WHAT TO EXPECT WHEN YOU'RE ELECTING:

FEDERAL COURTS AND THE POLITICAL THICKET IN 2012

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BY RICHARD L. HASEN

Introduction: Once More Into the Political Thicket

It is not your imagination. Over the last decade, since the Supreme Court's decision in *Bush v. Gore* ending the controversy over whether George W. Bush or Al Gore earned Florida's electoral votes in the 2000 election and therefore the presidency, the amount of election law litigation has more than doubled—from about 94 cases nationally before 2000 to about 237 cases per year afterward. Each election season since 2000 has seen its share of high-profile election disputes, including the following:

- the 2004 dispute over election challengers in Ohio polling places, culminating in an opinion issued by Justice Stevens of the U.S. Supreme Court early in the morning on Election Day;
- the 2006 dispute over 18,000 mysterious "undervotes" cast on electronic voting machines in a U.S. congressional race in Sarasota County, Fla.;
- the dispute between Norm Coleman and Al Franken over the results of the electoral contest for the U.S. Senate seat in Minnesota; and
- the litigation conducted in 2010 over the proper counting of misspelled write-in ballots cast for Lisa Murkowski in her fight to retain her Alaska U.S. Senate seat against the Tea Party insurgent, Joe Miller, who wrested the Republican Party's nomination from her.

These suits raise difficult constitutional and statutory questions.[1]

The election to be held in November 2012 should be no different. We have seen already lawsuits over whether Rick Perry, Newt Gingrich, and Rick Santorum were entitled to be placed on the ballot for the Virginia Republican presidential primary despite their failure to turn in enough signatures on the petition; whether the U.S. Department of Justice erred in objecting, under § 5 of the Voting Rights Act, to South Carolina's new voter identification law, which the state wants to use for its elections in the fall; and dozens of redistricting controversies, one of which already reached the Supreme Court.[2]

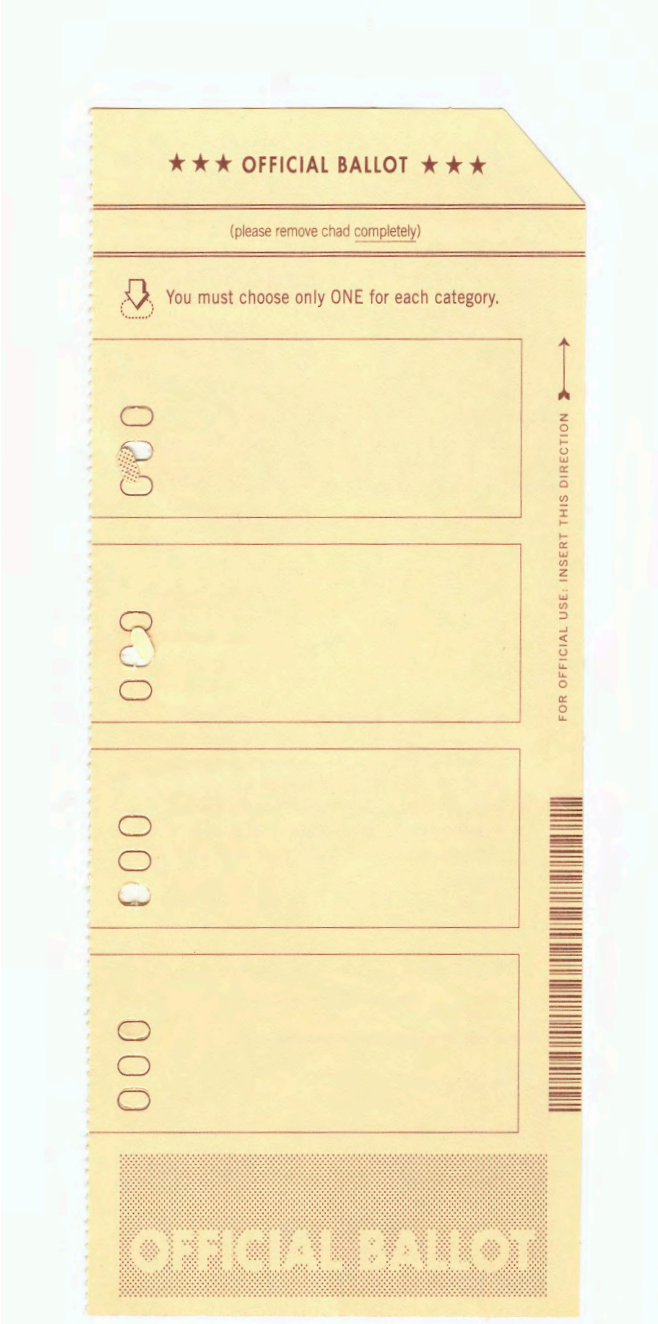
Litigants bring much of this litigation to state courts—by my count, since 2000, a majority of cases involving election law has been filed in state court rather than federal court. As in 2004 and 2008, however, federal courts should expect to play a crucial role in deciding important election law disputes in the run-up to the 2012 elections; the cases will undoubtedly involve issues ranging from voter registration disputes to ballot access questions and campaign finance regulations. If we are lucky, there will not be post-election contests or challenges to electoral results requiring federal courts to determine the proper winner of the election. If those lawsuits come, they may raise difficult constitutional questions about the meaning of *Bush v. Gore* in the context of disputes over provisional or absentee ballots.[3]

Election law litigation in the heat of the election season strains *all* courts by prompting questions about the legitimacy and fairness of courts in a high-stakes, high-salience context: when judges rule in ways that benefit the political party of which they were (or remain) members, losing litigants, the media, and the public—fairly or not—raise issues of bias and favoritism. But *federal* election litigation is especially sensitive, because litigants often go to federal court to make an end run around, or neutralize, state court decisions in the same election dispute. Some federal election litigation, then, raises additional issues of comity and federalism absent in the litigation of state election law.

This brief article has three objectives:

- to canvass the nature of election law disputes that are likely to be brought to federal courts during the 2012 election season, focusing on constitutional questions arising from the interaction of state and federal courts in this area;
- to discuss timing strategies that federal courts can and should use in order to avoid conflicts with state courts and to avoid becoming further enmeshed in the political thicket; and
- perhaps the most controversial aim, by using examples from two important election law cases—*Roe v. Alabama* and *Ohio Republican Party v. Brunner*—to suggest that, when evaluating election law disputes, federal courts should be aware of the potential for subconscious bias on the part of election administrators, state courts, and federal judges themselves.

The article concludes by proposing steps federal courts can take to minimize the potential for subconscious judicial bias and threats to the legitimacy of both the judiciary and the electoral process.



Federal Courts' Entry into the Political Thicket

Federal Statutes

It is probably surprising to find that there is relatively little federal statutory law governing elections, at least as compared to state and local election laws. The United States has what has been described as a "hyperfederalized" approach to the administration of elections, leaving many decisions about ballot machinery, voter registration rules, and other technical minutiae to counties or smaller units of government. No federal agency, for example, mandates detailed standards for the accuracy and reliability of voting machines, the rules for ballot access, or the design of ballots.[4]

Despite this localism, major federal statutes govern certain aspects of the election process. The 1965 Voting Rights Act protects the voting rights of minorities through a number of provisions, including a ban on literacy tests and the requirement that jurisdictions with a history of racial discrimination in voting obtain approval (or "pre-clearance") from the U.S. Department of Justice or a three-judge court in Washington, D.C., before making any changes in their voting practices or procedures. Two federal statutes, the Federal Election Campaign Act and the Bipartisan Campaign Reform Act, govern the rules for campaign financing in federal elections. The National Voter Registration Act, the Help America Vote Act, and various amendments to acts protecting military and other overseas voters impose certain standard requirements for the administration of elections, such as a requirement that absentee ballots be mailed to overseas voters at least 45 days before an election.[5]

Each of these statutes provides a basis for potential intervention by federal courts during the upcoming election season. Although we do not know precisely which issues will be brought to federal court in 2012, at the very least, federal courts will decide if a number of states will or will not be able to implement photographic voter identification requirements in the 2012 elections consistent with the dictates of the Voting Rights Act. In short, statutory decisions by federal courts, though just a small slice of election litigation, can be consequential.

Federal Constitutional Claims Against State Election Laws and Procedures

Although adjudication of federal statutory claims by federal courts can raise difficult and important questions, federal court adjudication of constitutional claims against *state* election laws and procedures is much trickier because of issues of comity and federalism. Sensitive issues may arise in the context of an imminent or a recently completed close election in which the federal court's decision directly or indirectly can determine the winner of the election. Sometimes these determinations by a federal court change the result of electoral outcomes declared by state courts.

A recent example of a case in this category is *Hunter v. Hamilton County Board of Elections*, a long-running dispute in Ohio over a juvenile county judgeship. The county's Board of Elections counted 27 provisional ballots cast by voters in the wrong precinct because of poll-workers' error during an early voting period. But the board refused to count additional provisional ballots which may have been cast in the wrong precinct because of poll-workers' error on Election Day, and those disputed ballots exceeded the vote margin between the two candidates. As a matter of state law, the Ohio Supreme Court held that ballots from the wrong precinct should not be counted, even if the error was the result of poll-workers' error. However, a federal district court and a panel of judges of the U.S. Court of Appeals for the Sixth Circuit applied legal principles used in the Supreme Court's decision in *Bush v. Gore* and held that equal protection principles required that *all* provisional ballots cast in the wrong precinct because of poll-workers' error be counted once election officials decided to count *some* similarly situated ballots. The case is ongoing.[6]

As *Hunter* illustrates, constitutional claims in these federal election cases often involve allegations of Fourteenth Amendment equal protection or due process violations. For another example, consider Joe Miller's lawsuits in the 2010 Alaska U.S. Senate election, in which he argued that misspelled write-in votes potentially cast for Lisa Murkowski

should not be counted. In state court, Miller argued that the counting of misspelled ballots violated state law. In parallel federal court litigation, Miller argued that allowing election officials to decide which misspelled ballots to accept deprived him of his right to equal protection of the laws by treating similar ballots differently. He also argued that the way the misspelled write-in ballots were counted violated his federal due process rights, because the state was changing the rules for counting ballots in the midst of the election dispute. Finally, Miller argued that such a change in election rules by Alaska election officials, rather than by the state legislature, violated the constitutional provision guaranteeing state *legislatures* the power to choose the rules governing federal elections.[7]

Why would someone like Joe Miller file two suits, one in state court raising state claims and one in federal court raising U.S. constitutional claims? After all, state courts have the power to adjudicate the federal constitutional claims, and, as provided by the U.S. Constitution, decisions handed down by both state and federal courts are subject to review by the U.S. Supreme Court.

Federal court litigation has several advantages. Federal courts may be more sensitive to vindication of federal constitutional rights—an idea popularized decades ago by Burt Neuborne, a constitutional lawyer, in his article entitled "The Myth of Parity" and published in the *Harvard Law Review* in 1977. Even if state courts these days are now equally willing to protect federal constitutional rights, a federal suit gives a litigant another bite at the apple in a potentially better forum. After the case has been filed, if the federal judge seems hostile to the constitutional claims, a litigant may simply drop the federal lawsuit (potentially adding the federal constitutional claims in state litigation). An important, but barely known, example of this strategy occurred in the 2000 election, when George W. Bush's lawyers filed suit in federal court in an effort to require Florida election officials to count late-arriving absentee ballots from overseas voters. When it appeared that the judge was not only about to rule against Bush's argument but also prepared to go further and declare that additional overseas ballots already counted should not have been counted, Bush's lawyers dropped the federal lawsuit. On the other hand, while *Bush v. Gore* was pending, Bush's lawyers continued pushing their equal protection arguments in parallel federal litigation in the U.S. Court of Appeals for the Eleventh Circuit. That suit was made irrelevant by the Supreme Court's decision in *Bush v. Gore*.[8]

Federal Constitutional Claims Against State Courts

The most sensitive type of interaction between federal and state courts in the area of election law arises when candidates in election disputes argue in federal court that the state court *itself* has violated the candidate's constitutional rights by adjudicating the challenge to the electoral results. The most famous example in this category is a case heard in 1995—*Roe v. Alabama*—which involved contested elections for state's chief justice and the state treasurer of Alabama. In both of those races, the results were close. Election officials, citing Alabama law, refused to count the ballots of absentee voters who had failed to have their ballots notarized or witnessed by two people. Two absentee voters who had failed to meet this affidavit requirement sued in state court to have their votes counted, and there were enough of these ballots at stake to have a potential effect on the outcome of both races. A state court judge ordered otherwise complying absentee ballots to be counted despite the failure to meet the affidavit requirement.[9]

The Republican candidates for chief justice and state treasurer, along with other plaintiffs, then filed suit in *federal* court seeking a preliminary injunction barring Alabama election officials from complying with the state court's order. The federal district court judge granted the injunction, citing the fact that the past practice of Alabama election officials was not to count such ballots. A three-judge panel of the U.S. Court of Appeals for the 11th Circuit voted 2-1 to affirm the grant of the preliminary injunction, holding that the counting of such ballots could violate the constitutional due process rights of the plaintiffs. The court ruled that a "post-election departure from previous practice in Alabama" will "dilute the votes of those voters who met [the affidavit requirement] as well as those voters who actually went to the polls on election day. Second, the change in the rules after the election would have the effect of disenfranchising those who have voted but for the inconvenience imposed by the notarization/witness requirement." The circuit court then certified to the Alabama Supreme Court the question whether absentee ballots lacking the requirement that they be notarized or witnessed by two individuals should be counted as legal ballots.

The Alabama Supreme Court accepted the case for certification after protesting the federal courts' intrusion into the state's case. "For over 70 years, decisions of this court have consistently construed Alabama's election laws liberally, where possible, to permit Alabama's citizens to express their will at the polls." The court cited some of the history of use of this "Democracy Canon" of statutory construction in Alabama, including its use in cases involving absentee ballots that did not comply with the law. Noting that a majority of jurisdictions apply a substantial compliance standard to similar voting laws and seeing that the case contained no allegations of "fraud, gross negligence, or intentional wrongdoing," the Alabama Supreme Court concluded that the ballots should be considered legal as long as they named the place of residence of the person casting the ballot, provided the reason for voting by absentee ballot, and include the voter's signature.

After receiving the answer from the Alabama Supreme Court, the Eleventh Circuit panel nonetheless remanded the case to the federal district court to take evidence on prior practice in Alabama regarding the treatment of absentee ballots lacking an affidavit. The district court conducted a trial and concluded that the prior practice in all but one of Alabama's electoral jurisdictions was not to count such ballots. The Eleventh Circuit then held that counting such ballots would infringe on the constitutional rights of the plaintiffs in the federal lawsuit, thereby ending the election contest and permanently barring the state court from counting such bal-

lots. As a result, the Republican candidates who brought suit in federal court assumed the offices that were in dispute.

Timing is Everything

Encouraging Early Suits

In *Roe v. Alabama*, the federal courts could not have avoided the clash with state courts through attention to timing. But in many other disputes, proper timing can diffuse tensions between federal and state courts while still protecting litigants' federal constitutional rights. In the controversy involving Joe Miller in Alaska, for example, the federal court retained jurisdiction over the case but did not expedite consideration of the constitutional questions immediately. The court let the state court resolve the state law issues first. The federal court ruled after the state court resolved the state law questions about the meaning of the statute dealing with counting write-in votes and after the actions of state election officials made it clear that the number of disputed write-in votes for Murkowski was much lower than Murkowski's margin of victory. By allowing the state litigation and vote counting to run its course, the federal court minimized federal intrusiveness in a state law issue unless and until a time that federal review became necessary and prudent. By the time the federal court acted, the federal constitutional issues were basically irrelevant.[10]

Even though federal courts often have good reason to go slow in the context of parallel state and federal election challenges, at other times federal courts have a reason to move quickly. When possible, courts should encourage litigation over disputed election rules and procedures early on in the election process before Election Day and before the resolution of the issues may become intertwined with a post-election challenge of election results. Courts should not use doctrines such as standing to avoid deciding such disputes early.[11]

Consider two examples. First, in the presidential election in 2000, it became apparent on Election Day that the design of the ballot used in Palm Beach County, Fla., to choose a presidential candidate confused many voters in the county. Because the so-called butterfly ballot listed candidates' names on two facing pages, many voters asked to punch out a cardboard chad corresponding to the candidate of their choice mistakenly chose the wrong candidate or punched the chad corresponding to the name of two candidates (for president and vice president). Imagine if someone had sued before the election, claiming that the ballot was likely to confuse voters, and had credible proof to that effect. Courts should hear such a challenge and, if convinced that the ballot is confusing and violates the law, should enjoin its use. The alternative to acting early is the loss of any remedy. As a Florida court later determined, after the presidential election, a do-over for confused Palm Beach County voters would have been unconstitutional.

The second example is California's gubernatorial recall election in 2003. California's secretary of state had agreed to phase out unreliable punch-card voting machines by the 2004 elections to settle a case arguing that the use of the machines in some parts of the state violated equal protection principles. Nonetheless, the secretary of state authorized the use of the machines for the last time in the unexpected special recall election. The plaintiffs in the case claimed that the punch-card machines violated voters' rights and sued to block use of the machines for the recall election. A federal court first refused to block the use of the punch-card voting machines, but a Ninth Circuit panel of judges reversed the ruling and barred the use of the machines. Then an en banc panel of the Ninth Circuit reversed the panel and restored the district court's ruling. The en banc court said that the harm plaintiffs alleged was too speculative; if the machines turned out to be problematic, a suit could be filed after the election was held.

It is a good thing that the outcome of the election was not close. Despite the fact that there were only four questions on the recall ballot, and the yes/no recall question was by far the most prominent of the four questions, almost 9 percent of the voters in Los Angeles—who had to use the disputed punch-card machines—did not record a valid vote on the first question. This statistic compares to an undervote rate of 0.75 percent in Alameda County on this same question; Alameda used electronic voting machines. The Ninth Circuit erred in not briefly delaying the election until another voting system—such as paper ballots using pen and paper—could be put into place. Had the election been close, nothing could have been done, short of a do-over election, to remedy any constitutional problem caused by using the punch-card voting machines.

Discouraging Late Suits

The prior section of this article demonstrated that courts should decide meritorious litigation over elections when delays can cause irreparable harm to plaintiffs. Allowing early suits in election cases also helps preserve judicial legitimacy by keeping courts out of the most controversial election lawsuits, in which courts must determine the winner of a close election.

On the flip side, courts should aggressively use the doctrine of laches to bar litigants from bringing suits that they could have brought earlier. Allowing litigants to sit on their rights essentially gives the litigants an option: if they win, they keep quiet about the election law problem; if they lose, they seek to overturn the election decision.

The recent federal litigation over access to ballots for the Republican Party's presidential candidates in Virginia offers a good illustration of this point. Virginia's ballot access rules are among the toughest in the nation. Only state residents are allowed to collect signatures, and, to get on the ballot, candidates must collect at least 400 valid signatures in each congressional district, with a total of at least 10,000 valid signatures.

Although Virginia's ballot access rules are unduly strict, they did not come as a surprise. Candidates know they need to fight hard to get on the ballot in Virginia—it takes hard work, good organization, and determination. Rick Perry's campaign—along with the campaigns of Newt Gingrich and Rick Santorum campaigns, which eventually joined the lawsuit—knew full well the hurdles they would face to get their names on the ballot. But Perry did not

sue early enough in the process to try to get Virginia to change its rules to allow nonresidents to collect signatures or to lower the threshold number of signatures required. Instead, Perry collected fewer than the number of signatures required to get on the ballot. He then sued only after Virginia officials declared him ineligible to appear on the ballot.

The federal district court held that Perry could probably show that Virginia's ban on nonresident circulators violated the First Amendment rights of Perry and his supporters. But the court held that Perry's suit was barred by laches: the emergency was of his own making. As the Fourth Circuit, which affirmed the district court's ruling, stated, Perry

> had every opportunity to challenge the various Virginia ballot requirements at a time when the challenge would not have created the disruption that this last-minute lawsuit has. [Perry's] request contravenes repeated Supreme Court admonitions that federal judicial bodies not upend the orderly progression of state electoral processes at the eleventh hour. [Perry] knew long before now the requirements of Virginia's election laws. There was no failure of notice. The requirements have been on the books for years. If we were to grant the requested relief, we would encourage candidates for President who knew the requirements and failed to satisfy them to seek at a tardy and belated hour to change the rules of the game. This would not be fair to the states or to other candidates who did comply with the prescribed processes in a timely manner and it would throw the presidential nominating process into added turmoil.[12]

Election law litigants do not need to be clairvoyant, anticipating all possible election law problems and suing over them early on. Rather, for the limited class of election law issues that are likely to arise and about which a prudent campaign would have advance notice (such as state ballot access rules), the rule should be sue early or do not sue at all.

Fighting (Subconscious) Bias in Election Cases

The United States is virtually alone among mature democracies in using partisan election officials to administer elections. In 33 states, the chief election officer of the state (usually the secretary of state) runs for the position in an election as a Democrat or a Republican. Many local election officials are elected in partisan elections or chosen by partisan elected officials. The "counting teams" that recounted ballots in the Florida 2000 dispute were partisan. It should come as no surprise that Democratic election officials were more likely than Republican election officials to count disputed ballots for Gore and less likely to count disputed ballots for Bush.[13]

It is tempting for the public to believe that partisan election officials make decisions about issues involving the administration of elections and challenges to election results in a way that benefits candidates from their political party. But whether deliberate bias is common or rare, there seems ample evidence that at least *subconscious* bias is at work when such decisions are made. Consider what happened after the Florida controversy ended and a consortium of media organizations had the University of Chicago's National Opinion Research Center hire people to count the uncounted ballots in Florida. Counters were to determine whether an uncounted ballot had a legal vote, and if so, for which candidate. Each ballot was judged by multiple counters. The counters agreed 96 percent of the time, but the 4 percent of the time they differed covered thousands of ballots—many times the number of votes separating Bush and Gore. Professor Einer Elhauge, who served as counsel for the Florida legislature during the controversy, later wrote about the role of subconscious bias found in the counting done by the National Opinion Research Center:

> On ballots where at least one counter saw a potential vote for Bush or Gore, the counters disagreed 34 percent of the time, 37 percent for punch card ballots. Most worrisome, even with elaborate efforts to screen for political bias, the political affiliation of the counters affected the results. Republican counters were 4 percent more likely than Democratic counters to deny a mark was for Gore. Even more striking, Democratic counters were 25 percent more likely to deny a mark was for Bush.

That such subconscious bias could exist when the stakes were low means it is even more likely in a high-stakes case when the decision matters. As Cass Sunstein has noted, deep psychological forces cause us to accept arguments in line with our pre-existing beliefs and to discount contrary evidence.[14]

The potential for subconscious bias should cause federal courts to take an especially close look at election decisions made by partisan election administrators (and even partisan state judges) that benefit a candidate from the same party. This does not mean that every decision made by a partisan election official in a contested election should be subject to strict scrutiny. It does mean, however, that courts should take a hard look (or use a skeptical eye) in evaluating neutral reasons offered for a decision related to a controversial election.[15]

Unfortunately, the potential for subconscious partisan bias exists even among members of the federal judiciary. In recent years, judges who have had to rule on contested election law issues have often lined up on the side favored by their political party. Consider two examples.

First, in *Roe v. Alabama*, described earlier, the judges' decisions about how to handle the election dispute broke along party lines. A Democratic trial judge and Democratic state Supreme Court judges voted to allow the counting of ballots that helped the Democratic candidates. Republican federal judges voted to block the counting of the ballots. To the federal court and supporters of the federal lawsuit, the state courts were engaged in making politicized judgments—a Democratic court helped Democratic candidates by changing the counting rules after the fact. To

opponents of state court intervention, a Republican district judge and Republican panel on the Eleventh Circuit were sticking their noses into state court business and were themselves engaged in politicized judging. The correlation is probably not a coincidence but can probably be better explained by subconscious psychological forces.[16]

The second example is a 2008 dispute, *Ohio Republican Party v. Brunner*. The case concerned the following technical provision in the Help America Vote Act (HAVA): "the chief state election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration." Despite this requirement, Secretary of State Jennifer Brunner, a Democrat, resisted sharing mismatched information with county officials because she did not trust the information or the officials. She said that applying the database matching requirement would disenfranchise legitimate voters because of errors in the database.[17]

The Ohio Republican Party sued to require Brunner to make the mismatch list available to the county's election officials, claiming that her interpretation of the mismatch provision violated the act. A federal district judge appointed by President Reagan issued a temporary restraining order requiring Brunner to reprogram her department's computers to provide the mismatch lists to the counties. Sweeping away her objections that Congress did not give entities such as the Ohio Republican Party a right to sue for violation of the mismatch provision of the act, the court wrote that it was "clear" that Brunner was in violation of the HAVA requirement. In addition, relying on two articles published in Ohio newspapers that focused on alleged voter registration fraud by ACORN, the court said that the potential for voter fraud made reprogramming an urgent need.

Brunner immediately sought to overturn the district court's order. A panel of three judges from the U.S. Court of Appeals for the Sixth Circuit voted 2-1 to reverse the order. The court majority, made up of two Democrats, expressed doubt that the party was even allowed to seek federal court relief for this type of HAVA violation but said that, even if the party could seek such relief, there was no violation. The majority dismissed the district court's concerns about ACORN-related voter fraud: "What is striking about the district court's decision is the complete lack of factfinding. The district court stressed that the public, as well as [the Ohio Republican Party] would be injured by voter fraud if a [temporary restraining order] were not granted. This kind of inquiry demands that extensive factfinding. However, rather than undertake such factfinding, the district court, citing two newspaper articles, merely assumed that there will be widespread voter fraud absent the issuing of a TRO."

The dissenting Sixth Circuit judge, a George W. Bush appointee, wrote a strong opinion supporting the district court's decision. The dissent began as follows: "Defendant Ohio Secretary of State Jennifer Bruner's lack of concern for the integrity of the election process is astounding and deeply disturbing." The acrimony continued when the entire Sixth Circuit heard the appeal of the case en banc. The Sixth Circuit divided almost perfectly along party lines, with judges appointed by a Republican President voting to reinstate the temporary restraining order and judges appointed by a Democratic President voting against the order. The Republican side won because there were more Republican judges.

The debate on the Sixth Circuit mirrored the public debate on these issues. The Republican judges were worried about voter fraud and ruled in a way that would minimize that danger, even if it meant disenfranchising some voters. The Democratic judges were skeptical of the voter fraud claims and voted against ordering Brunner to take steps that could disenfranchise voters, even if it raised the potential for fraud by new voters.

So strong were these countervailing instincts that judges seemed to abandon their usual jurisprudential philosophies. Generally speaking, conservative judges are much more hesitant than liberal judges to read federal statutes expansively to include a private right of action. Liberals are much more willing to interpret statutes expansively, consistent with their overall purposes; conservatives tend to favor narrower, more "textual" readings that adhere to what the conservative judges perceive to be the "plain meaning" of the statute. In the *Brunner* case, however, the Republican judges read the HAVA provision broadly to create a private right of action and interpreted its matching provision well beyond the plain meaning of the text, which on its face required no more than that the chief elections officer engage in a matching exercise. The Democratic judges read the act narrowly, contending that Republicans had no right to sue, and read the statute in a narrow, textual way.

After the loss before the entire Sixth Circuit, Brunner sought emergency relief from Justice Stevens of the U.S. Supreme Court (the justice who handled emergency appeals from the Sixth Circuit), and Justice Stevens sent the question to the entire Supreme Court. In a short unsigned opinion, the Court unanimously reversed the Sixth Circuit, saying it was highly unlikely that Congress had authorized entities such as the Ohio Republican Party to sue for violation of HAVA's matching requirement.

What can courts do to avoid subconscious bias that may arise in suits such as this one? First, judges need to engage in soul searching for subconscious bias. A judge needs to ask: Would the result in the case be the same if we have a *Gore v. Bush* rather than a *Bush v. Gore* lawsuit? Second, courts should try to draw upon principles of law established before the dispute arose. These could include precedent from other circuits, law review articles and treatises, and (soon to come) treatment of issues from the American Law Institute's new Election Law project, which is endeavoring to craft election rules. Rules established before a dispute arises may provide a neutral source for decision-making to avoid charges of lawlessness. Third, courts should take whatever steps they can to craft narrow unanimous opinions resolving such disputes; judicial

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compromise and unity are virtues in such cases.[18]

These steps cannot eliminate the problem of subconscious judicial bias. But judicial awareness of the issue can only help to minimize its effects. As federal courts enter the political thicket once again, prudence, caution, and self-awareness should guide the journey. **TFL**

Richard L. Hasen is Chancellor's Professor of Law and Political Science at the University of California, Irvine, School of Law. The title of this article comes from a segment on Stephen Colbert's television show that aired in 2006, "What to Expect When You're Electing" (www.colbertnation.com/the-colbert-report-videos/77891/november-06-2006/what-to-expect-when-you-re-electing). The title gives new meaning to the term "pregnant chad." © 2012 Richard L. Hasen. All rights reserved.

Endnotes

[1]*Bush v. Gore*, 531 U.S. 98 (2000). On the election litigation statistics, *see* Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69, 90 (2009). Each of the disputes described in this paragraph is detailed in Richard L. Hasen, The Voting Wars: From Florida 2000 to the Next Election Meltdown chs. 5, 6 (forthcoming 2012).

[2]*Perry v. Judd*, __ Fed. Appx. ___, 2012 WL 120076 (4th Cir. Jan. 17, 2012); Eric Conner, *S.C. Sues Feds for Blocked Voter ID Law*, USA Today (Feb. 8, 2012), available at www.usatoday.com/news/washington/story/2012-02-07/south-carolina-voter-id/53001466/1. On redistricting litigation, *see* Justin Levitt's comprehensive collection of redistricting litigation documents in Justin Levitt, *All About Redistricting*, redistricting.lls.edu.

[3]Hasen, *Democracy Canon, supra* note 1, at 90–91 (statistics on election law litigation in state rather than federal courts).

[4]On the hyperfederalized system, *see* Alec Ewald, The Way We Vote: The Local Dimension of Election Suffrage 3 (2009). The U.S. Election Assistance Commission plays an advisory role on such issues, but its power is very limited; *see* Leonard M. Shambon, *Implementing the Help America Vote Act,* 3 Election L.J. 424, 428 (2004). It does set the maximum error rate for voting machines, however. See Help America Vote Act § 301(a)(5).

[5]Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971 (2006)); Amendments to the Federal Election Campaign Act of 1971, Pub. L. No. 93-443, 88 Stat. 1263 (1974); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002); National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg-1–1973gg-10 (2006); Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002); Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff-1–1973ff-6 (2006); Military and Overseas Voter Empowerment Act, Pub. L. No. 111-84, § 575–89, 123 Stat. 2190 (codified at 42 U.S.C. §§ 1973ff–1973ff-2 (2006)).

[6]The most recent case, heard in federal district court, recites the procedural history of the case; *see Hunter v. Hamilton County Board of Elections*, ___F. Supp. 2d ___, 2012 WL 404786 (S.D. Ohio Feb. 8, 2012).

[7]For a recap of the Alaska litigation, *see* Chad Flanders, *How Do You Spell M-U-R-K-O-W-S-K-I? Part I: The Question of Assistance to the Voter*, 28 Alaska L. Rev. 1 (2011); Justin Levitt, *Fault and the Murkowski Voter: A Reply to Flanders*, 28 Alaska L. Rev. 39 (2011).

[8]Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977). On the *Bush* overseas voter example, *see* Hasen, The Voting Wars, *supra* note 1, at 27. On the federal equal protection case, *see Touchston v. McDermott*, 234 F.3d 1133 (11th Cir. 2000) (en banc) (per curiam), *cert. denied*, 531 U.S. 1061 (2001) (denying preliminary injunction).

[9]*Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), gives the procedural history. The next two paragraphs draw from Hasen, *Democracy Canon*, *supra* note 1, at 119–22, and include the citations to the statements made in these paragraphs.

[10]Flanders, *supra* note 7.

[11]On the timing and laches point, *see* Hasen, *Democracy Canon*, *supra* note 1; Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 Stan. L. Rev. 1 (2007); Justin Levitt, *Long Lines at the Courthouse, Pre-Election Litigation of Election Day Burdens*, 9 Election L.J. 19 (2010). On the examples in the next two paragraphs, *see* Hasen, The Voting Wars, *supra* note 1, ch. 1.

[12]*Perry v. Judd*, No. 12-1067, 2012 WL 120076, at *1 (4th Cir. Jan. 17, 2012).

[13]Hasen, The Voting Wars, *supra* note 1, ch. 1. The next few paragraphs come from *id*. at 33–34. The quotation comes from Einer Elhauge, *Florida 2000: Bush Wins Again,* Weekly Standard (Nov. 26, 2001).

[14]Cass Sunstein, *Of Law and Politics*, in The Vote: Bush, Gore, and the Supreme Court 6–7 (Cass Sunstein & Richard A. Epstein eds., 2001).

[15]For an extended argument along these lines, *see* Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions***,** 28 Yale L. & Pol'y Rev. 125 (2009).

[16]Hasen, The Voting Wars, *supra* note 1, at 121.

[17]On the disputes over the *Brunner* case, *see id.* at 112–16, from which I draw this account. The district court's opinion is at 582 F. Supp. 2d 957 (S.D. Ohio 2008). The original opinion of a panel of Sixth Circuit judges is not good law, because the en banc court vacated it. It can be read at moritzlaw.osu.edu/electionlaw/litigation/documents/ORPvBrunnerOct10.pdf. The order of the entire Sixth Circuit sitting en banc and reversing the panel decision is at 544 F.3d 711 (6th Cir. 2008) (en banc).

[18]On the anti-lawlessness principle, *see* Richard L. Hasen, Bush v. Gore *and the Lawlessness Principle: A Comment on Professor Amar*, 61 Fla L. Rev. 979 (2009). For information on the American Law Institute's new Election Law project, visit www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=24.