Oct. 2, 2013).

<sup>70</sup> *South Carolina v. United States*, 898 F. Supp. 2d at 48–51.

<sup>71</sup> *Id.* at 53–54 (Bates, J., concurring) (joined by Judge Kollar-Kotelly).

<sup>72</sup> See generally *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

<sup>73</sup> *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 3332376, at \*27–32 (Pa. Commw. Ct. Aug. 15, 2012).

<sup>74</sup> *Id.* at \*32.

<sup>75</sup> *Applewhite v. Commonwealth*, 54 A.3d 1, 4–5 (Pa. 2012).

lowed to vote in the 2012 elections, although confusingly the judge still allowed the State to ask voters to show identification,<sup>76</sup> leading to some uncertainty about identification requirements on Election Day.<sup>77</sup>

Despite the temporary setback for the voter ID law, all of the Pennsylvania Supreme Court Justices—both Democrats and Republicans—suggested that the law would likely be upheld against a state constitutional challenge once the State had enough time to roll out the new identification cards.<sup>78</sup> This recognition was one of a number of significant instances during the 2012 election season in which judges did not divide along party lines in these heated election law disputes<sup>79</sup> as judges had in earlier election seasons.<sup>80</sup>

In Wisconsin, two Democratic state court judges temporarily blocked the State's new voter identification law from being put into effect in 2012, holding that it likely violated that state's constitution by imposing severe burdens on voters.<sup>81</sup> The state supreme court refused to take up an appeal before the election, even after the state attorney

<sup>76</sup> *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211, at \*8 (Pa. Commw. Ct. Oct. 2, 2012).

<sup>77</sup> Jessica Parks, *Pa. Voter ID Law Confuses*, PHILA. INQUIRER, Nov. 7, 2012, at A1.

<sup>78</sup> *Applewhite*, 54 A.3d at 9 (McCaffery, J., dissenting) (“I have no argument with the requirement that all Pennsylvania voters, at some reasonable point in the future, will have to present photo identification before they may cast their ballots . . .”).

<sup>79</sup> In *Applewhite*, two of three Democratic justices on the Pennsylvania Supreme Court disagreed with the majority as to whether to send the case back to the trial court judge to determine if the Commonwealth of Pennsylvania would have enough time to get voter ID cards into the hands of voters who wanted them before the November 2012 elections. *Id.* For these dissenting Justices, the lower court record established that the Commonwealth could not do so. *See id.*; Jan Murphy, *Profile: Pennsylvania Supreme Court Justice Debra McCloskey Todd*, PENN LIVE (Aug. 18, 2012, 10:24 PM), [http://www.pennlive.com/specialprojects/index.ssf/2012/08/profile\\_pennsylvania\\_supreme\\_c\\_5.html](http://www.pennlive.com/specialprojects/index.ssf/2012/08/profile_pennsylvania_supreme_c_5.html); Jan Murphy, *Profile: Pennsylvania Supreme Court Justice Seamus McCaffery*, PENN LIVE (Aug. 18, 2012, 10:25 PM), [http://www.pennlive.com/specialprojects/index.ssf/2012/08/profile\\_pennsylvania\\_supreme\\_c\\_4.html](http://www.pennlive.com/specialprojects/index.ssf/2012/08/profile_pennsylvania_supreme_c_4.html).

<sup>80</sup> *Cf.* HASEN, *supra* note 9, at 82 (“Judges appointed by Republicans generally vote to uphold voter identification laws, and judges appointed by Democrats generally oppose them.”).

<sup>81</sup> *Milwaukee Branch of the NAACP v. Walker*, No. 2012AP557-LV, 2012 WL 1020254 (Wis. Ct. App. Mar. 28, 2012), *cert. denied*, 811 N.W.2d 821 (Wis. 2012); *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Mar. 12, 2012), *cert. denied*, 811 N.W.2d 821 (Wis. 2012). Dane County Judge David Flanagan, who decided the first of these cases, was criticized for signing the petition to recall Republican Wisconsin Governor Scott Walker. Daniel Bice, *Judge Draws Flak for Signing Walker Recall Petition*, MILWAUKEE WIS. J. SENTINEL (Mar. 6, 2012), <http://www.jsonline.com/watchdog/noquarter/flanagan-earlier-signed-walker-recall-petition-0a4febu-141695303.html>. Dane County Circuit Judge Richard G. Niess, who decided the second of these cases, was appointed to the bench by Democrat Jim Doyle. *See* Ed Treleven, *Election 2011: Dane County Circuit Court Judge, Branch 9*, WIS. J. SENTINEL (Mar. 21, 2011, 5:35 PM), [http://host.madison.com/news/local/govt-and-politics/elections/election-dane-county-circuit-court-judge-branch/article\\_968d87e4-540c-11e0-ae80-001cc4c03286.html](http://host.madison.com/news/local/govt-and-politics/elections/election-dane-county-circuit-court-judge-branch/article_968d87e4-540c-11e0-ae80-001cc4c03286.html); *Wisconsin Governor Jim Doyle*, NAT'L GOVERNORS ASSOCI-

general renewed the request before the court.<sup>82</sup> But the state supreme court is predominantly Republican,<sup>83</sup> and ultimate reversal of these trial court rulings seems fairly likely.

Voter identification skirmishes arose elsewhere as well. In Minnesota, the state's Democratic governor vetoed a voter identification bill passed by the Republican-controlled legislature.<sup>84</sup> The legislature then put a voter identification law on the ballot,<sup>85</sup> and its supporters successfully sued the Democratic secretary of state for writing what supporters called a misleading summary of the measure for the ballot materials.<sup>86</sup> The Minnesota Supreme Court blocked the Secretary's rewrite.<sup>87</sup> Voters nonetheless defeated the ballot measure, dividing mainly along party lines and challenging the earlier notion that voter identification laws have the support of voters from across the political spectrum.<sup>88</sup> In Tennessee, the City of Memphis successfully sued when the state refused to accept Memphis library cards as proper identification under the state's new law.<sup>89</sup>

Voter registration and voter roll maintenance also figured heavily into 2012 litigation. Most important was the attack on Florida's tough voter registration rules, which imposed stiff penalties on anyone regis-

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ATION, [http://www.nga.org/cms/home/governors/past-governors-bios/page\\_wisconsin/col2-content/main-content-list/title\\_doyle\\_jim.html](http://www.nga.org/cms/home/governors/past-governors-bios/page_wisconsin/col2-content/main-content-list/title_doyle_jim.html) (last visited Nov. 10, 2013).

<sup>82</sup> *Milwaukee Branch of NAACP*, 2012 WL 1020254; *League of Women Voters of Wis. Educ. Network, Inc.*, 2012 WL 763586; Bob Barnes, *Wisconsin High Court Won't Restore Voter ID Law Before Election Day*, WASH. POST (Sept. 27, 2012, 8:38 PM), <http://www.washingtonpost.com/blogs/election-2012/wp/2012/09/27/8271/>.

<sup>83</sup> Craig Gilbert, *A Conservative Victory Run in Supreme Court Races in Wisconsin*, MILWAUKEE WIS. J. SENTINEL (Apr. 3, 2013), <http://www.jsonline.com/blogs/news/201358491.html>.

<sup>84</sup> Joe Kimball, *Gov. Dayton Vetoes Voter ID Bill, but It Goes on November Ballot Anyway*, MINNPOST (Apr. 9, 2012), <http://www.minnpost.com/political-agenda/2012/04/gov-dayton-vetoes-voter-id-bill-it-goes-november-ballot-anyway>.

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

<sup>86</sup> See Doug Belden, *Minnesota Supreme Court Rejects Challenge to Voter ID; Throws Out Ritchie's Rewritten Titles*, TWINCITIES.COM (Aug. 27, 2012, 12:01 AM), [http://www.twincities.com/ci\\_21410796/minnesota-supreme-court-rejects-secretary-state-wording-constitutional](http://www.twincities.com/ci_21410796/minnesota-supreme-court-rejects-secretary-state-wording-constitutional).

<sup>87</sup> See *Limmer v. Ritchie*, 819 N.W.2d 622, 624 (Minn. 2012); Belden, *supra* note 86; see also *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 640 (Minn. 2012) (rejecting challenge to remove voter identification measure from ballot).

<sup>88</sup> See Jim Ragsdale, *Minnesota Poll: More than Half of Those Polled Back Voter ID, but Support Is Down*, STAR TRIBUNE, Sep. 23, 2012, at A1; Jim Ragsdale, *Voter ID Drive Rejected*, STAR TRIBUNE (Nov. 7, 2012, 3:02 PM), <http://www.startribune.com/politics/statelocal/177667691.html>.

<sup>89</sup> Tim Ghianni, *Memphis Library Cards Acceptable as Photo ID for Vote: Court*, REUTERS (Nov. 1, 2012, 3:56 PM), <http://www.reuters.com/article/2012/11/01/us-usa-tennessee-photo-id/idUSBRE8A01HF20121101>.

tering voters who did not comply.<sup>90</sup> The new law caused the League of Women Voters to suspend its registration operations in the state.<sup>91</sup> A federal court eventually put the law on hold, and the case's settlement ended its most serious restrictions.<sup>92</sup> The year in which the state did enforce the law, however, saw a decline in voter registrations across the state.<sup>93</sup> A state court also blocked New Hampshire's attempt to require that college students registering to vote also register a motor vehicle and obtain a driver's license in the state within sixty days.<sup>94</sup> A federal district court blocked Texas's tougher voter registration rules, but the Fifth Circuit reversed.<sup>95</sup>

Republican election officials also fought with the federal government and voting rights groups over the use of a list maintained by the Department of Homeland Security to ferret out potential noncitizens on the voting rolls.<sup>96</sup> The effort raised questions about whether states were entitled to access the federal database for this purpose<sup>97</sup> and whether attempts to remove noncitizens close to the election violated a provision in the National Voter Registration Act ("NVRA")<sup>98</sup> barring certain voter purges in the last ninety days before an election.<sup>99</sup> A federal court found that Florida's removal of noncitizen voters did

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<sup>90</sup> *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1160–65 (N.D. Fla. 2012).

<sup>91</sup> Deirdre Macnab, *Newly Registered Voters in Florida Could Become an Endangered Species*, TCPALM (Nov. 28, 2011, 4:00 AM), <http://www.tcpalm.com/news/2011/nov/28/deirdre-macnab-newly-registered-voters-in-could> (stating that the new Florida statute "resulted in the League of Women Voters of Florida imposing a moratorium on [its] voter registration efforts").

<sup>92</sup> *League of Women Voters of Fla.*, 863 F. Supp. 2d at 1163, 1165 (granting preliminary injunction); *Judge Finalizes Florida Voter Registration Ruling*, HT POL. (Aug. 29, 2012), <http://politics.heraldtribune.com/2012/08/29/judge-finalizes-florida-voter-registration-ruling>.

<sup>93</sup> Michael C. Herron & Daniel A. Smith, House Bill 1355 and Voter Registration in Florida 24 (Sept. 12, 2012) (unpublished manuscript), available at <http://www.dartmouth.edu/~herron/FloridaVoterRegistrationsHB1355.pdf>.

<sup>94</sup> John Quinn, *Student Voting Change Blocked*, N.H. UNION LEADER, Sept. 25, 2012, at A1.

<sup>95</sup> *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816 (S.D. Tex. 2012), *stay granted*, 488 F. App'x 890 (5th Cir. 2012).

<sup>96</sup> Michael Schwartz, *U.S. to Let Florida Use Its Data for Voter Check*, N.Y. TIMES, July 15, 2012, at A15; Corey Dade, *Florida, Colorado Voter Purges Net Few Noncitizens, So Far*, NPR (Sept. 5, 2012, 6:00 PM), <http://www.npr.org/blogs/itsallpolitics/2012/09/05/160624313/florida-colorado-voter-purges-net-few-noncitizens-so-far>.

<sup>97</sup> See Schwartz, *supra* note 96.

<sup>98</sup> National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg–1973gg-10 (2006).

<sup>99</sup> See *United States v. Florida*, 870 F. Supp. 2d 1346, 1346 (N.D. Fla. 2012).

not violate the NVRA,<sup>100</sup> even though most of the purge lists contained a very high number of false positives.<sup>101</sup>

Finally, the 2012 election season saw litigation in Florida and Ohio over cutbacks in early voting and in Ohio over the counting of provisional ballots. I discuss the Ohio litigation in Part II.<sup>102</sup> In Florida, the DOJ blocked some of the cutbacks in early voting in the five Florida counties then covered by section 5 of the Voting Rights Act.<sup>103</sup> The DOJ then agreed to a less draconian cutback of hours in those parts of the state.<sup>104</sup> Faced with long lines during the truncated early voting period in Florida, Democrats and voting rights groups went to federal court, eventually losing one case<sup>105</sup> and settling with some counties over some early voting cutbacks.<sup>106</sup> Whether caused in part by the cutback in early voting or not, long lines appeared in Florida on Election Day, with reports of voters waiting upwards of six hours to vote in some locations.<sup>107</sup>

## II. THE OHIO ELECTION CASES AND THE RESURRECTION OF *BUSH V. GORE*

### A. *The Early Voting Case*

The first key decision the Sixth Circuit issued during the 2012 election season, *Obama for America v. Husted*,<sup>108</sup> was a challenge to Ohio's cutback on early voting hours during the last weekend before

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<sup>100</sup> *Id.* Opponents of the law also brought suit claiming that the program to remove noncitizens needed to be precleared under section 5 of the Voting Rights Act for the five Florida counties subject to the preclearance requirement. *Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326 (M.D. Fla. 2012). A federal court agreed the law had to be precleared. *Id.* Yet another lawsuit raised additional claims against the program, and Florida settled the case to stop some of the noncitizen purges. Tia Mitchell & Marc Caputo, *Deal Reached on Voter Rolls*, TAMPA BAY TIMES, Sept. 13, 2012, at B1.

<sup>101</sup> *See Dade*, *supra* note 96.

<sup>102</sup> *See infra* Part II.

<sup>103</sup> *Florida v. United States*, 885 F. Supp. 2d 299, 357–58 (D.D.C. 2012).

<sup>104</sup> United States' Notice to the Court at 2–3, *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012) (No. 11-1428).

<sup>105</sup> *See* Margaret Cronin Fisk & Tom Schoenberg, *Florida Needn't Expand Early-Voting Hours, Judge Rules*, BLOOMBERG BUSINESSWEEK (Sept. 25, 2012), <http://www.businessweek.com/news/2012-09-24/florida-needn-t-expand-early-voting-hours-judge-rules>. *See generally* Brown v. Detzner, 895 F. Supp. 2d 1236 (M.D. Fla. 2012).

<sup>106</sup> Warren Richey, *Democrats Reach Settlement in Florida Early-Voting Lawsuit*, CHRISTIAN SCI. MONITOR, Nov. 5, 2012, at 8.

<sup>107</sup> Kathleen McGrory, Curtis Morgan & Jay Weaver, *Long Lines, Few Scanners, a Perfect Mess*, MIAMI HERALD, Nov. 7, 2012, at 3A.

<sup>108</sup> *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012).

the election for all voters aside from certain military and overseas voters.<sup>109</sup>

Ohio had major problems with long lines, especially in urban areas, during the 2004 presidential election, in which John Kerry narrowly lost to George W. Bush thanks to Ohio's electoral votes.<sup>110</sup> In response to the long line problem, Ohio instituted extensive early voting in the 2008 elections.<sup>111</sup> The line problems were less severe in that election.<sup>112</sup> Early voting was a key component of the Obama campaign victory in the 2008 election in Ohio and elsewhere, and likely in response to this successful Obama campaign strategy, Republican legislatures in Florida and Ohio cut back on early voting for 2012.<sup>113</sup> Both states cut out voting on the weekend before Election Day, including over the final Sunday before the election, which many African-American churches used for "Souls to the Polls" programs to bring voters on buses from church to early voting centers.<sup>114</sup>

Despite these cutbacks, Ohio's early voting period was very generous: it provided twenty-three days of early voting<sup>115</sup>—above the average of nineteen early voting days among the thirty-two states offering early voting<sup>116</sup>—and Ohio election officials for the first time sent everyone in the state a no-excuse absentee ballot application.<sup>117</sup> While the cutback of voting on the last weekend would be sure to

<sup>109</sup> See *id.* at 425–26.

<sup>110</sup> See *id.* at 426.

<sup>111</sup> See *id.* On the rise of early voting generally, see Paul Gronke, *Early Voting: The Quiet Revolution in American Elections*, in *LAW AND ELECTION POLITICS: THE RULES OF THE GAME* 134, 134–48 (Matthew J. Streb ed., 2d. ed. 2013).

<sup>112</sup> Robert F. Bauer, *The Fight for Early Voting in Ohio*, CLEVELAND.COM (July 21, 2012, 8:45 PM), [http://www.cleveland.com/opinion/index.ssf/2012/07/the\\_fight\\_for\\_early\\_voting\\_in.html](http://www.cleveland.com/opinion/index.ssf/2012/07/the_fight_for_early_voting_in.html).

<sup>113</sup> Dara Kam & John Lantigua, *Former Florida GOP Leaders Say Voter Suppression Was Reason They Pushed New Election Law*, PALM BEACH POST (Nov. 25, 2012, 9:58 AM), <http://www.palmbeachpost.com/news/news/state-regional-govt-politics/early-voting-curbs-called-power-play/nTFDy>.

<sup>114</sup> Barbara Liston, *In Florida, Black Churches Scramble to Get Early Voters to Polls*, REUTERS (Oct. 27, 2012, 5:28 PM), <http://www.reuters.com/article/2012/10/27/us-usa-campaign-florida-idUSBRE89Q0D720121027>; Jim Provance, *Lawsuit Seeks to Kill Early-Voting Directive*, TOLEDO BLADE (Aug. 25, 2012), <http://www.toledoblade.com/Politics/2012/08/25/Lawsuit-seeks-to-kill-early-voting-directive.html>.

<sup>115</sup> *Elections Chief Sets Uniform Voting Hours for Ohio*, NEWSNET 5 (Aug. 15, 2012), [http://www.newsnet5.com/dpp/news/local\\_news/oh\\_cuyahoga/elections-chief-sets-uniform-voting-hours-for-ohio](http://www.newsnet5.com/dpp/news/local_news/oh_cuyahoga/elections-chief-sets-uniform-voting-hours-for-ohio).

<sup>116</sup> *Absentee and Early Voting*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx> (last updated May 28, 2013).

<sup>117</sup> *Ohio Voters to Receive Absentee Ballot Applications by Mail*, BEACON (Sept. 5, 2012, 9:19 AM), <http://thebeacon.net/local-news/around-ottawa-county/item/1053-ohio-voters-to-receive-absentee-ballot-applications-by-mail>.

inconvenience some voters and to put a kink in get-out-the-vote strategies, the move did not appear to be disenfranchising.

The Ohio legislature's cutback in early voting had its own kinks. The state had passed a package of election laws including cutbacks in early voting that drew opposition from Democrats.<sup>118</sup> Democrats, led by former Secretary of State Jennifer Brunner, qualified a referendum to reverse the changes.<sup>119</sup> The Ohio legislature then repealed the law to avoid the referendum, but made certain changes to the state election code.<sup>120</sup> Along the way, the cutbacks in early voting were restored for all but military voters, who would be entitled to cast an overseas absentee ballot.<sup>121</sup>

The Obama campaign seized on the disparity in early voting rules for military voters and other voters, claiming an equal protection violation in a lawsuit entitled *Obama for America v. Husted*.<sup>122</sup> The legal claim was quite a stretch.<sup>123</sup> Ohio election law scholar Ned Foley later described it as a "Hail Mary" pass.<sup>124</sup> Courts had long allowed states to set different voting rules for different classes of voters,<sup>125</sup> Congress

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<sup>118</sup> See Joe Guillen, *House Oks Repeal of Election Law Slated for November Referendum*, CLEVELAND PLAIN DEALER, May 9, 2012, at A1.

<sup>119</sup> See *id.*; Joe Guillen & Henry J. Gomez, *Election Reform Put on '12 Ballot*, CLEVELAND PLAIN DEALER, Dec. 10, 2011, at A1.

<sup>120</sup> See Steven F. Huefner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. RICH. L. REV. 833, 859–62 (2013); Guillen, *House Oks Repeal of Election Law Slated for November Referendum*, *supra* note 118.

<sup>121</sup> For a more detailed description, see *Obama for America v. Husted*, 697 F.3d 423, 427 (6th Cir. 2012).

<sup>122</sup> See *id.* at 427.

<sup>123</sup> The suit also opened up the campaign to charges that it was against special voting rules for military voters. Matthew Larotonda, *Romney Says Obama Lawsuit Blocks Ohio Military Voters*, ABC NEWS (Aug. 4, 2012, 8:20 PM), <http://abcnews.go.com/blogs/politics/2012/08/romney-says-obama-lawsuit-blocks-ohio-military-voters>. A coalition of military groups intervened in the case to oppose the Obama campaign's position. Richard L. Hasen, *Military Voters as Political Pawns*, SAN DIEGO UNION-TRIB. (Aug. 18, 2012, 3:08 PM), <http://www.utsandiego.com/news/2012/aug/18/military-voters-as-political-pawns>. The campaign pushed back:

Democrats argue that this law is unconstitutional because it "requires election officials to turn most Ohio voters, including veterans, firefighters, police officers, nurses, small business owners and countless other citizens, away from open voting locations, while admitting military and nonmilitary overseas voters and their families who are physically present in Ohio and able to vote in person."

*Id.*

<sup>124</sup> See "Election Law in the Roberts Court" GW Law Symposium on Political Law, GW LAW (Nov. 16, 2012), <http://vimeo.com/user9108723/review/55785546/b29247c2fc> (providing a video recording of the symposium panel in which Professor Foley participated).

<sup>125</sup> See Samuel Issacharoff & Richard H. Pildes, *Epilogue: Bush v. Gore and the Constitutional Right to Vote* 7 (N.Y. Univ. Pub. Law & Legal Theory, Working Paper No. 381, 2013), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1382&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1382&context=nyu_plltwp) (stating that Ohio courts have come to develop "an intuitive sense of unjustified regulations of the elec-

had a long tradition of special voting rules for military voters,<sup>126</sup> and there was no constitutional right to early voting.<sup>127</sup>

The Obama campaign seemed to concede that the State could create additional voting periods for military voters so long as the state did so in a considered way.<sup>128</sup> The Supreme Court itself had issued an opinion in the 1969 case *McDonald v. Board of Commissioners*<sup>129</sup> holding that the State could offer absentee balloting to only one class of voters but not to others.<sup>130</sup> And the courts' general approach to this kind of garden-variety election law decisions had been to apply a flexible balancing test (the so called "*Anderson-Burdick* test"), which said that when the state imposed only a minor burden on voters' rights, it had wide latitude in setting the voting rules.<sup>131</sup> Nor was there any authority for the idea that once a state enacted a period of early voting, the Constitution would bar the state from contracting it.<sup>132</sup> No such "nonretrogression" principle applied to the routine choices each jurisdiction makes when it comes to the mechanics and details of voting.<sup>133</sup>

Nonetheless, in a somewhat muddled opinion relying both on the rollback of the early voting period and on the disparate treatment of military voters, a federal district court accepted the Obama cam-

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toral process," including "the creation of a real-world obstacle to voting, including the denial to some voters but not others of a previously granted ability to vote more easily").

<sup>126</sup> See Huefner, *supra* note 120, at 834 (stating that the "Uniformed and Overseas Citizens Absentee Voting Act . . . since 1986 has provided [military] voters with several key accommodations for voting in federal elections").

<sup>127</sup> See Issacharoff & Pildes, *supra* note 125, at 6 (explaining that "[a]s a formal matter, the Ohio law did not deny anyone the right to vote").

<sup>128</sup> See Foley, *Two Big Cases*, *supra* note 24 (stating that among the three factors supporting the Equal Protection Clause violation argument is the "bizarre and arguably capricious legislative process that gave rise to the differential treatment between two groups of voters").

<sup>129</sup> *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969).

<sup>130</sup> See *id.* at 810–11.

<sup>131</sup> For a detailed look at this balancing test and its complications, see Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 513 (2008).

<sup>132</sup> See Foley, *Two Big Cases*, *supra* note 24 ("[T]he revocation of previously available opportunities may make no difference if a State was not obligated to grant those opportunities in the first place, and the State has simply returned to a situation it was entitled to be in initially.").

<sup>133</sup> The only nonretrogression standard recognized by courts applied to jurisdictions (not including Ohio) covered until recently by section 5 of the Voting Rights Act. See *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2008) (finding that a lower court failed to conduct the correct analysis to determine whether the state's redistricting plan resulted in the retrogression of minority voters' rights in contravention of the Voting Rights Act); Edward B. Foley, *Non-Retrogression, Equal Protection, and Ohio's Early Voting Case*, ELECTION L. @ MORITZ (Sept. 6, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9673>. These jurisdictions could not make any voting changes without proof that the change would not have the purpose or effect of making protected minority voters worse off. See 42 U.S.C. § 1973 (2006).

paig'n's arguments.<sup>134</sup> On the rollback, the court seemed to impose a nonretrogression standard;<sup>135</sup> on military voting, the district court brushed aside earlier precedent and found the State's justifications for the different treatment unconvincing.<sup>136</sup>

Rather than beginning with the deferential *Anderson-Burdick* balancing test, the district court judge began by quoting extensively from *Bush v. Gore*, placing in bold the key sentence from the case which became part of scholars' calls for a "lemonade from lemons" strategy: "**Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.**"<sup>137</sup> The court also relied upon other Sixth Circuit precedent relying on *Bush v. Gore* (including *Hunter v. Hamilton County Board of Elections*,<sup>138</sup> discussed below), to conclude that "[a]ll of these cases—and their precedents—rely on the principle that voters cannot be restricted or treated in different ways without substantial justification from the state."<sup>139</sup> The court then mischaracterized the *Anderson-Burdick* test as standing for the proposition that "even where a burden may be slight, the State's interests must be weighty."<sup>140</sup> This was a mischaracterization because courts had not found that the states must show "weighty" interests to justify nonsevere burdens on voters.<sup>141</sup>

The court then found the burden on Ohio voters of losing the three extra days of voting "significant," pointing also to statistical studies supporting plaintiffs' "assertion that low-income and minority voters are disproportionately affected by the elimination of those voting days."<sup>142</sup> The court then rejected as unsupported the State's argument that the cutbacks were necessary to address the needs of Ohio

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<sup>134</sup> See *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 904–10 (S.D. Ohio 2012).

<sup>135</sup> See *id.* at 907.

<sup>136</sup> See *id.* at 908–09.

<sup>137</sup> *Id.* at 905 (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

<sup>138</sup> *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011).

<sup>139</sup> See *Obama for Am.*, 888 F. Supp. 2d at 905–06.

<sup>140</sup> *Id.* at 906. This statement appeared to be a mangling of the standard from the Supreme Court's statement in *Crawford*: "However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)).

<sup>141</sup> *Elmendorf & Foley*, *supra* note 131, at 523–24 (stating that, "[m]uch to [their] surprise," a plurality in *Crawford* found that the state may have to justify even slight burdens with "relevant and legitimate state interests 'sufficiently weighty to justify the limitation'" (quoting *Crawford*, 553 U.S. at 191)).

<sup>142</sup> *Obama for Am.*, 888 F. Supp. 2d at 907.

election officials as they prepared for Election Day.<sup>143</sup> It further rejected the argument that the State had an interest in accommodating military voters, who might be called up to military duty just before election day, on grounds that the Ohio legislature's actions did not ensure that these voters would have the opportunity to vote on these days—the law left county elections boards the choice of whether to remain open for these voters over the last weekend.<sup>144</sup>

The district court concluded:

The issue here is *not* the right to absentee voting, which, as the Supreme Court has already clarified, is not a “fundamental right.” The issue presented is the State’s redefinition of in-person early voting and the resultant restriction of the right of Ohio voters to cast their votes **in person** through the Monday before Election Day. This Court stresses that where the State has authorized in-person early voting through the Monday before Election Day for all voters, “**the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.**” Here, that is precisely what the State has done.<sup>145</sup>

The Sixth Circuit affirmed in an opinion by two Democratic judges and a Republican-appointed district judge sitting by designation.<sup>146</sup> The Sixth Circuit majority also relied heavily on *Bush v. Gore* in reaching its conclusion that the cutbacks in early voting violated the Equal Protection Clause.<sup>147</sup> The appellate court seemed to meld a stricter *Bush v. Gore* voting as a “fundamental right” standard with the flexible *Anderson-Burdick* balancing test in concluding that when the State imposed serious burdens on a class of voters, a stricter level of scrutiny applied.<sup>148</sup>

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<sup>143</sup> See *id.* at 908–09.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 910 (citations omitted) (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

<sup>146</sup> See *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012). Judge Hood is the district court judge from Kentucky appointed by a President George H.W. Bush. *Biographical Directory of Federal Judges*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1088&cid=999&ctype=na&instate=na> (last visited Oct. 2, 2013). Judge Clay was appointed by President Clinton. See *Court of Appeals—Judges*, U.S. CT. APPEALS SIXTH CIRCUIT, [http://www.ca6.uscourts.gov/internet/court\\_of\\_appeals/courtappeals\\_judges.htm](http://www.ca6.uscourts.gov/internet/court_of_appeals/courtappeals_judges.htm) (last visited Oct. 2, 2013). Judge White was originally nominated by Clinton but appointed by President George W. Bush as part of a compromise over the nomination of Sixth Circuit judges blocked by the Senate. Ken Thomas, *Bush Nominates Michigan Appellate Judge to 6th Circuit*, BAY LEDGER (Apr. 15, 2008, 7:05 PM), [http://www.blz.com/news/2008/04/15/Bush\\_nominates\\_Michigan\\_appellate\\_judge\\_7611.html](http://www.blz.com/news/2008/04/15/Bush_nominates_Michigan_appellate_judge_7611.html).

<sup>147</sup> *Obama for Am.*, 697 F.3d at 428–32.

<sup>148</sup> See *id.*

It held that the district court's finding that the cutback in the last three days of early voting imposed a significant burden on vulnerable voters was not clearly erroneous.<sup>149</sup> It also agreed with the district court that the State failed to make a record indicating that conducting early voting during that last weekend would affect the ability of election officials to prepare for Election Day.<sup>150</sup> As to the special treatment of military voters, the court found no justification for the State's decision to offer an additional voting period only to them and not also to other voters who might need the last weekend to vote.<sup>151</sup> It further opined that granting a special voting period only for some voters could allow a legislature to extend special voting privileges only to certain groups for partisan advantage.<sup>152</sup>

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<sup>149</sup> As the Sixth Circuit majority explained:

The State argues that the burden on non-military voters is slight because they have "ample" other means to cast their ballots, including by requesting and mailing an absentee ballot, voting in person prior to the final weekend before Election Day, or on Election Day itself. However, the district court concluded that because early voters have disproportionately lower incomes and less education than election day voters, and because all evening and weekend voting hours prior to the final weekend were eliminated by Directive 2012-35, "thousands of voters who would have voted during those three days will not be able to exercise their right to cast a vote in person. Based on the evidence in the record, this conclusion was not clearly erroneous. Because the district court found that Plaintiffs' right to vote was burdened, it properly applied the *Anderson-Burdick* standard. Therefore, if Plaintiffs can show that the State's burden on their voting rights is not sufficiently justified, they are likely to succeed on their claim that the State has violated the Equal Protection Clause.

*Id.* at 431–32 (citation and footnote omitted).

<sup>150</sup> *Id.* at 432–34.

<sup>151</sup> The Sixth Circuit stated that:

Ohio's commitment to providing as many opportunities as possible for service members and their families to vote early is laudable. However, the State has offered no justification for not providing similarly situated voters those same opportunities . . . [A]ny voter could be suddenly called away and prevented from voting on Election Day. At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters and other first responders could be suddenly called to serve at a moment's notice. There is no reason to provide these voters with fewer opportunities to vote than military voters, particularly when there is no evidence that local boards of elections will be unable to cope with more early voters.

*Id.* at 434–35.

<sup>152</sup> The court also stated:

Equally worrisome would be the result if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges. Partisan state legislatures could give extra early voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party's core constituents.

*Id.*

Judge White, concurring in part and dissenting in part, sensibly rejected the majority's argument that the three-day cutback in early voting imposed a significant burden on voters.<sup>153</sup> The judge drew a sharp distinction between a risk of disenfranchisement, which was not present given the extensive early voting period, the absentee ballot possibility, and the opportunity to vote on Election Day, and mere inconvenience.<sup>154</sup> But, refusing to look at the legal question in a "vacuum," Judge White concluded that because Ohio had a terrible track record of conducting competent elections in the past, and because extended early voting seemed to alleviate the problem in 2008, the State was constitutionally required to restore that early voting period in 2012.<sup>155</sup> She concluded:

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<sup>153</sup> *Id.* at 440–41 (White, J., concurring in part and dissenting in part).

<sup>154</sup> Judge White wrote:

In applying this balancing test, I cannot agree with the majority's assertion that "Plaintiffs introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting." If that were in fact the case, this would be a simple matter. The burden would be great and the rationales offered by Ohio, which are plausible and rational on their face but find little support in the record, would not outweigh the burden on those precluded from exercising their right to vote. However, though the record clearly establishes that a significant number of Ohio voters found it most convenient to vote after hours and the weekend before the election, the study did not consider the extent to which these voters would or could avail themselves of other voting options, either by mail ballot or in-person absentee ballot at other times, or in-person voting on election day. Convenience cannot be equated with necessity without more. Thus, it cannot be fairly said that there was evidence that a significant number of Ohio voters will be precluded from voting unless weekend and after-hours voting is restored.

*Id.* at 440 (internal citations omitted).

<sup>155</sup> Judge White also wrote:

The key distinguishing factor here is that Ohio voters were granted the statutory right to in-person absentee voting through the close of business hours on the Monday before election day, and the election boards of the largest counties broadly embraced and facilitated that right, in response to the unacceptably burdensome situation at many Ohio polling sites during the 2004 election where, in some counties, voters were required to stand in line for long hours and until late at night. Thus, [the early voting statute], as originally enacted, was intended to relieve the pressure on the system resulting from heavy turnout on election day. Further, experience shows that Ohio voters have taken increasing advantage of in-person absentee voting. In the last presidential election, close to 500,000 Ohio voters cast in-person absentee ballots, of which it appears a little over 100,000 were cast the weekend before the election. Further, in the 2008 election, the residents of Ohio's two largest counties, Cuyahoga and Franklin, cast over 100,000 in-person absentee votes, the vast majority during after-hours and on weekends. These counties have budgeted and planned for the expected extended hours and weekend in-person absentee voting, especially the weekend before the election. They have not budgeted or planned for any increase in election-day voting caused by the elimination of

Although states are permitted broad discretion in devising the election scheme that fits best with the perceived needs of the state, and there is no abstract constitutional right to vote by absentee ballot, eleventh-hour changes to remedial voting provisions that have been in effect since 2005 and have been relied on by substantial numbers of voters for the exercise of their franchise are properly considered as a burden in applying *Anderson-Burdick* balancing. To conclude otherwise is to ignore reality. This does not mean that states cannot change their voting schemes, only that in doing so they must consider the burden the change and the manner of implementing the change places on the exercise of the right to vote.<sup>156</sup>

Judge White's decision, while sensible as a matter of policy, was completely unmoored to the plaintiffs' theory of the case and unconnected to any identified constitutional violation.<sup>157</sup> It had nothing to do with the distinction between military and nonmilitary voters, which was the legal basis for the Obama campaign's claim.<sup>158</sup> The majority

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weekend and after-hours voting, and fear that the restrictions on the hours for in-person absentee voting will cause some citizens not to vote and others to vote on election day, leading to long lines and unreasonable delays at the polls, which in turn will cause some voters to abandon their attempts at voting, as happened in 2004.

*Id.* at 441–42.

<sup>156</sup> *Id.* at 442. Judge White also dissented on the remedy:

Turning to the question of remedy, I understand the district court to have required Secretary Husted to restore in-person absentee voting through the Monday preceding election day. I would remand the matter with instructions to give the Secretary and the General Assembly a short and finite period in which cure the constitutional defects, with the understanding that a failure to do so will result in the reinstatement of the preliminary injunction.

*Id.* at 443.

<sup>157</sup> As Ned Foley put it:

It is worth observing how far removed these “key” components of Judge White’s reasoning are from the distinction between military and non-military voters that is at the heart of Equal Protection claim in the case. Her analysis might be vulnerable on this ground were the case at its ultimate conclusion, when it is time for a final adjudication of the Equal Protection claim.

Edward B. Foley, *The “Equitable” Aspect of the Sixth Circuit’s Early Voting Decision*, ELECTION L. @ MORITZ (Oct. 7, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9823>.

Foley defended the decision not on the merits but as one of equity given the short time before the election. *Id.* For a defense on the merits of the equal protection decision, see Joshua A. Douglas, *The Soundness of the Equal Protection Holding in the Ohio Early Voting Decision*, ELECTION L. @ MORITZ (Oct. 8, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9825>.

<sup>158</sup> *Obama for Am.*, 697 F.3d at 427.

decision was more closely related to the constitutional claims raised by the Obama campaign, but, as described more fully in Part II.C below, it too was at best a major stretch of existing precedent.

### B. *The Wrong Precinct Provisional Ballot Case*

The second key decision the Sixth Circuit issued during the 2012 election season, *Northeast Ohio Coalition for the Homeless v. Husted*,<sup>159</sup> concerned the treatment of provisional ballots cast in the right polling location but at the wrong precinct (generally the wrong table in a single polling location) because of poll worker error.<sup>160</sup> This is the so-called “right church, wrong pew” problem resulting from routine poll worker errors.<sup>161</sup> For example, one poll worker sent a number of voters to vote in the wrong precinct because the poll worker could not tell odd from even numbers in voter addresses.<sup>162</sup> The worker testified that if a number (such as “798”) contained more odd than even digits, he would categorize the address as odd regardless of whether the last digit was odd or even.<sup>163</sup> Over the prior three elections, Ohio poll workers made many wrong precinct errors, leading thousands of voters to cast provisional ballots.<sup>164</sup> Under Ohio law, wrong precinct ballots may not be counted, even if poll workers caused the errors.<sup>165</sup>

Ohio has had a long and tortured history of post-HAVA litigation over its treatment of provisional ballots,<sup>166</sup> much of which I will elide in this brief overview out of mercy for the reader (as well as the author). It is no wonder that provisional ballots have been the subject of bitter and protracted litigation: Ohio is a perennial swing state in pres-

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<sup>159</sup> *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012).

<sup>160</sup> *See id.* at 583.

<sup>161</sup> *See id.* at 589.

<sup>162</sup> *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795, 819–20 (S.D. Ohio 2012).

<sup>163</sup> *Id.*

<sup>164</sup> *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 223 (6th Cir. 2011) (describing poll worker errors in the 2010 election); Foley, *supra* note 6, at 937–38 (describing problems in the 2006 election); Harlan Spector, *Provisional Ballots Could Keep Ohio’s Presidential Outcome in Doubt for Days After Election*, CLEVELAND.COM (Oct. 30, 2012, 6:01 AM), [http://www.cleveland.com/open/index.ssf/2012/10/provisional\\_ballots\\_could\\_keep.html](http://www.cleveland.com/open/index.ssf/2012/10/provisional_ballots_could_keep.html) (“More than 200,000 provisional ballots were cast in Ohio in 2008.”); *see also* League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 467 (6th Cir. 2008) (describing precinct errors leading to voters casting provisional ballots in 2004).

<sup>165</sup> *See Hunter*, 635 F.3d at 223–24 (describing the circumstances that led to the adoption of a 2010 consent decree requiring that certain provisional votes be counted when they result from poll-worker error).

<sup>166</sup> For a brief history, *see id.*

idential elections and it had over 200,000 provisional ballots to be counted in the 2008 elections, including thousands of right church, wrong pew ballots.<sup>167</sup> In a very close election, the rules for which provisional ballots must or cannot be counted could therefore be outcome determinative.

At an earlier stage of the litigation, the State of Ohio entered into a consent decree regarding the counting of a subset of right church, wrong pew ballots.<sup>168</sup> To settle claims brought by advocates for the homeless, the Northeast Ohio Coalition for the Homeless (“NEOCH”), the State agreed to count such ballots for voters who used the last four digits of their social security number as identification on their provisional ballots (the “SSN-4 voters”).<sup>169</sup> The Democratic Secretary of State, Jennifer Brunner, agreed to the consent decree.<sup>170</sup> Later, when Republican Secretary of State Jon Husted replaced Brunner, the State sought to modify the consent decree, arguing that the agreement to count wrong precinct ballots was inconsistent with state law as later interpreted by the Ohio Supreme Court and that it was not constitutionally required.<sup>171</sup> Meanwhile, in separate litigation brought by the Service Employees International Union (“SEIU”), later consolidated with the NEOCH litigation, the SEIU and other plaintiffs challenged the constitutionality of Ohio’s right church, wrong pew rule, which applied to all Ohio voters.<sup>172</sup>

The SEIU plaintiffs relied in large part upon an earlier Sixth Circuit case, *Hunter v. Hamilton County Board of Elections*, which involved a dispute over a 2010 local race for juvenile court judge.<sup>173</sup> That election was very close, and the outcome depended on the

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<sup>167</sup> Ohio voters cast more than 200,000 provisional ballots for a variety of reasons in 2008, and election officials rejected over 40,000 of them. Joe Guillen, *Ohio’s Complicated Process for Counting Provisional Ballots Could Decide the Presidency*, CLEVELAND.COM (Nov. 6, 2012, 7:12 AM), [http://www.cleveland.com/open/index.ssf/2012/11/ohios\\_complicated\\_process\\_for.html](http://www.cleveland.com/open/index.ssf/2012/11/ohios_complicated_process_for.html). In the NEOCH litigation, “the court found that Ohio rejected more than 14,000 wrong-precinct ballots in 2008 and 11,000 more in 2010, with wrong-precinct rejections occurring in the vast majority of Ohio counties.” *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 586 (6th Cir. 2012). The Ohio Secretary of State reported 208,084 provisional ballots cast in the state in 2012. OHIO SEC’Y OF STATE, GENERAL ELECTION: NOVEMBER 6, 2012 PROVISIONAL BALLOT REPORT (2012), available at <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results.aspx>.

<sup>168</sup> *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 584–88.

<sup>169</sup> *Id.* at 588.

<sup>170</sup> *See id.* at 584.

<sup>171</sup> *See id.* at 585.

<sup>172</sup> *See id.* at 583.

<sup>173</sup> *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 219, 226 (6th Cir. 2011) (describing detailed factual and procedural history).

board's treatment of provisional ballots.<sup>174</sup> The Board had agreed to count twenty-seven provisional ballots that were cast at the county board of elections during the early voting period using the wrong precinct ballot.<sup>175</sup> The Board voted to accept those ballots based upon proof of clear poll worker error.<sup>176</sup> The Board deadlocked two-to-two, however, over whether to count right church, wrong pew provisional ballots cast on Election Day at polling places.<sup>177</sup> The Democrats on the Board wanted to investigate these ballots to see which ones were miscast because of poll worker error and to count those ballots.<sup>178</sup> The Republicans on the Board voted against doing so.<sup>179</sup> Although Democratic Secretary of State Brunner had issued directives to count more of the ballots, Republican Secretary of State Husted ultimately rescinded Brunner's directives and opposed the further counting of the ballots.<sup>180</sup>

The trailing Democratic judicial candidate sued in federal court, arguing that United States constitutional due process and equal protection principles required the counting of the rest of the right church, wrong pew ballots.<sup>181</sup> She argued that once the Board agreed to count some of these wrong precinct ballots caused by poll worker error, it had to count other, similarly situated ballots.<sup>182</sup> Ohio went to state court seeking a ruling that wrong precinct provisional ballots may not be counted, even if they result from poll worker error.<sup>183</sup> The federal court, citing *Bush v. Gore's* guarantee against the arbitrary and disparate treatment of voters, issued a preliminary injunction ordering that these ballots be counted.<sup>184</sup> The State meanwhile obtained an Ohio Supreme Court ruling that these wrong precinct ballots should *not* count under state law.<sup>185</sup>

The Sixth Circuit affirmed the federal district court's preliminary order to count the ballots, relying heavily upon *Bush v. Gore's* equal protection guarantees.<sup>186</sup> It read *Bush* as requiring the uniformity of

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<sup>174</sup> See *id.* at 226.

<sup>175</sup> See *id.* at 224.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* at 225.

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795, 800 (S.D. Ohio 2012).

<sup>181</sup> See *Hunter*, 635 F.3d at 222.

<sup>182</sup> See *id.*

<sup>183</sup> See *id.* at 228; *State ex rel. Painter v. Brunner*, 941 N.E.2d 782 (Ohio 2011).

<sup>184</sup> See *Painter*, 941 N.E.2d at 796.

<sup>185</sup> *Id.* at 793–95.

<sup>186</sup> See *Hunter*, 635 F.3d at 234–35, 241.

similarly-situated ballots: one could not count one group of right church, wrong pew provisional ballots without counting other similarly situated ballots.<sup>187</sup> There was a certain irony in the Sixth Circuit's *Hunter* remedy because it required compounding an error of state law (the counting of ineligible ballots) in order to satisfy United States constitutional standards.

The one Republican judge on the Sixth Circuit *Hunter* panel, Judge Rogers, concurred in the judgment, expressing considerable skepticism that the board violated equal protection under *Bush* by counting only the wrong precinct ballots cast during the early voting period.<sup>188</sup> Judge Rogers thought that the Board could constitutionally agree to count wrong precinct ballots given out by the Board's own workers and cast at the Board's headquarters without counting wrong precinct ballots given out by poll workers at polling locations on Election Day.<sup>189</sup> Nevertheless, Judge Rogers concurred in the judgment, because the Ohio Supreme Court agreed, for reasons of comity, that all wrong precinct ballots should be counted in this case.<sup>190</sup>

The equal protection holding in *Hunter* concerned only the unequal treatment of what the court viewed as similarly situated right church, wrong pew provisional ballots.<sup>191</sup> The constitutional problem was the counting of only *some* of these ballots.<sup>192</sup> Importantly, however, the *Hunter* majority also expressed "substantial constitutional concerns regarding the invalidation of votes cast in the wrong precinct due solely to poll-worker error."<sup>193</sup> In other words, the *Hunter* court suggested it might be unconstitutional not to count *all* provisional ballots miscast because of poll worker error, even if the board wanted to count none of them.

The courts confronted this latter issue head-on in the consolidated *NEOCH/SEIU* case. The district court rejected the State's argument to modify the consent decree to bar the counting of wrong precinct votes cast by SSN-4 voters.<sup>194</sup> The court further agreed with

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<sup>187</sup> See *id.* at 238.

<sup>188</sup> *Id.* at 247–49 (Rogers, J., concurring); see *Court of Appeals—Judges*, *supra* note 146.

<sup>189</sup> See *Hunter*, 635 F.3d at 247–48 (Rogers, J., concurring).

<sup>190</sup> *Id.* at 247–49.

<sup>191</sup> *Id.* at 222 (majority opinion).

<sup>192</sup> *Id.* at 240–41.

<sup>193</sup> *Id.* at 243.

<sup>194</sup> *Serv. Emp. Int'l Union v. Husted*, 887 F. Supp. 2d 761, 798–99 (S.D. Ohio 2012).

the plaintiffs that the Constitution required counting all right church, wrong pew ballots cast because of poll worker error.<sup>195</sup>

A conservative panel of the Sixth Circuit,<sup>196</sup> relying upon *Hunter* and other precedents, affirmed the district court on this point,<sup>197</sup> holding that the disenfranchisement of voters solely because of poll worker error likely violated both the Equal Protection Clause and the Due Process Clause.<sup>198</sup> On equal protection, the court concluded that the rule disenfranchising these voters imposed a substantial burden because it “effectively requires voters to have a greater knowledge of their precinct, precinct ballot, and polling place than poll workers. Absent such omniscience, the State will permanently reject their ballots without an opportunity to cure the situation.”<sup>199</sup> The State could offer no substantial interest to justify the disenfranchisement.<sup>200</sup>

On due process, the Sixth Circuit panel concluded:

Ohio has created a system in which state actors (poll workers) are given the ultimate responsibility of directing voters to the right location to vote. Yet, the state law penalizes the voter when a poll worker directs the voter to the wrong precinct, and the penalty, disenfranchisement, is a harsh one indeed. To disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair.<sup>201</sup>

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<sup>195</sup> *Id.* at 779–90. The district court also ruled that the state had to count certain provisional ballots with defective voter affirmations. *Id.* at 790–92.

<sup>196</sup> Court of Appeals Judges Julia Smith Gibbons and Deborah L. Cook were appointed by President George W. Bush. See *Court of Appeals—Judges*, *supra* note 146. District Court Judge Lee H. Rosenthal, who sat on the Sixth Circuit Panel by designation, was appointed by President George H. W. Bush. See *Biography: Lee. H. Rosenthal*, AM. L. INST., [http://www.ali.org/index.cfm?fuseaction=about.bio&bio\\_id=54](http://www.ali.org/index.cfm?fuseaction=about.bio&bio_id=54) (last visited Oct. 3, 2013).

<sup>197</sup> See *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 599 (6th Cir. 2012). However, the Sixth Circuit reversed the ruling on provisional ballots with defective affirmations. *Id.* at 599–600.

<sup>198</sup> The district court on remand also required the State to count provisional ballots cast in the wrong polling location (and not just the wrong precinct within the polling location). *Serv. Emp. Int’l Union v. Husted*, Nos. 2:12-CV-562, 2:06-CV-896, 2012 WL 5334080, at \*3–9 (S.D. Ohio Oct. 26, 2012). The Sixth Circuit stayed this ruling, indicating that the plaintiffs were unlikely to succeed on appeal. *Serv. Emp. Int’l Union v. Husted*, 698 F.3d 341, 344–45 (6th Cir. 2012). The Sixth Circuit also stayed another order of the district court regarding Secretary Husted’s rules for whether voters or poll workers fill in certain information on provisional ballot envelopes. The order staying the latest district court order is not yet on Westlaw, but is available at: *Serv. Emp. Int’l Union v. Husted*, No. 12-4354 (6th Cir. Nov. 16, 2012), available at [http://electionlawblog.org/wp-content/uploads/12-4354\\_Documents.pdf](http://electionlawblog.org/wp-content/uploads/12-4354_Documents.pdf).

<sup>199</sup> *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 595.

<sup>200</sup> *Id.* 595–96.

<sup>201</sup> *Id.* at 597.

Both of these readings relied upon *Hunter, Obama for America*, and other Sixth Circuit cases reading *Bush v. Gore* as requiring a certain amount of fairness or at least non-arbitrariness in the casting and counting of votes.<sup>202</sup> The *NEOCH/SEIU* court also directly cited *Bush v. Gore* in holding that there would be a *Bush v. Gore* “problem” if the consent decree required the counting of right church, wrong pew ballots caused by poll worker error only for the SSN-4 voters.<sup>203</sup> It therefore approved the district court’s order extending the earlier consent decree to require counting all of Ohio’s right church, wrong pew ballots caused by poll worker error.<sup>204</sup>

### C. *The Sixth Circuit’s Unexpected Extension of Bush v. Gore*

What to make of the Sixth Circuit’s significant reliance in both the Ohio early voting and provisional ballot cases on *Bush v. Gore*’s amorphous equal protection and due process guarantees?

One way of explaining the outcome is as a series of lucky breaks for the Democrats and bad lawyering by the State of Ohio. In the early voting case, the Obama campaign got a good draw of a liberal district court judge.<sup>205</sup> The State of Ohio did not make a good record of its administrative interests in truncating the early voting period, relying instead on earlier precedent giving it apparently broad discretion in setting up special election rules for military voters.<sup>206</sup> Ohio Secretary of State Husted did not help matters after the district court’s initial ruling by failing to seek a stay or implement the judge’s order.<sup>207</sup>

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<sup>202</sup> *Id.* at 591–96.

<sup>203</sup> *Id.* at 598. The court also noted another *Bush v. Gore* problem:

Before concluding, we note some additional issues our ruling creates that must be resolved. While we have set aside the portion of the preliminary injunction addressing deficient-affirmation provisional ballots, the consent decree continues to mandate that some deficient-affirmation provisional ballots will be counted. This discrepancy appears to create a *Bush v. Gore* problem. Similarly, the consent decree standing on its own also raises *Bush v. Gore* issues by virtue of treating some provisional ballots differently than others. This latter concern is not purely academic, as the consent decree will be the only agreement governing these issues for Ohio’s 2013 primary elections.

*Id.* at 603–04.

<sup>204</sup> *Id.* at 603.

<sup>205</sup> Judge Economus was appointed to the bench by Democratic President Bill Clinton. See *Judge Peter C. Economus*, U.S. DISTRICT CT. S. DISTRICT OHIO, <http://www.ohsd.uscourts.gov/judges/jeconomus.htm> (last visited Oct. 3, 2013).

<sup>206</sup> See *Obama for Am. v. Husted*, 697 F.3d 423, 430–31 (6th Cir. 2012) (noting the State’s reliance on *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802 (1969)).

<sup>207</sup> Joe Guillen, *Judge Orders Husted to Hearing on Enforcement of Court’s Order*, CLEVELAND PLAIN DEALER, Sept. 6, 2012, at B1.

This recalcitrance led the judge at one point to demand Husted's personal presence at a courtroom hearing.<sup>208</sup> After losing the early voting case before the Sixth Circuit panel, the State made the unusual decision to seek Supreme Court review rather than en banc Sixth Circuit review.<sup>209</sup> Given the merits of the State's case, en banc review had a fairly good chance of success. The Supreme Court's decision not to intervene may have been less about the merits and more a calculation about whether it was worth injecting the Court into another election over a relatively small dispute.<sup>210</sup>

The provisional voting case went to a very conservative panel, but it was a much easier case than the early voting case for the Democrats' allies to win. Even putting aside *Bush v. Gore* and a muscular reading of the Equal Protection or Due Process Clause, it was hard to accept the argument that voters literally could be disenfranchised because a poll worker could not tell an odd number from an even number.<sup>211</sup> The Ohio Supreme Court had definitively decided that right church, wrong pew votes caused by poll worker error could not be counted under state law, and it therefore fell to the federal courts to prevent disenfranchisement through application of United States constitutional principles.<sup>212</sup>

Upon closer examination, the Sixth Circuit voting rights victories and reliance on *Bush v. Gore* were about more than luck and lawyering. The results reflect a broader change in the circuit's view of election administration cases and the precedential value of the controversial 2000 Supreme Court case.

For years, scholars and courts fought over whether *Bush v. Gore* had any precedential value at all, and whether the limiting language in

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<sup>208</sup> See *id.*

<sup>209</sup> See *Husted v. Obama for Am.*, 133 S. Ct. 497 (2012) (denying stay).

<sup>210</sup> See Liptak, *supra* note 30. The Supreme Court's decision not to grant a stay has no precedential value in other cases. *Barefoot v. Estelle*, 463 U.S. 880, 907 n.5 (1983) (Marshall, J., dissenting).

<sup>211</sup> Richard L. Hasen, *Wrong Number: The Crucial Ohio Voting Battle You Haven't Heard About*, SLATE (Oct. 1, 2012, 8:15 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/10/ohio\\_voter\\_laws\\_the\\_battle\\_over\\_disenfranchisement\\_you\\_haven\\_t\\_heard\\_about\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/10/ohio_voter_laws_the_battle_over_disenfranchisement_you_haven_t_heard_about_.html) ("Amid all the fights over voter ID laws, purging noncitizens from voter rolls, and early voting, we should at least be able to agree, across partisan lines, on one thing: No one should lose the right to vote because a poll worker can't tell an odd from an even number."). Notably, Secretary Husted did not appeal this aspect of the case; Attorney General DeWine made the decision to appeal for the State. Barry M. Horstman, *Ruling: Ohio Provisional Votes Must Count*, MASONBUZZ (Oct. 12, 2012, 10:02 AM), <http://masonbuzz.com/2012/10/12/judges-count-problem-ballots/>.

<sup>212</sup> See *supra* notes 183–85 and accompanying text.

the case signaled that it was a “one-day only” ticket.<sup>213</sup> Some scholars and courts read the Court’s admonition that local election issues present “many complexities” as a signal that the case was not to be used to expand voting rights through litigation.<sup>214</sup> Even among those who believed the case had precedential value, the scope of any *Bush v. Gore* right has been hotly debated. Does the case apply only to post-election recount standards in a single jurisdiction? Does it require some equal treatment of voters more generally in a jurisdiction? Or is it a case about non-arbitrary treatment of voters, imposing a floor on irrational state action which could deprive voters of a right to cast a vote that will be accurately counted? If the claim is the latter, is that more of a due process claim than one about equal protection?

*Bush v. Gore* has come a long way in the Sixth Circuit. In 2006, a Sixth Circuit panel in *Stewart v. Blackwell*<sup>215</sup> divided bitterly over whether *Bush v. Gore* had any precedential value at all, and if it did whether it would bar the use of notoriously unreliable punch card machines for the casting of votes in only part of the State of Ohio.<sup>216</sup> The plaintiffs’ theory was that the State would be valuing one person’s vote more than another’s under *Bush* if voters in part of the state had a much lower chance of having their votes accurately counted than in other parts of the state.<sup>217</sup>

After a district court denied plaintiffs’ arguments to halt the use of punch card ballots,<sup>218</sup> a two-to-one panel of the Sixth Circuit reversed, holding that the selective use of punch cards in fact constituted an equal protection violation under *Bush v. Gore*.<sup>219</sup> The dissenting judge took the position that *Bush v. Gore* had no precedential value whatsoever.<sup>220</sup>

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<sup>213</sup> See *supra* notes 6–9 and accompanying text.

<sup>214</sup> See *supra* notes 6–9 and accompanying text.

<sup>215</sup> *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *superseded by* 473 F.3d 692 (6th Cir. 2007) (en banc).

<sup>216</sup> *Id.* at 873–74.

<sup>217</sup> See *id.* at 871.

<sup>218</sup> *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 804–07 (N.D. Ohio 2004).

<sup>219</sup> *Stewart*, 444 F.3d at 843.

<sup>220</sup> Drawing upon my 2001 article arguing that the Supreme Court would eventually limit *Bush v. Gore*’s holding to its facts, Hasen, *Bush v. Gore and the Future of Equal Protection*, *supra* note 6, the dissent took the position that *Bush v. Gore* should not be applied as valid precedent:

Since Professor Hasen’s article, the Supreme Court has had ample opportunity to prove him wrong [that the case would ultimately have no precedential value] by explaining, or even citing to, its decision in *Bush v. Gore*. But despite taking a steady load of election-related cases, the Court has not cited *Bush v. Gore* even once . . . .

The Sixth Circuit voted to rehear the case en banc, which under Sixth Circuit rules had the effect of automatically vacating the panel opinion.<sup>221</sup> The State had been arguing that the case should have been dismissed as moot because the State had made the decision to abandon punch card voting.<sup>222</sup> The panel majority had rejected that argument, but plaintiffs filed a letter with the en banc court conceding mootness,<sup>223</sup> no doubt fearing that the Sixth Circuit—at least then with more conservative than liberal judges<sup>224</sup>—would agree with the views of the dissenting panel judge. The en banc court then dismissed the case as moot,<sup>225</sup> but that did not revive the earlier precedent.

Although *Stewart* ultimately provided no precedent for an equal protection reading of *Bush v. Gore*, the Sixth Circuit in 2008 decided *League of Women Voters of Ohio v. Brunner*,<sup>226</sup> holding that allegations of improper administration of the 2004 presidential election in Ohio—from long lines at polling places,<sup>227</sup> to improper voter registration methods,<sup>228</sup> to problems with the accuracy of voting machinery<sup>229</sup>—raised equal protection and due process problems under *Bush v. Gore*.<sup>230</sup> The case later settled without proof that the problems alleged in the complaint existed, but *League of Women Voters* established *Bush*'s precedential value in the Sixth Circuit as both an equal

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*Stewart*, 444 F.3d at 887–88 (Gilman, J., dissenting) (internal citations omitted).

Applying a deferential standard of review, the dissenting judge, Ronald Lee Gilman, would have rejected the equal protection argument. *Id.* at 894. The majority, however, “reject[ing] the dissent’s claim that Professor Hasen’s article has overruled the Supreme Court’s decision,” *id.* at 874 (majority opinion), held that *Bush v. Gore*'s equal protection holding was binding precedent:

Murky, transparent, illegitimate, right, wrong, big, tall, short or small; regardless of the adjective one might use to describe the decision, the proper noun that precedes it—“Supreme Court”—carries more weight with us. Whatever else *Bush v. Gore* may be, it is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it.

*Id.* at 859 n.8. The majority held that because of the much higher chance that a vote cast on a punch card machine would be accurately counted, the Equal Protection Clause was violated. *Id.* at 871–72.

<sup>221</sup> 6TH CIR. R. 35(b).

<sup>222</sup> See *Stewart v. Blackwell*, 473 F.3d 692, 693 (6th Cir. 2007).

<sup>223</sup> See *id.*

<sup>224</sup> Hasen, *Untimely Death*, *supra* note 8, at 14 n.68.

<sup>225</sup> *Stewart*, 473 F.3d at 693–94.

<sup>226</sup> *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008).

<sup>227</sup> *Id.* at 467.

<sup>228</sup> *Id.* at 468.

<sup>229</sup> *Id.* at 467.

<sup>230</sup> *Id.* at 477–78. The case eventually settled before plaintiffs tried to prove their allegations. Order Enforcing Settlement Agreement, *League of Women Voters of Ohio v. Brunner*, No. 3:05-CV-7309 (N.D. Ohio June 16, 2009), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/LWVBlackwell-Order-6-19-09.pdf>.

protection and due process case. The Sixth Circuit then decided *Hunter* in 2010, reinforcing the interpretation of *Bush* as requiring equal treatment of similarly situated voters within a jurisdiction.<sup>231</sup>

In the Sixth Circuit's 2012 provisional ballot case, the judicial panel and all of the parties (including the State of Ohio) notably agreed there would be a "*Bush v. Gore* problem" if the rules for counting right church, wrong pew ballots applied only to some voters (the SSN-4 voters) and not to others.<sup>232</sup> The Sixth Circuit thus now appears to accept that *Bush v. Gore* has precedential value and that it requires some general baseline of fairness and equality in the treatment of voters.

*League of Women Voters* and *Hunter* set the stage for both the early voting case and the provisional ballot case in 2012. The early voting case,<sup>233</sup> however, went much further than *League of Women Voters*, *Hunter*, or the 2012 provisional ballot case. It reads *Bush v. Gore* as a kind of free-floating license to do equity in election cases.<sup>234</sup>

Judge White's concurring opinion in which she refused to decide the case in a "vacuum" or to "ignore reality" demonstrates that at least some courts are willing to go beyond the parties' pleadings and recognize a judicial backstop role, accepting judicial intervention in the face of both partisanship and incompetence in election administration.<sup>235</sup> I suspect the other judges on the panel agreed with Judge White on the equities but did not want to be as blunt in their legal analysis. Instead, the majority accepted the very suspect factual finding that the cutback of three days of early voting was a major burden, and moved the legal standard for reviewing election changes from a deferential standard to a skeptical standard.<sup>236</sup> In place of a deferential *Anderson-Burdick* flexible balancing test, in which voters must tolerate minor burdens and inconveniences when the state posits a plausible administrative reason for how it has structured its election,<sup>237</sup> the Sixth Circuit panel cast a skeptical eye toward asserted state interests, and embraced a special solicitude for voters' ability to easily cast a ballot which will be counted fairly and accurately.<sup>238</sup>

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<sup>231</sup> See *supra* Part II.B.

<sup>232</sup> See *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 598 (6th Cir. 2012).

<sup>233</sup> See *generally* *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012).

<sup>234</sup> For a defense of this result on equitable, if not legal, grounds, see *Foley*, *supra* note 157.

<sup>235</sup> See *Obama for Am.*, 697 F.3d at 437–43 (White, J., concurring in part and dissenting in part).

<sup>236</sup> See *id.* at 428–42.

<sup>237</sup> See *supra* note 131 and accompanying text.

<sup>238</sup> See *Obama for Am.*, 697 F.3d at 428–42.

I argued in Part II.B above that the Sixth Circuit's early voting decision was a major stretch and its reliance on *Bush v. Gore* was surprising. But the Sixth Circuit result has prominent defenders. Professor Richard Pildes, a member of the Obama legal team, strongly defends the result, arguing that courts are beginning to recognize early voting as akin to voting on Election Day (rather than being akin to absentee voting).<sup>239</sup> He justifies the Sixth Circuit decision by citing Supreme Court cases recognizing the fundamental right to vote which applies to Election Day voting and which prevents states from discriminating among classes of voters to be granted the franchise.<sup>240</sup>

This argument misses the mark. To begin with, just because voting is a fundamental right does not mean that all state "nuts and bolts" regulations of election processes are subject to heightened scrutiny. Imagine if Ohio in 2008 had set Election Day in-person voting hours from 6 am to 10 pm, and in 2012 it changed those hours to 7 am to 9 pm. If someone challenged the cutback in hours on equal protection grounds, I expect a federal court would apply the *Anderson-Burdick* balancing test, and if the court determined that the two-hour cutback did not impose a severe burden on voters, it would uphold the cutback. The court would do so despite the fact that "in-person" voting is a fundamental right.

The same *Anderson-Burdick* analysis should apply to a state's decision to enact a general cutback on early voting but keep additional in-person voting hours for military and overseas voters. Under such a law, other voters are not denied the franchise as in those Supreme Court cases recognizing the right to vote as a fundamental right;<sup>241</sup> instead, voters retain the right to vote, and merely have fewer, although ample, hours (even days) to vote in person, as well as an easy method to vote alternatively by absentee ballot.<sup>242</sup> So long as the law does not impose a severe burden on nonmilitary voters and the state has a legitimate reason<sup>243</sup> for offering the additional voting hours to

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<sup>239</sup> Pildes, *supra* note 26.

<sup>240</sup> *Id.*; *see, e.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

<sup>241</sup> *See, e.g.*, *Kramer*, 395 U.S. at 626.

<sup>242</sup> *See supra* Part II.A.

<sup>243</sup> Indeed, the strongest argument in favor of the challenge to Ohio's early voting scheme is that the State did not enact the law rationally. Instead, it appeared to happen as the result of a convoluted legislative accident. I am skeptical, however, of arguments that the constitutionality of garden-variety voting laws should turn on the legislature's intent (an issue on which Professor Pildes and I have long disagreed). *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 847-48. As noted above, the Obama campaign seemed to concede that the state could have adopted the exact same law without a constitutional problem if it was the result of considered deliberation. *See supra* note 128 and accompanying text.

the military voters, the law should be upheld under normal equal protection principles set forth in *Anderson-Burdick*, regardless of whether the voting takes place in person or absentee. To rule otherwise can be characterized fairly as at least a major stretch of existing precedent.

As Ned Foley explained while the Ohio early voting case was pending:

[One] can easily reach the conclusion that the Equal Protection Clause is not violated just because military and foreign-domiciled voters receive a modest increment in the number of days available for casting a ballot that is not generally available to regular voters. First, there is precedent for judging the state's early voting rules according to the best argument that can be made on their behalf, regardless of whether the State blundered into the situation of adopting the rules that it did. Second, the revocation of previously available opportunities may make no difference if a State was not obligated to grant those opportunities in the first place, and the State has simply returned to a situation it was entitled to be in initially. Third, letting local officials decide whether to give an extra three days to military and foreign-domiciled voters undoubtedly makes that special benefit less valuable to those who might take advantage of it (compared to a mandatory requirement that local officials must make these three days of early voting available to these voters), but if the government is entitled to give more robust extra protections to military and overseas voters—as Congress repeatedly has done—then much more modest extra protections for these same voters is not inherently unconstitutional vis-à-vis the ordinary voters who don't receive the same benefits.<sup>244</sup>

In sum, the expansion of equal protection law in elections through *Bush v. Gore* in the Sixth Circuit was surprising and not inevitable. The expansion may well be justified as an expansion of precedent, but it cannot be defended as a natural extension of that precedent. Time will tell whether the expansion continues, or a contraction begins.

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<sup>244</sup> Foley, *Two Big Cases*, *supra* note 24. For an argument that the unique factual circumstances justified the district court's decision to extend early voting, see Michael S. Kang, *Michael Kang Responds to Foley on Obama for America Non-Retrogression Principle*, ELECTION L. @ MORITZ (Sept. 7, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9689>.

## CONCLUSION: A CONTINUING JUDICIAL BACKSTOP?

The developments in the Sixth Circuit are significant, but they could be limited and ephemeral. No other circuits have given *Bush v. Gore* a wide reading (or much of a reading at all). In the rest of the country, *Bush v. Gore* is still basically dead.<sup>245</sup> The Sixth Circuit sitting en banc eventually could cut back on these cases too, or the Supreme Court may get involved and stop the expansion of the *Bush* cases; the Sixth Circuit is one of the Courts of Appeals most reversed by the Supreme Court.<sup>246</sup> We could return to the days in which the Sixth Circuit declines to be aggressive in protecting equality and fairness in voting rules through *Bush*.

Aside from the future use of *Bush v. Gore* as viable precedent in the Sixth Circuit, the broader unanswered question is whether the courts will continue to play the backstopping role we saw in 2012. We might view this backstopping role as *Bush v. Gore* being applied as a *concept* rather than as a strict legal *precedent*. In other words, courts may be taking their cue from *Bush v. Gore* to more aggressively police election rules even if they do not cite the case or purport to apply its holding to new election law cases.<sup>247</sup> If this is the case, it leaves open the question of why courts would do so in 2012 when they were less willing to do so earlier in the last decade.<sup>248</sup> The answer may be that the Republican overreaching triggered the court reaction.<sup>249</sup>

In 2012, courts were ready to approve voter identification requirements, for example, but not without proof that the requirements could be rolled out fairly.<sup>250</sup> Tough voter registration and purge laws received close looks by courts, and some courts were willing to block the laws or put them on hold.<sup>251</sup> Courts, to some extent, served as judicial backstops in 2012, but it is not clear if the trend will continue.

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<sup>245</sup> Since publishing *The Untimely Death of Bush v. Gore* in 2007, I have found no circuit-level cases outside the Sixth Circuit in which the courts have read *Bush v. Gore* to create strong equal protection or due process guarantees in voting. See *supra* notes 8–10 and accompanying text.

<sup>246</sup> For a close look at reversal measures, see John Summers & Michael Newman, *The “Full” Method of Measuring the Court’s Review of Decisions by the Court of Appeals: October Term 2011*, SCOTUSBlog (Oct. 23, 2012, 10:59 AM), <http://www.scotusblog.com/2012/10/the-full-method-of-measuring-the-courts-review-of-decisions-by-the-courts-of-appeals-october-term-2011/> (finding Sixth Circuit to be the second or third most-reversed appellate court).

<sup>247</sup> See *supra* Part II.C.

<sup>248</sup> See generally Hasen, *Untimely Death*, *supra* note 8.

<sup>249</sup> See *supra* note 11 and accompanying text.

<sup>250</sup> See *supra* notes 51–89 and accompanying text.

<sup>251</sup> See *supra* notes 90–101 and accompanying text.

Just as importantly, courts spoke with surprising unanimity across party lines in a number of the controversial cases, with bipartisan panels approving South Carolina's modified voter identification law but blocking Texas's stricter law.<sup>252</sup> The unanimity, which differed from partisan disputes among the judiciary in earlier years,<sup>253</sup> boded well for the legitimacy of the courts and for distancing courts from political controversy when deciding these very sensitive election cases.

There are early signs that some Republicans are considering pulling back on efforts that have made it harder for people to register and vote in the name of fraud prevention or election integrity. Cleta Mitchell, president of the Republican National Lawyers Association, appeared to call for a truce in the voting wars in a *New York Times* opinion article.<sup>254</sup> Republican legislators in Florida passed legislation to restore early voting days in an effort to eliminate long lines<sup>255</sup> after evidence mounted that their earlier voting reform efforts were intended to suppress Democratic votes.<sup>256</sup> Wisconsin's Republican governor, Scott Walker, gave up on his plan to end same-day voter registration in the state.<sup>257</sup> But all was not rosy. As North Carolina shifted to unified Republican government control, it began examining many ways to roll back voting mechanisms which had worked to Democrats' advantage in getting more casual voters to the polls.<sup>258</sup>

It seems doubtful that the voting wars will come to an end before the 2016 elections, even if we will see some pullback from more egregious efforts to make registration or voting more difficult. Democrats

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<sup>252</sup> See *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012); *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).

<sup>253</sup> See *supra* notes 79–80 and accompanying text.

<sup>254</sup> Cleta Mitchell, Op-Ed., *Give Partisanship a Rest and Address Real Issues*, N.Y. TIMES ROOM FOR DEBATE (Apr. 18, 2013, 12:55 PM), <http://www.nytimes.com/roomfordebate/2012/11/08/does-our-voting-system-need-to-be-fixed/give-partisanship-a-rest-and-address-real-issues> (“First, we partisans should declare a truce. What if we held our noses and declared together that Republicans really are *not* trying to suppress votes and Democrats are really *not* promoting illegal voting and fraud. What might we accomplish together if we quit calling each other names and turned our attention to the challenges facing our electoral systems?”). I note, however, that her reform proposals led with “clean[ing] up” the voter rolls and preventing coercion of voters and included no efforts to make sure all eligible voters could vote. See *id.*

<sup>255</sup> Mary Ellen Klas, *Gov. Rick Scott Signs Elections Bill to Fix Long Voter Lines*, MIAMI HERALD (May 21, 2013), <http://www.miamiherald.com/2013/05/21/3409387/gov-rick-scott-signs-elections.html>.

<sup>256</sup> Kam & Lantigua, *supra* note 113.

<sup>257</sup> See Don Walker, *Walker Says Ending Same-Day Registration Too Costly*, MILWAUKEE WIS. J. SENTINEL (Dec. 12, 2012), <http://www.jsonline.com/blogs/news/183173611.html>.

<sup>258</sup> Ari Berman, *7 Ways North Carolina Republicans Are Trying to Make It Harder to Vote*, NATION (Apr. 5, 2013, 12:13 PM), <http://www.thenation.com/blog/173685/7-ways-north-carolina-republicans-are-trying-to-make-it-harder-to-vote#>.

are redoubling their efforts to expand voting, including through same day voter registration.<sup>259</sup> As opponents of cutbacks enter the next election season, they will be armed with some powerful legal precedents from the 2012 election, especially from the Sixth Circuit.

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<sup>259</sup> See, e.g., Ivan Moreno & Nicholas Riccardi, *Democrats Strike Back at GOP Voting Measures in Colorado*, HUFFINGTON POST (May 20, 2013, 1:14 PM), [http://www.huffingtonpost.com/2013/05/20/democrats-strike-back-at-\\_0\\_n\\_3307732.html](http://www.huffingtonpost.com/2013/05/20/democrats-strike-back-at-_0_n_3307732.html).