

ESSAY

Voting Rules and Constitutional Law

*Edward B. Foley**

ABSTRACT

Anyone concerned that Bush v. Gore may have been unprincipled or at least insufficiently precise in its reasoning should have the same concern about the leading voting law case emanating from the 2012 presidential election, Obama for America v. Husted. That case is just as fact-specific in its holding as Bush v. Gore was. Moreover, both cases are signs of a pervasive problem in contemporary election law—namely, that the judicial evaluation of electoral rules under the prevailing Fourteenth Amendment jurisprudence is woefully indeterminate, as was also revealed in the Supreme Court's 2008 decision in Indiana's voter identification case, Crawford v. Marion County Election Board. When one attempts to put Crawford together with Bush v. Gore, as the lower courts attempted to do in Obama for America v. Husted and other voting related litigation in 2012, one is at a loss as to the specificity of the standard to apply to the facts of the pending case. This indeterminacy is especially problematic in election cases because it tempts judges to decide these politically fraught cases according to their own partisan preferences, rather than according to objectively discernible principles.

An alternative approach would be to have federal judges focus explicitly on the problem of partisanship. The new test of a voting procedure's constitutionality under the Fourteenth Amendment would be whether it was imposed as an effort to tilt the electoral playing field in favor of a particular political party. One advantage of this new test is that it would substitute a relatively straightforward single inquiry—did the relevant arm of state government en-

* Director, Election Law @ Moritz and Chief Justice Thomas J. Moyer Professor for the Administration of Justice and the Rule of Law, The Ohio State University Moritz College of Law. The ideas expressed in this Essay have benefited from many sources, including conversations with other participants in this symposium and my Election Law @ Moritz colleagues.

gage in improper partisan manipulation of the electoral process?—for the currently incommensurate balancing of electoral burdens and administrative benefits. Another advantage of this new test would be that by making federal judges more consciously (and, in their opinions, expressly) attuned to the risks of improper partisanship, it would increase the likelihood that federal judges would do a better job at policing their own temptations towards partisan rulings in high-stakes election cases.

TABLE OF CONTENTS

INTRODUCTION: THE PROBLEM OF INDETERMINACY	1837
I. <i>OBAMA FOR AMERICA V. HUSTED</i>	1840
II. <i>ANDERSON-BURDICK</i> BALANCING	1847
III. <i>BUSH V. GORE'S</i> RELATIONSHIP TO <i>ANDERSON-</i> <i>BURDICK</i> BALANCING.....	1851
V. LOWER COURT GRAPPLING WITH THE SUPREME COURT'S INDETERMINACY	1860
V. TOWARDS AN ALTERNATIVE APPROACH: AN EXPLICIT INQUIRY INTO IMPROPER PARTISANSHIP	1860

INTRODUCTION: THE PROBLEM OF INDETERMINACY

The biggest complaint about the Equal Protection reasoning of the majority opinion in *Bush v. Gore*¹ was its self-proclaimed narrowness. “Our consideration is limited to the present circumstances,” the majority famously asserted, “for the problem of equal protection in election processes generally presents many complexities.”² At the time, many scholars read that sentence as the majority’s acknowledgement of deliberately reaching an unprincipled decision, which would have no applicability to any future case.

But one may still be concerned about the narrowness of the Court’s reasoning without finding the decision to be deliberately unprincipled. Even if the Court meant to be principled about the limited nature of its Equal Protection holding, such that the Court faithfully would apply that holding to any future case presenting equivalent facts, how would one know whether or not the future case was indeed equivalent? The problem with an exceedingly narrow judicial ruling is that one cannot determine whether a future court is being unprincipled in refusing to apply the precedent in the new circumstances. “Like cases should be treated alike,” but the exceedingly narrow precedent does not tell future judges enough about what is factually im-

¹ *Bush v. Gore*, 531 U.S. 98 (2000).

² *Id.* at 109.

portant in the precedent case to assess whether future cases are relevantly similar or dissimilar.³

The problem of exceedingly narrow precedents is hardly unique to election law. Any area of constitutional law, indeed of law generally, can fall prey to this problem. For example, if a Fourth Amendment precedent concerning unreasonable searches is too fact specific, future judges will have great difficulty in determining whether a subsequent search is equivalently unreasonable. There will then be a risk that “like cases” are not being “treated alike” and thus the system as a whole will not be fair to equally situated criminal defendants.⁴

But this problem presents special concerns in the context of election law. An overriding imperative of election law is that judges decide cases without partisan favoritism. Judges, in other words, should not rule for Democrats and against Republicans because the judges themselves are Democrats or prefer the Democratic Party, and vice versa. Yet exceedingly narrow judicial rulings in election cases present the risk of precisely that. There is the concern that the judges announcing the exceedingly narrow ruling were trying to do their party a favor without creating a precedent. That, fundamentally, was the concern expressed about the majority opinion in *Bush v. Gore*.⁵ But there is also the concern that in a subsequent case the judges might refuse to apply the precedent, even though it might be applicable, for the simple reason that in the new case the precedent is disadvantageous to the party they prefer. Either way, such partisan rulings from the bench are a corruption of the electoral process and unfair to voters and candidates.

For this reason, the most celebrated judicial ruling of the 2012 election is troubling. In *Obama for America v. Husted* (“*OfA*”),⁶ the Sixth Circuit invoked Equal Protection to require that early voting be made available to non-military voters to the same extent as military voters.⁷ The decision had the practical effect of making early voting

³ See generally Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925 (2007), and Edward B. Foley, *Refining the Bush v. Gore Taxonomy*, 68 OHIO ST. L.J. 1035 (2007), for a detailed discussion of the ambiguities of *Bush v. Gore*.

⁴ Jeremy Waldron has a penetrating and useful discussion of how the rule of law requires a workable system of precedent, which in turn requires that judges attempt to articulate generalizable rules in the cases they adjudicate. See Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 18–19, 29–30 (2012).

⁵ See, e.g., Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 950 (2009).

⁶ *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012).

⁷ *Id.* at 436.

available for all registered voters during the last three days before Election Day itself,⁸ a decision that might have made a difference to the outcome of the presidential election if it had been close.

Supporters of the Sixth Circuit's decision emphasize its narrowness.⁹ First, it applies only to a *rollback* of early voting, in comparison to what had been offered previously, and would not extend to a selective expansion of early voting for military voters.¹⁰ Second, it applies only in the context where local election officials have *discretion* to give greater early voting opportunities to military voters, as opposed to a situation where state law *mandates* that military voters must have these extra opportunities.¹¹ Third, it applies only when the legislative process that yields the different voting opportunities for military and non-military voters is chaotic and convoluted in the extreme, thereby undermining the assumption that the legislature made a thoughtful decision to provide extra early voting for military voters.¹²

Yet the very narrowness of the Sixth Circuit's ruling is what is worrisome. If one is concerned about the narrowness of *Bush v. Gore* (as one should be), then one should also be worried about the narrowness of *OfA*. The fact that *OfA* gave Democrats a victory, whereas *Bush v. Gore* was a win for Republicans, is no principled basis for distinguishing between the two Equal Protection cases.

Rather, the point is that both cases taken together signal that we are in a new era of Equal Protection indeterminacy in the context of election cases. Currently prevailing Fourteenth Amendment jurisprudence lacks clear guidelines for determining when a state's administration of the voting process violates federal constitutional law. It is not only these two cases that exhibit this indeterminacy. The Supreme

⁸ *Id.* at 437.

⁹ Michael Kang first expressed this narrowness point while the case was pending before the Sixth Circuit. 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>. Josh Douglas expressed similar sentiments after the Sixth Circuit's ruling. 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>. Rick Pildes, in supporting the Sixth Circuit's ruling, has emphasized the difference between in-person early voting on the one hand, and vote-by-mail on the other. See Richard Pildes, *Early Voting and Constitutional Law*, ELECTION L. BLOG (Nov. 27, 2012, 4:25 PM), <http://electionlawblog.org/?p=44801>. Other scholars in conversations, both private and public, including at this Symposium, have defended the Sixth Circuit's ruling in *OFA v. Husted* on the understanding that it has very limited applicability based on a constellation of factors present in the case.

¹⁰ *Obama for Am.*, 697 F.3d at 433.

¹¹ *Id.* at 435.

¹² *Id.* at 436.

Court's fractured and inconclusive ruling in the Indiana voter identification case, *Crawford v. Marion County Election Board*,¹³ demonstrates this, as do other Fourteenth Amendment cases involving the voting process in 2012.

We are unlikely to escape this indeterminacy for the foreseeable future. Therefore, we must learn to manage it as best we can for the sake of the fairness of the nation's electoral system. After describing *OfA* and other sources of this indeterminacy in more detail, I will analyze various strategies for coping with this problem.

I. *OBAMA FOR AMERICA V. HUSTED*¹⁴

Obama for America v. Husted was the only case that the Obama campaign itself brought in advance of the 2012 election in order to affect the rules in place once the voting began—a fact which indicates the importance of the lawsuit to the President's reelection efforts. Allies of the Democratic Party brought other cases. In Ohio, the litigation over provisional voting rules, discussed in Part IV below, was a prime example, as were the lawsuits over voter identification rules in Pennsylvania, Wisconsin, and elsewhere. In Florida, as in Ohio, there were lawsuits over cutbacks in early voting, as well as other litigation over the maintenance of voter registration databases.¹⁵ The Obama campaign was surely following all of these developments. But that is not the same as suing in one's own name and being the lead plaintiff.

OfA grew out of a legislative effort to end early voting in Ohio for all of the state's voters on the Friday before Election Day.¹⁶ In Ohio, early voting is technically "in-person absentee" voting, whereby any registered voter can apply for and immediately cast an absentee ballot by showing up at the local board of elections' office (or other designated site) during the five weeks prior to Election Day when absentee voting is available.¹⁷ After suffering the problem of long lines at polling places on Election Day in 2004, Ohio opened up absentee voting to any registered voter who would prefer to vote by this method and developed two options for casting absentee ballots: by

¹³ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

¹⁴ Rick Hasen's contribution to this Symposium discusses this case in detail, and for the benefit of the reader I shall not repeat what Rick has already written. See Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1879–87 (2013).

¹⁵ All of this litigation is collected in the Major Pending Cases and companion archives of Election Law @ Moritz, <http://moritzlaw.osu.edu/electionlaw/litigation/index.php>.

¹⁶ *Obama for Am.*, 697 F.3d at 426–27.

¹⁷ *Id.* at 437–38 (White, J., concurring in part and dissenting in part).

mail or in person at each local board's early voting site.¹⁸ In the 2008 presidential election, the in-person early voting option was popular in the state's urban localities, especially during the last weekend prior to Election Day.¹⁹ In what appeared to be a tactical maneuver designed to tilt the electoral playing field to the advantage of Republicans in advance of the 2012 elections, Republican members of the state's General Assembly pressed to eliminate the last three days of early voting before Election Day.²⁰ After the 2010 elections, when Republicans controlled both houses of the General Assembly and had a newly inaugurated Republican governor, they were in a position to effectuate this rollback in early voting.²¹

Accordingly, the state's General Assembly, as part of a broad measure to change Ohio's elections laws, passed H.B. 194,²² which set this new Friday end date for both military and non-military voters.²³ The problem, however, was that this legislative change overlooked the fact that two additional statutory provisions still permitted early voting to continue until the Monday immediately before Election Day.²⁴ The legislature then passed a new law, H.B. 224,²⁵ to eliminate the inconsistencies and make Friday the last day for early voting for both military and non-military voters.²⁶

Meanwhile, however, opponents of the first measure gathered enough signatures to place it on the ballot, which under Ohio law pre-

18 *Id.* at 431 (majority opinion).

19 *Id.* at 440–41 (White, J., concurring in part and dissenting in part).

20 See Joe Guillen, *Ohio Lawmakers Set to Approve Election Overhaul Legislation*, CLEVELAND.COM (May 24, 2011, 6:08 PM), http://www.cleveland.com/open/index.ssf/2011/05/ohio_law_makers_set_to_approve.html.

21 See *Election Results: Ohio*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/ohio> (last visited Sep. 10, 2013); Guillen, *supra* note 20.

22 Amended Substitute H.B. 194, 129th Gen. Assemb. (Ohio 2011).

23 See *id.* Ohio's statutory language refers to "UOCAVA" and "non-UOCAVA" voters, tracking the federal law applicable to both military and overseas voters, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, Pub. L. No. 99-410, 100 Stat. 924. For the sake of simplicity, I speak in terms of "military" and "non-military" voters, which was the distinction at the heart of the Equal Protection question in the case.

24 Terri L. Enns, *Thoughts on HB 194 and Ohio's Referendum Process*, ELECTION L. @ MORITZ (Apr. 3, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9075> ("Included in those 'technical amendments' were provisions adding some of HB 194's changes to sections of the Code that HB 194 did not amend."). For a thorough discussion of these legislative provisions and the General Assembly's bumbling maneuvers, see generally Steven F. Huefner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. RICH. L. REV. 833, 858–62 (2013).

25 Amended Substitute H.B. 224, 129th Gen. Assemb. (Ohio 2011).

26 See *id.*

vented it from taking effect.²⁷ The legislature then decided that it did not want a political fight over the law during the campaign season. The Republican-controlled legislature was fearful that a public debate over the controversial election law might drive up turnout at the polls among Democrats. Therefore, the legislature passed yet a third law, this one to repeal the first, thereby removing it from the ballot.²⁸

But the legislature did not repeal the second law. The upshot was to reintroduce an inconsistency among Ohio's statutory provisions concerning the end date for early voting. Two provisions now clearly ended early voting for both military and non-military voters on the Friday before Election Day (these were the provisions added by H.B. 224 to eliminate the original inconsistency).²⁹ One provision permitted "in-person absentee" voting to continue through Election Day for military voters, and another was unclear as to when early voting ended for non-military voters (these last two provisions would have been superseded by H.B. 194, but were now reinstated as a result of that bill's repeal).³⁰

Given these legislative stumbles, it is highly doubtful that Ohio's General Assembly ever harbored any intent to differentiate between military and non-military voters with respect to its effort to end early voting on the Friday before Election Day. It certainly had no such intent in its initial effort to eliminate the last three days of early voting. Nor did it have any such intent in its second piece of legislation, which was an effort to make all of Ohio's statutory law consistent with this across-the-board rollback of early voting. And the legislature left this second law in place, with its explicitly equivalent treatment of military and non-military voters in terms of the rollback of early voting, when it decided to repeal its first law, H.B. 194, in order to remove that legislation from the ballot.³¹ Furthermore, the repeal legislation itself did not distinguish between military and non-military voters; it simply undid the entire initial election law measure.³²

Nonetheless, when faced with the statutory inconsistencies generated by this repeal of the first measure, Ohio's Secretary of State Jon Husted decided on his own to differentiate between military and non-military voters.³³ Given the explicit and specific statutory language of

²⁷ See Enns, *supra* note 24.

²⁸ See *id.*

²⁹ See Ohio Amended Substitute H.B. 224.

³⁰ See Huefner, *supra* note 24, at 833.

³¹ Substitute S.B. 295, 129th Gen. Assemb. (Ohio 2012).

³² See *id.*

³³ Ohio Sec'y of State, Advisory Op. 2011-07, at 2 (2011).

the second law, which had not been repealed, Husted easily could have instructed Ohio's local election boards to end early voting for both military and non-military voters on the Friday before Election Day (as this second law unambiguously required).³⁴ Had he done so, there never would have been an Equal Protection issue for the Obama campaign to pursue, and early voting would have ended for all Ohio voters on that final Friday. Instead, Husted advised the local boards to end early voting on that Friday just for non-military voters and to keep "in-person absentee" voting available for military voters through Election Day.³⁵

Consequently, the Obama campaign sued the Secretary in federal district court, claiming that this differential treatment of military and non-military voters violated Equal Protection.³⁶ The Obama campaign, of course, did not want the court to remedy the inequality by eliminating the extra three days of early voting for military voters. Rather, the lawsuit was only useful to the campaign if it ended up restoring those three days for non-military voters.

The district court did just that.³⁷ During oral argument in the district court, it was revealed that even in 2008 not all local boards of election had made in-person early voting available during the last weekend before Election Day.³⁸ Most, including large urban counties, had, while others, mostly rural counties, had not.³⁹ Accordingly, the State's attorney told the court that for the 2012 election military voters would not necessarily get to vote in person during the last three days of early voting, even under Husted's instructions to the county boards.⁴⁰ Instead, each county board would need to decide for itself whether to make these three days of early voting available to military voters. Husted's instructions, according to his lawyer, permitted, but did not require, the county boards to do so.⁴¹

³⁴ See Ohio Amended Substitute H.B. 224.

³⁵ *Id.*

³⁶ For the filings in the lawsuit, see *Obama for America v. Husted Case Information, ELECTION L. @ MORITZ*, <http://moritzlaw.osu.edu/electionlaw/litigation/ObamaForAmericaVHusted.php> (last updated Feb. 22, 2013, 10:52 AM).

³⁷ *Obama for Am. v. Husted*, 888 F. Supp. 2d 897 (S.D. Ohio 2012), *aff'd*, 697 F.3d 423 (6th Cir. 2012).

³⁸ See Defendants' Response to Plaintiffs' Supplemental Memorandum at 2, *Obama for Am. v. Husted*, 888 F. Supp. 2d 897 (S.D. Ohio 2012) (No. 2:12-cv-00636).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 3; see also Plaintiffs' Corrected Memorandum to the Court on Further Developments at 1 n.1, *Obama for Am. v. Husted*, 888 F. Supp. 2d 897 (S.D. Ohio 2012) (No. 2:12-cv-00636).

The district court pounced on this point as a justification for viewing the differential treatment of military and non-military voters as a violation of Equal Protection. As the district court observed, the Supreme Court's election law precedents require a state to provide an adequate justification for differentiating among voters in the availability of voting opportunities.⁴² The district court did not see how the state could have an adequate justification for giving military voters an extra three days of early voting when the local boards of elections could decide to deny military voters these extra three days.⁴³ "In sum, [the State's] justification for excepting [military] voters from the 6 p.m. Friday deadline—that the military *requires* this extra voting opportunity—is completely eviscerated, county by county."⁴⁴ The district court strongly suggested that the outcome of the case would have been different if Husted had ordered the local boards to make these three days available for military voters:

He could have required all boards of election to be open Saturday, Sunday and Monday for [military] voters, but he did not From the onset of this litigation, Defendants have pointed to special concerns for the military—concerns all parties share—and the military's need to maintain additional access to in-person early voting. But . . . Defendants undercut the virtue of their support of military voters by failing to protect any significant measure of [in-person absentee voting for those three days].⁴⁵

The district court also seemed to rely on the fact that for non-military voters the state was taking away three days of early voting that had previously been available to them, rather than adding the possibility of an extra three days for military voters that previously had been unavailable to anyone:

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.⁴⁶

In this way, the district court built a kind of "non-retrogression" principle into its Equal Protection analysis.⁴⁷ Thus, the court's order em-

⁴² *Obama for Am.*, 888 F. Supp. 2d at 905 (citing *Gray v. Sanders*, 372 U.S. 368 (1963)).

⁴³ *Id.* at 909.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 910 (citation omitted) (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

⁴⁷ *Id.* I have previously commented on this aspect of the district court's reasoning. *See*

phatically “RESTORED”⁴⁸ early voting “on the three days immediately preceding Election Day for all eligible Ohio voters,” rather than permitting Husted to eliminate these three days equally for all of the state’s voters.⁴⁹

On appeal, the Sixth Circuit’s majority opinion affirmed the district court’s order and essentially embraced its reasoning.⁵⁰ The majority acknowledged that eliminating these three days of early voting would have been valid had the regulation applied equally to military and non-military voters: “If the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all Ohio voters, its ‘important regulatory interests’ would likely be sufficient to justify the restriction.”⁵¹ Indeed, the majority had no choice but to acknowledge this point, as the state was not constitutionally obligated to provide these three days of early voting to any Ohio voters in the first place, and surely even the desire to save money in a period of financial difficulties could justify cutting back early voting for all the state’s voters from five weeks to a slightly shorter amount.

The Sixth Circuit majority opinion also seems to acknowledge that the State could have provided extra early voting opportunities for only military voters—as long as it did not simultaneously cut back on previously available early voting opportunities for non-military voters.⁵² At one point, the majority opinion states: “while there is a compelling reason to provide more opportunities for military voters to cast their ballots, there is no corresponding satisfactory reason to prevent non-military voters from casting their ballots as well.”⁵³ The majority opinion’s reasoning, frankly, is murky. In other places in its opinion, the majority seems to say that the state could not add extra in-person early voting days for military voters, even if it did not take away any previously available days from non-military voters:

With respect to in-person early voting . . . there is no relevant distinction between the two groups. The State argues that military voters need extra early voting time because they could be suddenly deployed. But any voter could be sud-

Edward B. Foley, *Non-Retrogression, Equal Protection, and Ohio’s Early Voting Case*, ELECTION L. @ MORITZ (Sept. 6, 2012), <http://moritzlaw.osu.edu/electionlaw/freefair/index.php?ID=9673>.

⁴⁸ *Obama for Am.*, 888 F. Supp. 2d at 911.

⁴⁹ *Id.*

⁵⁰ *Obama for Am. v. Husted*, 697 F.3d 423, 425 (6th Cir. 2012).

⁵¹ *Id.* at 433–34 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

⁵² *Id.*

⁵³ *Id.* at 434.

denly 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 voters⁵⁴

This logic would seem to require lock-step equal availability of early voting to military and non-military voters and never any extra for military voters. But then the majority opinion backtracks. It is the cut-back of previously available early voting for non-military voters that offends the majority:

Although the State argues that it has justifiably given more early voting time to military and overseas voters, in fact, the time available to those voters has not changed and will not be affected by the district court's order. Rather, the State must show that its decision to reduce the early voting time of non-military voters is justified by a 'sufficiently weighty' interest. The State has proposed no interest which would justify reducing the opportunity to vote by a considerable segment of the voting population.⁵⁵

Thus, for the majority, it is the combination of the rollback and the differential treatment of military and non-military voters that results in the Equal Protection violation. Rollback for all voters would be okay. Expansion of extra opportunities for military voters, without any rollback for non-military voters, would seemingly also be okay, given the acknowledged "compelling reason to provide more opportunities for military voters to cast their ballots."⁵⁶ It is keeping the opportunities the same for military voters, while cutting back those opportunities for everyone else, that the majority cannot accept. Call it a "selective non-retrogression" principle.

One member of the Sixth Circuit panel, Judge Helene White, could not accept the majority opinion's analysis. She supported ordering the state to restore the early voting that had been available in 2008, but she did so based on the equitable ground that the state might not be able to handle the increased volume of voters on Election Day if these three days of early voting are eliminated.⁵⁷ Although her point was rooted in practicality, it is not clear exactly how it was

⁵⁴ *Id.* at 435.

⁵⁵ *Id.* at 436.

⁵⁶ *Id.* at 434.

⁵⁷ *Id.* at 441-42 (White, J., concurring in part and dissenting in part).

grounded in federal constitutional law. She went out of her way to repeatedly emphasize that states have wide latitude in structuring their voting rules, and that the availability of only three fewer days of early voting (during a five-week period) could not be considered as imposing a hardship on non-military voters.⁵⁸ Nonetheless, she seemed to feel that the change was too precipitous, and not adequately thought through, to permit it to take effect for the 2012 general election—at least not without the Secretary of State and General Assembly taking extra steps to justify the early voting regime they wished to put in place.⁵⁹

After losing in the Sixth Circuit, the State asked the Supreme Court for an emergency stay, but the Supreme Court declined to get involved, issuing only a one-line denial of the State's request.⁶⁰ This refusal to intervene is not necessarily an agreement with the Sixth Circuit's Equal Protection analysis. Indeed, it is highly unlikely that all nine Justices would embrace the majority opinion's Equal Protection reasoning. Instead, the Supreme Court's refusal to get involved can be understood as simply a recognition that no great harm would likely occur if the state were obligated to provide the same amount of early voting as it successfully did in 2008, and thus the Court was entitled to exercise its discretionary jurisdiction to stay out of the matter.

II. *ANDERSON-BURDICK* BALANCING

The Supreme Court has struggled to articulate a test for determining when a state's rules and procedures for administering the electoral process violate the Fourteenth Amendment. In *Anderson v. Celebrezze*,⁶¹ a 1983 decision involving filing deadlines for presidential candidates, the Court announced a flexible balancing test:

[A] court . . . must first consider the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing

⁵⁸ *Id.* at 442.

⁵⁹ *See id.* at 443.

⁶⁰ *See Husted v. Obama for Am.*, 133 S. Ct. 497 (2012).

⁶¹ *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

court in a position to decide whether the challenged provision is unconstitutional.⁶²

To give some guidance on how this abstract formulation might work in practice, and to indicate that the state's burden of justification is not too heavy when the electoral rule is neither discriminatory nor disenfranchising, the Court advised: "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."⁶³ Nonetheless, Ohio's March deadline for independent presidential candidates did not satisfy this standard. The state simply did not need that much time before the November election in order to process the independent candidate's filing papers and get the candidate's name on the ballot.⁶⁴

A decade later, in *Burdick v. Takushi*,⁶⁵ which involved a ban on write-in voting, the Court attempted to give a bit more structure to its *Anderson* balancing test. The Court bifurcated the inquiry, depending on the degree to which the state is burdening constitutionally protected rights of electoral participation.⁶⁶ "[W]hen those rights are subjected to 'severe' restrictions," the Court explained, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'"⁶⁷ Conversely, quoting *Anderson*, the Court described the second part of the analysis: "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' [on those electoral rights] 'the State's important regulatory interests are generally sufficient to justify' the restrictions."⁶⁸ The write-in ban survived this inquiry because, in the Court's view, it was not a severe burden and was justified by the state's desire to narrow the field of candidates in the general election to those that received sufficient support in the primary election.⁶⁹

In *Crawford v. Marion County Election Board*, decided in the spring of 2008 (the year of a particularly momentous presidential election), the Court fractured badly over the application of the *Anderson-Burdick* balancing test to Indiana's voter identification law. The three-judge plurality opinion, authored by Justice Stevens and joined by Chief Justice Roberts and Justice Kennedy, emphasized the flexi-

⁶² *Id.* at 789.

⁶³ *Id.* at 788.

⁶⁴ *See id.* at 800–01.

⁶⁵ *Burdick v. Takushi*, 504 U.S. 428 (1992).

⁶⁶ *Id.* at 434.

⁶⁷ *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

⁶⁸ *Id.* (quoting *Anderson*, 460 U.S. at 788).

⁶⁹ *Id.* at 441.

bility of the original *Anderson* formulation.⁷⁰ The three-judge concurrence, written by Justice Scalia and joined by Justices Thomas and Alito, agreed with the plurality's conclusion that the Indiana law was not facially invalid, but could not accept the plurality's willingness to apply the balancing test on a *voter-specific* basis if and when (in a potential future case) an individual plaintiff were to present the right set of facts in an as-applied challenge to the voter identification law.⁷¹ Instead, the conservative trio's concurrence declared that they would permit only *wholesale* balancing: weighing the law's burden on all voters collectively, as compared to the state's across-the-board interests in adopting the law.⁷² Meanwhile, the three dissenting Justices authored two separate opinions (one by Justice Souter for himself and Justice Ginsburg, the other by Justice Breyer for himself alone), both of which embraced the plurality's flexible balancing test but believed that it led to the conclusion that Indiana's voter ID law was facially invalid.⁷³

Justice Scalia, true to form, was pointed in his criticism of the plurality's approach. He began by accusing the plurality of collapsing *Burdick's* bifurcated inquiry:

The lead opinion resists the import of *Burdick* by characterizing it as simply adopting 'the balancing approach' of *Anderson v. Celebrezze*. Although *Burdick* liberally quoted *Anderson*, *Burdick* forged *Anderson's* amorphous 'flexible standard' into something resembling an administrable rule. Since *Burdick*, we have repeatedly reaffirmed the primacy of its two-track approach.⁷⁴

Justice Scalia was especially insistent that balancing under *Burdick* must be confined to a categorical approach, considering only the burdens that fall collectively on voters as a whole, not on disproportionate burdens that individual voters might suffer from a generally applicable law.⁷⁵ In stressing this point, he relied on both *stare decisis* and first principles of constitutional adjudication.⁷⁶ Cataloguing case after case that he described as supporting his position, Justice Scalia asserted: "our precedents refute the view that individual impacts are relevant to determining the severity of the burden [a challenged regu-

⁷⁰ Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (plurality opinion).

⁷¹ *Id.* at 205 (Scalia, J., concurring in the judgment).

⁷² *Id.*

⁷³ *Id.* at 209 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting).

⁷⁴ *Id.* at 204–05 (Scalia, J., concurring in the judgment) (citations omitted).

⁷⁵ *Id.*

⁷⁶ *See id.*

lation] imposes.”⁷⁷ But quite apart from precedent, Justice Scalia made clear that he would take the same position “as an original matter.”⁷⁸ His reasoning for doing so was grounded in the indeterminacy of the alternative approach and the litigation it would inevitably breed:

This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.⁷⁹

Justice Scalia expressed concern both for the state officials needing to establish the rules for running elections, as well as for the courts tasked with the challenge of determining when a state's rule is unduly burdensome:

It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class. Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose is too severe.⁸⁰

Despite the lengths to which Justice Scalia went to distance the conservative trio from the plurality's approach, the plurality opinion offered little in response. In a footnote, the plurality stated only:

Contrary to Justice Scalia's suggestion, our approach remains faithful to *Anderson* and *Burdick*. The *Burdick* opinion was explicit in its endorsement and adherence to *Anderson*, and repeatedly cited *Anderson*. To be sure, *Burdick* rejected the argument that strict scrutiny applies to all laws imposing a

⁷⁷ *Id.* at 205.

⁷⁸ *Id.* at 208.

⁷⁹ *Id.*

⁸⁰ *Id.*

burden on the right to vote; but in its place, the Court applied the “flexible standard” set forth in *Anderson*. *Burdick* surely did not create a novel “deferential ‘important regulatory interests’ standard.”⁸¹

In any event, the plurality did not back away from its position that it would evaluate the burdens on an individualized voter-by-voter basis: “The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of [Indiana’s new voter ID law].”⁸² Moreover, the plurality was willing to assume that the law’s burdens on specific voters were too much to justify its enforceability against them specifically.⁸³ The plaintiffs’ case failed, the plurality pronounced, solely because it sought invalidation of the statute in its entirety: “[E]ven assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners’ right to the relief they seek.”⁸⁴ Perhaps the plurality thought it did not need to say more in response to Justice Scalia’s attack because it had strength in numbers; it knew that the three dissenters shared its individualized voter-by-voter approach, for a total of six Justices, whereas Justice Scalia spoke only for the three most conservative members of the Court.⁸⁵

III. *BUSH v. GORE*’S RELATIONSHIP TO *ANDERSON-BURDICK* BALANCING

In *Bush v. Gore*, the majority opinion notably did not even cite *Anderson* or *Burdick*, much less attempt to apply any version of their balancing test. The Court in *Bush v. Gore* never identified a burden on voting rights, nor weighed that burden against justificatory interests advanced by the state. Instead, the Court spoke of “arbitrary and disparate treatment”⁸⁶ of similarly situated voters and ruled that the recount of a statewide election needed to treat equivalent ballots the

81 *Id.* at 190 n.8 (plurality opinion) (citations omitted).

82 *Id.* at 198.

83 *Id.* at 200.

84 *Id.* at 199–200 (footnote omitted).

85 One wonders, of course, how secure is the allegiance of the two other members of plurality, especially Chief Justice Roberts, to the individualized approach. After all, both he and Justice Kennedy could have signed on to Justice Scalia’s opinion, rather than Justice Stevens’s. But in the end they did not.

86 *See, e.g., Bush v. Gore*, 531 U.S. 98, 104, 107 (2000).

same, pursuant to a single and adequately specified standard, when doing so was “practicable.”⁸⁷

Lower courts, including the one in *Obama for America v. Husted*, understandably have viewed *Bush v. Gore* as generating a separate “arbitrariness” inquiry, distinct from the *Anderson-Burdick* balancing test.⁸⁸ Nonetheless, it is possible to tease out of *Bush v. Gore* an implicit element of balancing. The burden was the discriminatory treatment of equivalent ballots in the same election—some counted, others did not—and, perhaps more broadly, the burden on other voters participating in the same election when the validity of the ultimate outcome is tarnished by this discriminatory counting practice. On the other side of the equation, the state’s interest in *Bush v. Gore* was not weighty when it was possible to avoid this discriminatory treatment by adopting a more specific (and uniformly enforced) counting rule. The state’s conduct is thus “arbitrary” when it is clearly unjustifiable under a straightforward application of *Anderson-Burdick* balancing. In this way, despite its failure to mention either case, *Bush v. Gore* can be subsumed under these two precedents.

But what of the debate between the plurality and the concurrence in *Crawford*? Is *Bush v. Gore* an example of individualized voter-specific balancing? Or, instead, is it consistent with Justice Scalia’s insistence on an exclusively categorical approach to balancing?

If the focus is solely on those voters whose ballots would have been counted had they received the benefit of a more lenient standard that was elsewhere applied to equivalent ballots in the same election—in other words, think of ballots with dimpled chads that were rejected but would have been counted by other recount teams that employed a more generous standard—then it would seem that the implicit balancing of *Bush v. Gore* is individualized and voter-specific. Most ballots cast in Florida’s 2000 presidential election, after all, were not themselves directly affected by the disparate treatment of dimpled chads. Most of the state’s roughly six million ballots cast in that election were not the so-called “undervotes” to which the standard for evaluating a dimpled chad might make a difference.⁸⁹

From another perspective, however, it is possible to view *Bush v. Gore* as an exercise of categorical balancing. All voters in the elec-

⁸⁷ *Id.* at 106.

⁸⁸ See, e.g., *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 230–31 (6th Cir. 2011).

⁸⁹ See *Bush v. Gore*, 531 U.S. at 103 (citing nationwide figure of two percent of ballots being undervotes).

tion, whether their ballots contained dimpled chads or not, are affected by the utilization of a counting procedure that permitted the counting of some dimpled chads but not others. Consider a hypothetical counting procedure that randomly fails to count one out of every 10,000 ballots—meaning that in an election of six million voters, 600 valid votes will be improperly disqualified (more than Bush's eventual 537-vote margin of victory in 2000).⁹⁰ The risk of disenfranchisement for each one of the six million voters is slight, and if the random disenfranchisement is anonymous, no voter will suffer the psychological harm of knowing that his or her ballot was one of the 600 that were improperly excluded. Still, every voter knows that the outcome of the election is tainted by the wrongful disqualification of 600 ballots that should have been counted. From a categorical or system-wide perspective, this injury to every voter in the electorate can be weighed against the state's interest in utilizing a procedure that improperly invalidates one out of every 10,000 ballots.

This analysis may reveal that Justice Scalia is not inconsistent by both joining the majority opinion of *Bush v. Gore* and insisting in *Crawford* on categorical rather than individualized balancing. But the same analysis may also reveal that ultimately there is not a meaningful operational significance between his approach and that of the *Crawford* plurality. After all, any harm to an *individual* voter can also be viewed as a systemic harm to *all* voters who suffer from a process that harms some voters in this particular way. That is the analytical move that makes *Bush v. Gore* consistent with Justice Scalia's concurrence in *Crawford*. But the same analytic move would allow treating as a systemic harm the fact that only some voters are disenfranchised by a stringent voter identification law.

If it seems difficult to square *Bush v. Gore* with *Anderson*, *Burdick*, and *Crawford*, it is because the Supreme Court has not yet told us enough to make confident judgments about the currently disparate strands of the Court's voting law jurisprudence. As *Crawford* itself indicates, the Court is unable to muster even a five-member majority for key components of that jurisprudence.⁹¹ Taken individually, each one of these precedents is imprecise in its reasoning, leaving lower courts (and other readers) confused. Taken together, rather than refining the doctrine in a way that adds clarity through increased precision (as the common law method of adjudication ideally is supposed

⁹⁰ David Barstow & Don Van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at A1.

⁹¹ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (plurality opinion).

to do), these precedents seem somewhat contradictory and thus collectively increase, rather than reduce, confusion and uncertainty.

IV. LOWER COURT GRAPPLING WITH THE SUPREME COURT'S INDETERMINACY

Such was the situation that the two lower courts in *Obama for America v. Husted*—the district court and the Sixth Circuit—found themselves. They purported to apply the *Anderson-Burdick* balancing test. They also invoked the “arbitrariness” standard of *Bush v. Gore*.

Yet there was not much precision in how the two lower courts applied these Supreme Court precedents. Both the district court and the Sixth Circuit majority in *OfA* characterized the burden caused by removing the last three days of early voting as “particularly high.”⁹² Both courts credited “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.”⁹³ But Judge White could not accept this characterization of the burden caused by Ohio’s rollback of early voting (which is why she needed to come up with a different reason for sustaining the district court’s injunction). She chastised her colleagues that there was no evidence that any voters would be “precluded” from voting, in contrast to being merely inconvenienced:

[T]hough 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 [on which the district court and Sixth Circuit majority relied] 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.⁹⁴

Ohio gave all voters the option to vote by mail or to cast an in-person ballot on all the other days during the five weeks in which early voting was available. Thus, Judge White emphasized: “*Convenience* cannot be equated with necessity.”⁹⁵

Did the different ways of characterizing the burden in *Obama for America v. Husted* make a difference? One can only speculate. But one wonders if the Sixth Circuit majority would have found the state’s

⁹² *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (quoting *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 906 (S.D. Ohio 2012)) (internal quotation marks omitted).

⁹³ *Id.* at 432; see also *Obama for Am.*, 888 F. Supp. 2d at 902–03.

⁹⁴ *Obama for Am.*, 697 F.3d at 440 (White, J., concurring in part and dissenting in part).

⁹⁵ *Id.* (emphasis added).

interest in accommodating military voters to be unjustified if the majority believed that the accommodation caused no serious hardship on non-military voters. For example, if Ohio had tacked on an extra three days solely for military voters *before* the period of early voting began for non-military voters, one doubts that the Sixth Circuit majority would have had a problem with that. Yet if the entirety of Ohio's voting process gave non-military voters ample opportunities to cast a ballot, one could argue that the extra three days for the military left non-military voters equally unimpaired whether the military's extra benefit occurred at the beginning or end of the early voting period. In any event, whether the fault lay with the tape measure or the tailor using it, the Sixth Circuit majority's difficulties with measuring the burden under the *Anderson-Burdick* balancing test indicates the uncertainty that is inherent in the current state of election law jurisprudence.

Nor is *Obama for America v. Husted* the only case from 2012 to exhibit this uncertainty. In a set of cases involving provisional ballots, the federal judiciary again demonstrated that its willingness to find a state voting rule unconstitutional depends to a significant extent on the identity of the particular federal judge assigned to the case.

This problem was masked to a large degree by the most prominent aspect of the provisional ballot rulings. The so-called "right church, wrong pew" issue⁹⁶ received the most attention.⁹⁷ This was the situation in which several precincts shared the same polling location, and voters who showed up at their correct polling location would end up casting a provisional ballot for the wrong precinct, rather than a regular ballot for the correct precinct.⁹⁸ The Ohio Supreme Court had taken the exceptionally harsh position of saying that in this situation the voter's ballot must be disqualified, even though the voter reasonably relied on the poll workers to complete the voting process once the voter had arrived at the correct polling place.⁹⁹ Consequently, when the claim was made in federal court that the disqualification of these "right church, wrong pew" ballots violated the Fourteenth Amendment, both the district court and the Sixth Circuit easily agreed, sus-

⁹⁶ The litigation over this issue became focused in *Service Employees International Union, Local 1 v. Husted*, 906 F. Supp. 2d 745 (S.D. Ohio 2012), as well as the related case *Northeast Ohio Coalition for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012). See *SEIU v. Husted Case Information*, ELECTION L. @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/litigation/SEIUvHusted.php> (last updated Sep. 9, 2013, 3:22 PM).

⁹⁷ See generally Hasen, *supra* note 14, at 1887-92.

⁹⁸ *Id.*

⁹⁹ *State ex rel. Painter v. Brunner*, 941 N.E.2d 782, 794 (Ohio 2011).

taining the claim and thereby repudiating the Ohio Supreme Court's draconian ruling. As the Sixth Circuit's unanimous opinion put it: "The State would disqualify thousands of right-place/wrong-precinct provisional ballots, where the voter's only mistake was relying on the poll-worker's precinct guidance. That path unjustifiably burdens these voters' fundamental right to vote."¹⁰⁰ When it was announced, this Sixth Circuit decision was rightly heralded as an important victory for voting rights.¹⁰¹

To be sure, one wonders whether this holding is consistent with a strict application of Justice Scalia's categorical approach to *Anderson-Burdick* balancing. Even though Ohio would disqualify "thousands" of these ballots, they are but a small fraction of the millions cast statewide.¹⁰² In any event, as indicated above, the burden of Ohio's excessively harsh rule can be recast as systemic in nature: every voter suffers from being part of an electorate subjected to such oppressive ballot-counting rules. Moreover, whether or not *Crawford's* conservative trio would go along with this result, it is plain that under the approach of the *Crawford* plurality (along with the *Crawford* dissenters) the Sixth Circuit's unanimous invalidation of Ohio's disqualification of "right church, wrong pew" ballots would survive Supreme Court scrutiny.

But the "right church, wrong pew" issue was only one of three questions concerning provisional ballots that reached the Sixth Circuit in 2012, and the other two were issues on which the Sixth Circuit reversed rather than affirmed the district court's rulings.¹⁰³ These other two issues, although hardly publicized at all, demonstrate the difficulty that the federal judiciary has in deciding these voting cases in a fully consistent fashion.

In addition to the "right church, wrong pew" issue, there was also the issue of voters casting a provisional ballot in the wrong polling place altogether. The district court accepted the argument that these ballots often were miscast because of poll worker error and thus were entitled to the same federal constitutional protection as the "right

¹⁰⁰ *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 599.

¹⁰¹ See, e.g., Rick Hasen, *Breaking News: Sixth Circuit Decides Provisional Ballot Cases, Finds Constitutional Violation in Not Counting Certain Wrong Precinct Ballots*, ELECTION L. BLOG (Oct. 11, 2012, 9:32 AM), <http://electionlawblog.org/?p=41452>.

¹⁰² See *Serv. Emps. Int'l Union, Local 1 v. Husted*, 887 F. Supp. 2d. 761, 779 (S.D. Ohio 2012).

¹⁰³ *Serv. Emps. Int'l Union, Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012); *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 599-600.

church, wrong pew” ballots.¹⁰⁴ The Sixth Circuit, however, unanimously disagreed.¹⁰⁵ It rebuked the district court for erring on both elements of the *Anderson-Burdick* balancing. First, the Sixth Circuit found that the district court mischaracterized the burden:

While poll-worker error may contribute to the occurrence of wrong-place/wrong-precinct ballots, the burden on these voters certainly differs from the burden on right-place/wrong-precinct voters—and likely decreases—because the wrong-place/wrong-precinct voter took affirmative steps to arrive at the wrong polling location. The district court abused its discretion by failing to distinguish these burdens.¹⁰⁶

In chastising the district court for this error, the Sixth Circuit continued in the same vein:

Though voters must rely heavily on poll workers to direct them to the proper precinct in a multi-precinct voting place, they are not as dependent on poll workers to identify their correct polling place. Ohio law requires election officials to provide notice to voters of where they are eligible to vote after they register or if their precinct changes. Furthermore, information about where to vote is easily accessible by calling county boards of elections or accessing the Secretary’s webpage. In our view, a voter who fails to utilize these tools and arrives at the wrong polling location cannot be said to be blameless in the same way as a right-place/wrong-precinct voter.¹⁰⁷

With respect to the second part of the balancing test, the evaluation of the state’s interests, the Sixth Circuit found the district court’s analysis to be equally erroneous:

[T]he district court’s injunction, in disregarding the importance of voting place, has a significant effect on the State’s legitimate interest in maintaining its precinct-based voting system. Unlike the prior injunction, the expanded injunction opens the door for steering last-second voters to convenient (though incorrect) polling places, in the hopes that some of the votes will count. This perverse incentive did not exist with right-place/wrong-precinct voters; voters who make the effort to arrive at the correct polling place would have no

104 See *SEIU v. Husted*, 906 F. Supp. 2d at 752–55.

105 *SEIU v. Husted*, 698 F.3d at 344.

106 *Id.* (emphasis omitted).

107 *Id.* (citations omitted).

reason to miscast their vote at the wrong table or in the wrong line.¹⁰⁸

One might wonder just how likely it is that voters would show up at any polling location if federal constitutional law required the counting of their ballots. Even so, the point is that different federal judges reached opposite outcomes on the application of *Anderson-Burdick* to this particular issue. So much for the certainty that federal constitutional law ideally should provide in this situation. Is the validity of the state's electoral system at the mercy of which particular federal judges happen to have the last word in the particular case?

The other issue for which the Sixth Circuit reprimanded the district court concerned the disqualification of provisional ballots when voters failed to print or sign their names properly on the envelope in which they placed their ballot. The district court held that the disqualification of these ballots was unjustified under *Anderson-Burdick* balancing. The district court reasoned: "Any provisional ballots cast containing these sorts of technical deficiencies necessarily involves poll-worker error because it is the poll worker's duty to ensure that provisional ballots are cast with a validly completed ballot envelope and affirmation."¹⁰⁹ The district court also rejected the interests that the state offered to justify the disqualification of these ballots. As long as the state "is able to discern in its regular course that the ballot is cast by a lawfully-registered voter," the district court saw no need to invalidate a ballot because of a deficiency in the printing or signing of the voter's name on the ballot's envelope.¹¹⁰

As with the wrong-location ballots, the Sixth Circuit unanimously determined that the district court was incorrect on both parts of its *Anderson-Burdick* balancing. First, the Sixth Circuit saw the burden as minimal:

In our view, the [district court's] difficulty in measuring the voter burden . . . stems from the fact that all of the identified deficiencies arise from voters' failure to follow the [envelope's] rather simple instructions: (1) print name, (2) provide identification [which was not at issue in the case], and (3) sign the affirmation appearing at the bottom.¹¹¹

¹⁰⁸ *Id.* at 345.

¹⁰⁹ *Serv. Emps. Int'l Union, Local 1 v. Husted*, 887 F. Supp. 2d 761, 790 (S.D. Ohio 2012).

¹¹⁰ *Id.* at 791.

¹¹¹ *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 599–600 (6th Cir. 2012) (footnote omitted).

Second, the Sixth Circuit did not hesitate to view the state as fully justified in enforcing these requirements: “Ohio’s legitimate interests in election oversight and fraud prevention easily justify the minimal, unspecified burden” claimed by the plaintiffs.¹¹²

Let us contemplate for a moment the possibility that the explanation for the Sixth Circuit’s unanimous reversal of the district court on these two other provisional ballot issues (the wrong-location ballots and the deficient envelopes) is simply that the district judge was willfully unfaithful to the requirements of *Anderson-Burdick* balancing. Even if true, it should be troublesome that *Anderson-Burdick* balancing is amorphous enough that it is possible for a judge (without regard to the actual requirements of the law) to write an opinion achieving his or her desired result, which subsequently must be reversed on appeal. What if the appellate judges themselves willfully choose to follow their own personal views rather than what the law requires? Then they could use *Anderson-Burdick* balancing to write whatever opinion they want, and it would be necessary to take the case to the Supreme Court in order to reverse their willful disobedience. And, of course, if a majority of the Supreme Court chooses to be willfully disobedient to the Court’s own precedent, there is no possibility of further recourse.

Still, a better explanation for the disagreement between the district court and Sixth Circuit on these two provisional ballot issues is the malleability of *Anderson-Burdick* balancing itself. The district court probably thought that it was applying *Anderson-Burdick* in good faith, as did the Sixth Circuit. It is simply that *Anderson-Burdick* balancing is such an imprecise instrument that it is easy for the balance to come out one way in the hands of one judge, yet come out in the exact opposite way in the hands of another. A test this indeterminate is arguably no test at all, and thus the federal constitutional law that is supposed to supervise the operation of a state’s electoral process has little objectivity or predictability.

This indeterminacy exists in *Anderson-Burdick* balancing alone, without regard to *Bush v. Gore*. Yet *Bush v. Gore* only adds to the indeterminacy. Incorporating an “arbitrariness” standard within the *Anderson-Burdick* inquiry¹¹³ does not yield any more definitiveness. What is “arbitrary” is just as amorphous as what is unjustified under a case-by-case balancing of burdens and state interests.

¹¹² *Id.* at 600.

¹¹³ *Bush v. Gore*, 531 U.S.98, 105 (2000) (“The question . . . is whether the recount procedures . . . are consistent with its obligation to avoid arbitrary and disparate treatment of the [voters].”).

V. TOWARDS AN ALTERNATIVE APPROACH: AN EXPLICIT INQUIRY INTO IMPROPER PARTISANSHIP

Regrettably, there appears to be no easy way out of the current morass. One option would be to abandon the effort altogether and to return to a posture of judicial hands-off, as existed when the so-called “political question doctrine” reigned.¹¹⁴ Yet this option, even apart from its inconsistency with precedent, is ultimately unattractive. An examination of the cases, both old and new, reveals a need for the federal judiciary to maintain a supervisory role over the administration of elections by state governments. Even before *Bush v. Gore*, there were cases in which a state’s manipulation of its own voting rules cried out for federal court intervention under the authority of the Fourteenth Amendment, in the name of Due Process or Equal Protection.¹¹⁵ Moreover, the “right church, wrong pew” case¹¹⁶ from 2012 only confirms that state law cannot be left to itself when it comes to the operation of the voting process. No fair-minded person would want to leave in place a state regime that disqualified the ballots of eligible and innocent voters in that situation. Therefore, when the federal judiciary is able to stop such egregious wrongdoing, it would be obtuse to say that the federal judiciary should stand aside and let the wrongdoing prevail.

Another option would be to strive for a more definitive version of *Anderson-Burdick* balancing. But I fear that this goal will prove illusory. Even Justice Scalia’s effort at greater precision is unavailing, as shown by his acceptance of *Bush v. Gore* and its extremely imprecise reasoning. Moreover, if Justice Scalia’s categorical balancing would not condemn the disqualification of “right church, wrong pew” ballots, then it is not worthy of further consideration (for the reasons just stated, namely that any version of federal constitutional law that would permit this injustice should be jettisoned in favor of a fairer constitutional jurisprudence). Conversely, if Scalia’s approach con-

¹¹⁴ *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), a case involving a dispute over which of two competing state constitutions governed in Rhode Island, created the political question doctrine. *Id.* at 56. *Colegrove v. Green*, 328 U.S. 549 (1946) (plurality opinion), represents the doctrine’s high water mark, invoking its applicability to block a federal constitutional challenge to a state’s congressional reapportionment. *Id.* at 552 (“We are of opinion that the petitioners ask of this Court what it is beyond its competence to grant.”). *Baker v. Carr*, 369 U.S. 186 (1962), essentially repudiated *Colegrove*’s reasoning and ushered in the new era of federal court supervision of state electoral rules. *Id.* at 203.

¹¹⁵ See *Roe v. Alabama*, 68 F.3d 404, 406–07 (11th Cir. 1995); *Griffin v. Burns*, 570 F.2d 1065, 1065 (1st Cir. 1978).

¹¹⁶ *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 599.

demns this disqualification, then it has just as much difficulty distinguishing invalid and valid electoral rules as the *Crawford* plurality's more flexible form of *Anderson-Burdick* balancing.

At root, the problem of imprecision exists because balancing concerns what European jurists (among others around the world) call "proportionality."¹¹⁷ The goal of balancing is to condemn disproportionate burdens on the exercise of voting rights. But what burdens are disproportionate is exceedingly difficult to measure or quantify, despite the strenuous efforts of scholars to do so.¹¹⁸

Perhaps a better strategy would be to relocate the judicial inquiry. Instead of attempting to measure burdens and interests, perhaps federal judges should ask whether the state's administration of the voting process is a ploy to achieve a partisan advantage. After all, the need for federal court intervention is greatest when one party is attempting to capture the electoral machinery to tilt the playing field in its favor.¹¹⁹

Something like this approach seems to have been at work in *Bush v. Gore*, even if it was not explicitly part of the Court's reasoning. The majority of the U.S. Supreme Court most likely intervened in *Bush v. Gore* because they thought the majority of the Florida Supreme Court was endeavoring to distort Florida law in an effort to swing the election to Gore.¹²⁰ Had the majority of the U.S. Supreme Court been

117 For a thorough account of this jurisprudential principle, see AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir trans., 2012).

118 Barak offers what he calls "principled balancing," but he does not discuss how it would apply in the context of voting rights or how it would be more precise than *Anderson-Burdick* balancing. See *id.* at 542–47. Indeed, he describes American-style balancing in the context of constitutional rights as a source of inspiration for his approach to "principled balancing," but ultimately he concludes that the two differ, at least in part, because American-style balancing sometimes can be too formulaic in its approach. *Id.* Thus, although it would be interesting to consider the possibility of applying more systematically the "proportionality" inquiry to the context of voting rights, I do not expect that it ultimately would offer more precision and predictability than *Anderson-Burdick* balancing.

119 My Moritz colleague Dan Tokaji has suggested something along the same lines, emphasizing the need for federal court review to block inappropriately partisan manipulation of the voting process by state officials. See, e.g., Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 150–53 (2009); Daniel P. Tokaji, *Judicial Activism and Passivism in Election Law*, 159 U. PA. L. REV. PENNUMBRA 274, 282 (2011), <http://www.pennlawreview.com/online/159-U-Pa-L-Rev-PENNumbra-273.pdf>. In this Essay, I push this point further than I believe Dan has thus far: rather than having the concern of partisanship be a reason to elevate a federal court's level of scrutiny under *Anderson-Burdick* balancing, as Dan has suggested, see Tokaji, *Judicial Activism and Passivism in Election Law*, *supra*, at 282, perhaps the issue of improper partisanship should replace *Anderson-Burdick* balancing as the focus of federal court inquiry.

120 See, e.g., Amar, *supra* note 5, at 950.

more upfront about this motivation in its opinion, it could have reduced the criticism that its decision was unprincipled; the same standard would apply whenever a state supreme court is attempting to sway an election in one party's favor. Moreover, this basis of decision could have been evaluated on its merits: was the Florida Supreme Court in fact acting in a partisan fashion, and was the U.S. Supreme Court's response to that partisanship the appropriate one?

This same alternative approach also would have put *Obama for America v. Husted* on a firmer footing. The Sixth Circuit majority there hinted that something like this was going on in its analysis. Towards the end of its opinion, the Sixth Circuit majority expressed the fear that “[p]artisan 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.”¹²¹ But why not come right out and say that such partisanship is exactly what the Sixth Circuit majority thinks is going on in the actual case before it? Suppose the majority had simply stated: the Republican-dominated state legislature took away the last three days of early voting in order to disadvantage Democrats, and that fact by itself is enough to invalidate the maneuver under the Fourteenth Amendment. Such straightforward reasoning would not be susceptible to the criticism that one cannot discern the principle on which the decision relies, and therefore one cannot determine when the precedent would govern in a future case.

This alternative partisanship inquiry, if adopted, would not be perfect in its implementation (even though it would be more predictable than current doctrine). Sometimes the federal courts would wrongly accuse a state of improper partisanship. In other instances, the federal courts would fail to detect improper partisanship at work. But a federal judiciary focused on ferreting out improper partisanship would be aiming at just the kind of mischief it should be endeavoring to undo. Lawyers would know that their task would be to introduce, or refute, evidence of partisan bias, rather than guessing about how to weigh competing and immeasurable values or what qualifies as arbitrary.

Moreover, this partisanship inquiry would achieve much the same goals that *Anderson-Burdick* balancing was attempting to address. After all, a state electoral system that is untainted by partisan manipulation is unlikely to impose inappropriate burdens on voters and un-

¹²¹ *Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012).

likely to serve state interests that are illegitimate or insufficiently worthy of federal court respect. Conversely, a state electoral system that has been distorted by a partisan effort to obtain an unfair advantage is inherently imposing improper burdens on the electorate, with the state commandeered to pursue interests that are intrinsically illegitimate and deserving of federal court condemnation.¹²²

Thus, wrongful partisanship is what the federal courts should be after in future election cases. At least this alternative approach is worth a try. It would seem unlikely to be more problematic than the current situation, with the extreme indeterminacy of *Anderson-Burdick* balancing supplemented by the “arbitrariness” inquiry of *Bush v. Gore*.

Finally, if the federal judiciary in election cases is explicitly looking to root out the vice of manipulative partisanship, the federal judges are more likely to be sensitive to whether they themselves are acting with sufficient judicial virtue in this respect. The single greatest risk from federal court involvement in election cases is that the federal judges themselves will act in a partisan manner, attempting to manipulate electoral outcomes in their party’s favor. In our system of government, which gives the federal judiciary the last word in cases involving claims of federal constitutional law, the only protection against this risk is that the federal judges act with sufficient virtue to set aside whatever partisan impulses they might have. When the issue of partisanship is not openly discussed in these cases as part of the judicial inquiry in enforcing Due Process and Equal Protection, then it is easier for federal judges to keep hidden—both from themselves as well as the public—partisan sentiments that they (like other actors in the system) may harbor and act upon. But if eliminating improper partisanship becomes the explicit goal in this area of federal constitutional law, then the judges will find it hard to avoid asking themselves whether their conduct in these cases is also immune from improper partisanship. This increased self-policing of their own motives on the part of the federal judiciary is the best that we can hope for, at least for the foreseeable future.

In this respect, 2012 offers some promising signs. In its consideration of high-profile election disputes, the federal judiciary was, in fact,

¹²² See generally Samuel Issacharoff & Richard H. Pildes, *Epilogue: Bush v. Gore and the Constitutional Right to Vote* (N.Y.U. Sch. Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 13-05, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227062 (describing and applauding the federal judiciary’s greater sensitivity to the partisan manipulation of the democratic process).

less divided along partisan lines than it had been in 2008.¹²³ Whether this development was accidental or intentional, it is worth building upon. Whatever happens in terms of election litigation between now and 2016, let us hope that federal judges do not act in a way that warrants criticism that they are deciding these cases according to partisan impulses. If federal judges see it as their job to block the improper partisan impulses of other actors in the electoral system, then it is likely they will be more vigilant in setting aside the partisan impulses they find within themselves.

¹²³ See Hasen, *supra* note 14, at 1868.