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THE UNTIMELY DEATH OF *BUSH V. GORE*

Richard L. Hasen

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Shortly before this Article went to press, the Supreme Court agreed to hear the consolidated Indiana voter identification appeals described in detail in Part III.D. *Crawford v. Marion County Election Bd.*, No. 07-21, 2007 WL 1999941 (Sept. 25, 2007); *Indiana Dem. Party v. Rokita*, No. 07-25, 2007 WL 1999963 (Sept. 25, 2007). A few days before the announcement I published an op-ed in the *Washington Post* setting forth why I thought the Court should hear the case. See Richard L. Hasen, *A Voting Test for the High Court*, WASH. POST, Sept. 19, 2007, at A23, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/18/AR2007091801572.html>. The Court will hear the argument in early 2008 and likely issue an opinion before the 2008 presidential election. The Court will have a chance to reconsider its position in the *Purcell* case and perhaps avoid the partisan divide that has plagued the courts and other institutions since *Bush v. Gore*, 531 U.S. 98 (2000).

INTRODUCTION

When the United States Supreme Court decided *Bush v. Gore*,¹ ending the controversial recount of presidential votes in Florida and handing the contested 2000 election to George W. Bush over Al Gore, some election law scholars told a “lemonade from lemons” story.² It is true there was much to criticize about the Supreme Court’s decision to take the case, its equal protection rationale, and its controversial remedial decision to end the recount rather than remand for a recount complying with (newly articulated) equal protection standards.³ But the opinion could usher in an era when courts would use the equal protection clause as a tool to fix some fundamental inequalities in the “nuts and bolts” of our country’s hyper-decentralized election administration system.⁴ These scholars stood opposed to those who saw the case—especially given its language “limiting” its precedential reach⁵—as a “one-day-only” ticket to assure the choice of Bush over Gore for President⁶ and to another group of scholars who saw it as an appropriate resolution of the case,⁷ perhaps avoiding a constitutional crisis.⁸

Moreover, some scholars hoped the Florida controversy culminating in *Bush v. Gore* would make lemonade indirectly as well: the attention generated by the Florida debacle—particularly attention directed to problems with

1. 531 U.S. 98 (2000).

2. See, e.g., Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert Bush v. Gore into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL’Y 357 (2002); Samuel Issacharoff, Op-Ed, *The Court’s Legacy for Voting Rights*, N.Y. TIMES, Dec. 14, 2000, at A39. Constitutional law scholar Cass R. Sunstein advanced a similar argument in *The Equal Chance to Have One’s Vote Count*, 21 L. & PHIL. 121, 133 (2002). See also HOWARD GILLMAN, *THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION* 198 (2001) (“[T]hose who remain resentful [about *Bush v. Gore*] are the most likely to feel tempted into supporting the equal protection rationale of the decision. . . . [in] a classic example of making political lemonade out of lemons . . .”).

3. For a summary of the relevant literature and critiques of the case, see Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004).

4. See Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378 (2001) (characterizing *Bush v. Gore* as the first “nuts-and-bolts” case taken by the Supreme Court); Alec C. Ewald, *American Voting: The Local Character of Suffrage in the United States* 2 (Feb. 2005) (unpublished Ph.D. dissertation, University of Massachusetts, Amherst) (on file with author). Ewald traces the hyper-federalized system back to the colonial period. *Id.* at 52-60.

5. Chad Flanders, Comment, *Bush v. Gore and the Uses of “Limiting,”* 116 YALE L.J. 1159 (2007).

6. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001).

7. See, e.g., Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002).

8. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001).

election machinery and partisan discretion over the counting of votes—would spur state and federal legislative action to fix the problems. One especially important problem is the conflict of interest created when partisan election officials oversee elections in which their party, or even they personally, has a stake in the outcome.⁹

Now, a little over six years later, *Bush v. Gore* is dead. The death did not come in the usual way that Supreme Court cases die, through outright or *sub silentio* overruling in a later case. Indeed, no Court opinion—majority, concurrence, or dissent—has cited the opinion since it was decided.¹⁰ But election law developments in the relatively short time since *Bush v. Gore* show that conservative federal circuit court judges so far have been able to resist the “lemonadization” of *Bush v. Gore*. Worse, the Supreme Court’s recent opinion in *Purcell v. Gonzalez*,¹¹ allowing Arizona to implement (at least temporarily) its controversial voter identification law,¹² shows that the Court itself has not understood the problems it caused with its *Bush v. Gore* opinion. The Court’s decision to quickly issue an opinion in *Purcell*, the casual empiricism of its unanimous opinion, and its discouragement of pre-election litigation all are exceedingly troublesome.

By stating *Bush v. Gore* is “dead,” I am not making the claim that the Supreme Court will *never* rely on the case as precedent in an election administration dispute. I mean instead that the promise of election reform inspired by the case is now dead.¹³ Indeed, a case could come along some day

9. See Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 49 (2004) (advocating reading *Bush v. Gore* as a case about control of excessive partisan manipulation of the electoral process); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409 (2003). The Court perhaps envisioned its *Bush v. Gore* opinion playing this “catalytic” function, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 162 (1999), when it wrote in *Bush v. Gore* that “[a]fter the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting,” 531 U.S. 98, 104 (2000).

10. Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 685 (2006); Chad Flanders, *Please Don’t Cite this Case! The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 144 (2006), <http://thepocketpart.org/2006/11/07/flanders.html>.

11. 127 S. Ct. 5 (2006).

12. *Id.* at 8.

13. I recently declared *Buckley v. Valeo*, 424 U.S. 1 (1976), to be dead, only to have been proven wrong, or at least premature, in my pronouncement. Compare Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 42-46 (2004), with Daniel H. Lowenstein, *BCRA and McConnell in Perspective*, 3 ELECTION L.J. 277, 282 (2004) (“*Buckley* is not only not dead, it may not be dying at all.”). With the latest Supreme Court opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), *Buckley*’s vitality is again in question, but this time from a more speech-

reviving *Bush v. Gore* as precedent.¹⁴ Perhaps it is better to think of the case as *dormant* as a constitutional precedent. My main point is that we should abandon any hope created by the case that the judiciary would serve as an engine of election administration reform.

Bush v. Gore's failure has been not just a failure in the courts. Legislative fixes to problems of election administration have fared no better, except in the area of voting technology. The good news is that changes in voting technology, subsidized by the federal government, mean that many fewer votes are now "lost" due to inadequate vote counting machinery.¹⁵ But the rest of the news is bad. States have not learned what is arguably the primary lesson of *Bush v. Gore*: partisan officials should not run elections because of the obvious self-interest problem. Indeed, election administration has become more, rather than less, politicized.¹⁶ State legislatures have not searched for an honest broker to design and implement fair and impartial electoral rules. Many Democrats appear concerned only about problems of voter "access," while many Republicans appear to care only about voter fraud or "ballot integrity." This divide has played out in a number of areas, most importantly in the enactment by state legislatures of voter identification laws supported almost exclusively by Republicans and opposed almost exclusively by Democrats.

The U.S. Election Assistance Commission (EAC), formed by Congress as part of the Help America Vote Act (HAVA)¹⁷ to fix the problems made apparent by the 2000 Florida debacle, has so far proven ineffective and now appears in danger of becoming a new site for partisan stalemate over election reform. Even given the EAC's ineffectiveness thus far, the National Association of Secretaries of State (NASS), the main body of (mostly partisan and elected) state chief elections officers, has not backed off its resolution calling for the EAC to be disbanded. What little good the EAC can accomplish is being undermined by state officials' need to protect their turf and by lack of funding from Congress.

protective direction. See Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1003922>.

14. For a look at the types of future cases that could raise *Bush v. Gore* equal protection issues, see Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. (forthcoming 2007). For alternative taxonomies, see Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. (forthcoming 2007), and Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. (forthcoming 2007).

15. See *infra* Part II. Even there, bitter controversies continue.

16. It has followed a general increase in partisanship in the United States in recent years. See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 948-49 (2005).

17. Help America Vote Act of 2002, 42 U.S.C.A. §§ 15301-15545 (West 2007).

Unfortunately, the story is even worse than this description. *Bush v. Gore*'s main legacy has been to increase the amount of election-related litigation. As election law has become a political strategy, it threatens to further undermine public confidence in the electoral process. No lemonade, only lemons.

Part I of this Article looks at why the election reform litigation strategy relying on *Bush v. Gore* appears to have failed by examining the Ninth Circuit's California recall litigation and the Sixth Circuit's punch card litigation. Although some lower court judges still may look to the *Bush v. Gore* precedent as a means to election reform, the en banc process in the federal appellate courts has thus far stymied that effort.

Part II considers state and federal legislative and administrative responses to the 2000 Florida election debacle and *Bush v. Gore*. Although vote counting technology has improved, states have made little progress otherwise in fixing their election administration problems. Even within the voting technology arena, well-publicized problems, such as those in Denver and in Florida's 13th congressional district, continue to send the public the message that election "meltdown" is a real possibility. Worse, election administration reform has taken on an increasingly partisan cast. The debate over good election practices is taking place in the absence of good evidence, raising the possibility that some laws, most prominently new laws requiring voters to show identification at the polls, are being enacted for partisan advantage rather than to remedy any real problem. The partisanship, as well as continuing voting technology snafus, appear to be contributing to a troubling party and race divide in public confidence about the election process.

Part III returns to the failure of the courts in the wake of *Bush v. Gore*. It begins by noting that the rise in election litigation that this country witnessed after *Bush v. Gore* continues unabated. It then uses the *Purcell* case to show that the Court has failed to learn the lessons of *Bush v. Gore*. The Court's decision to issue a quick opinion, its casual empiricism, and its discouragement of pre-election litigation demonstrate that all members of the Court—both liberal and conservative Justices—are insufficiently sensitive to the kind of trouble their election law opinions may cause.

The Court in *Purcell* unanimously endorsed an empirically unsupported view that voters "feel" disenfranchised when some amount of voter fraud takes place in elections, and that this "feeling" must be balanced against the interests of voters who may be *literally disenfranchised* by voter identification laws. The opinion is likely to add more confusion, and less equality, to a politically sensitive area of the law and encourage the wave of partisan election administration battles. *Purcell* also shows that the Court failed to learn another lesson from *Bush v. Gore*: because post-election litigation threatens to undermine voter confidence in the electoral process and potentially to undermine confidence in the judiciary as well, courts should encourage litigation *before* elections. But the *Purcell* Court has already sent the wrong

signal on timing, discouraging lower courts from resolving election disputes before, rather than after, an election. This holding may have the ultimate effect of moderately reducing the total amount of election litigation, but only at the expense of eliminating cases for which the only viable remedy may come through pre-election judicial review.

Part III concludes with an examination of Judge Posner's troubling opinion in the recent challenge to Indiana's voter identification law, *Crawford v. Marion County Election Board*,¹⁸ and what that opinion and the dissent by Judge Evans (and Judge Wood's dissent from denial of rehearing en banc) suggest about how other courts will handle future election administration litigation.

The death of *Bush v. Gore* was not unexpected, but its early demise is still something to be mourned.

I. *BUSH V. GORE*'S FAILURE TO IGNITE ELECTION ADMINISTRATION REFORM THROUGH LITIGATION

Briefly,¹⁹ the Supreme Court in *Bush v. Gore* voted 5-4 to end the recount ordered by the Florida Supreme Court in the 2000 election contest brought by Al Gore to overturn a narrow victory in Florida by George W. Bush.²⁰ Seven of the Justices on the Court saw equal protection problems with the Florida Supreme Court's order mandating a statewide manual recount of "undervotes," that is, ballots which were classified by vote counting machines as not including any vote for President.²¹ The U.S. Supreme Court flagged a number of problems with the Florida court-ordered recount, perhaps most importantly the lack of uniform standards for judging when a ballot classified as an undervote by a vote counting machine should be counted in a manual recount as a valid ballot for one of the candidates (the "dimpled chad" problem).²²

18. 472 F.3d 949 (7th Cir. 2007), *cert. granted*, No. 07-21, 2007 WL 1999941 (Sept. 25, 2007), and *cert. granted*, No. 07-25, 2007 WL 1999963 (Sept. 25, 2007).

19. This is not the place to rehash the details of the 2000 Florida saga and the Court's opinions in *Bush v. Gore*. For my own summaries, see Hasen, *supra* note 4, at 382-86. See also RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 42-46 (2003).

20. Because Florida's electoral votes were decisive in the Electoral College, the decision meant that Bush, rather than Gore, would become president.

21. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

22. The other problems included: (1) the fact that the recounts included votes from already conducted manual recounts in selected counties, including both overvotes and undervotes; (2) the fact that the Miami-Dade recount numbers were the result of only partial vote totals, thereby giving no assurance that the recounts included in the final certification would be complete; and (3) the failure of the Florida court to specify who would count the ballots, forcing county boards to include team members without experience in counting ballots. See Hasen, *supra* note 4, at 385.

Two of the seven Justices recognizing equal protection issues, Justices Breyer and Souter, would have remanded the case back to the Florida courts for a recount using uniform standards.²³ The remaining five voted to end the recount, thereby awarding Florida's electoral votes and the presidency to George W. Bush, on grounds that prolonging the counting would deprive Florida of the chance to have its electoral votes counted without challenge in Congress under the Electoral Count Act.²⁴ Of the five Justices recognizing an equal protection issue and rejecting remand, three (Chief Justice Rehnquist and Justices Scalia and Thomas) also endorsed an alternative rationale for decision: the Florida Supreme Court's recount order made "new law" for the counting of votes for presidential electors, thereby depriving the Florida legislature of its exclusive power to set the rules for choosing presidential electors granted to it by Article II of the U.S. Constitution.²⁵

Bush v. Gore's equal protection holding relied upon *Reynolds v. Sims*,²⁶ one of the early one person, one vote cases, and *Harper v. Virginia State Board of Elections*,²⁷ a case holding the use of a poll tax unconstitutional, to strike down the Florida court-ordered recount as an equal protection violation. The Court held that the recount standards, through "arbitrary and disparate treatment," impermissibly "valu[ed] one person's vote over that of another."²⁸ The Court limited its holding, however, with some important language: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."²⁹

Much ink has been spilled on the question whether the Court's equal protection rationale was a logical extension of or a break from existing precedent.³⁰ The subtext of this debate, of course, was whether the Court was consciously or subconsciously making a *political* decision (with conservatives on the Court backing the legal theories benefiting the Republican candidate and liberals on Court backing the theories benefiting the Democratic candidate) as opposed to a *legal* one.³¹ Part of that debate too concerned whether *Bush v.*

23. 531 U.S. at 134-35 (Souter, J., dissenting).

24. *Id.* at 110.

25. *Id.* at 111-22 (Rehnquist, C.J., concurring); *id.* at 131 (Souter, J., dissenting) (describing the "new law" theory of the case).

26. 377 U.S. 533 (1964).

27. 383 U.S. 663 (1966).

28. 531 U.S. at 104-05 (citing *Harper*, 383 U.S. at 665); *see id.* 105 (citing *Reynolds*, 377 U.S. at 555).

29. *Id.* at 109; *see also id.* ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."). For different perspectives on this limiting language, compare Flanders, *supra* note 5, with Lowenstein, *supra* note 14.

30. Compare Hasen, *supra* note 4, with Lund, *supra* note 7.

31. Judge Posner saw the Court's decision through the lens of pragmatism: the Court's decision was justified not on equal protection grounds, but on pragmatic grounds of ending a

Gore itself would serve as valid precedent to bring greater equality to the administration of elections, a debate that continues to this day.³²

Perhaps believing in the civilizing effect of hypocrisy,³³ some scholars predicted that the Court would eventually endorse the use of *Bush v. Gore* as precedent to bring greater equality to the nuts and bolts of election administration. Thus, in a *New York Times* op-ed written just two days after the Court's decision, Sam Issacharoff wrote that the Court has "asserted a new constitutional requirement: to avoid disparate and unfair treatment of voters. And this obligation obviously cannot be limited to the recount process alone. . . . The court's new standard may create a more robust constitutional examination of voting practices."³⁴ Steve Mulroy expanded on this point in a law review article, asserting that, while liberals may have been disappointed with the result in *Bush v. Gore*, its broadly written equal protection holding meant it was possible to make "lemonade from lemons."³⁵

My own view in 2001 was "far less sanguine"³⁶ but not quite as dire as those reading the case as a "one-day-only ticket." Though I believed that the Court would "ultimately limit *Bush v. Gore* to its facts,"³⁷ I also thought that "[l]ower courts will first apply *Bush v. Gore* as precedent to cases coming before [them] . . . [s]o there is at least a window of time in which the case may serve as valid precedent."³⁸ I further thought that lower courts would view *Bush v. Gore* in Rashomonic fashion,³⁹ with liberal judges embracing a more

constitutional crisis. See POSNER, *supra* note 8. For my critique of Judge Posner's argument, see Richard L. Hasen, A "Tincture of Justice": Judge Posner's Failed Rehabilitation of *Bush v. Gore*, 80 TEX. L. REV. 137 (2001) (book review).

32. Adam Cohen, Op-Ed, *Has Bush v. Gore Become the Case That Must Not Be Named?*, N.Y. TIMES, Aug. 15, 2006, at A18 ("The courts could start to undo the damage [caused by the partisan nature of the case] by deciding that, rather than disappearing down the memory hole, *Bush v. Gore* will stand for the principle that elections need to be as fair as we can possibly make them.").

33. Jon Elster, *Introduction to DELIBERATIVE DEMOCRACY* 12 (Jon Elster ed., 1998); see also Hasen, *supra* note 4, at 391 ("Embarrassment provides the only hope that the case will have precedential value.").

34. Issacharoff, *supra* note 2.

35. Mulroy, *supra* note 2.

36. Hasen, *supra* note 4, at 381. With the replacement of Chief Justice Rehnquist and Justice O'Connor by Chief Justice Roberts and Justice Alito, I remain pessimistic that the Court would read *Bush v. Gore* broadly should a case ever come before it raising the issue. Hasen, *supra* note 10, at 686-87.

37. Hasen, *supra* note 4, at 392; see also Flanders, *supra* note 5, at 1167 (noting that the Supreme Court in *Bush v. Gore* for the first time limited the very case it was deciding to its own facts).

38. Hasen, *supra* note 4, at 392.

39. See Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1497 (2002) (citing the opacity of the opinion and predicting that the Court will eventually sort out the various lower courts' interpretations).

expansive equal protection reading of *Bush v. Gore* and conservatives embracing a more restrictive reading of the case—returning liberal judges to the more familiar position of pushing for an expansion of voting rights through equal protection and conservative judges resisting such expansion. In that window of time, I believed that public interest litigants appearing before sympathetic judges could use the logic of the case to make conditions fairer for voters who, because of intentional election administrator choice or mismanagement, would be much less likely to be able to cast a valid vote than other voters in the jurisdiction.

Indeed, at first some lower courts played this enabling role by reading *Bush v. Gore* to require greater equality in the administration of elections.⁴⁰ Sometimes the threat of litigation was enough: to avoid a probable adverse judgment the California Secretary of State settled litigation brought by Common Cause to bar use of punch card voting machines.⁴¹ But that initial success has fizzled, at least as evidenced by the “punch card” cases. As these cases reached the en banc process in circuit courts, conservative judges have blocked *Bush v. Gore*’s lemonadization.

One of the most notable facts emerging from Florida in 2000 was that punch card voting systems were much less reliable than other voting systems, such as systems in which voters used pencils to mark ballots which were then optically scanned.⁴² Challenges to punch card voting systems seemed the most logical follow-on litigation to *Bush v. Gore*, and such challenges should have presented an easy case for plaintiffs if one took *Bush v. Gore*’s equal protection holding seriously:

[T]here is little question that the use of different voting systems with different error rates treats voters differently and makes it much less likely that voters in punch card districts will cast votes that count. . . . Under strict scrutiny, this disparate treatment in the *counting* of votes appears just as “dilutive” of the right to vote and just as “arbitrary” as the different methods of *recounting* votes struck down in *Bush v. Gore*. There is no compelling interest for the different treatment; a decision about resource allocation by localities should not be able to trump a “fundamental right.”⁴³

However, in the two circuits in which the punch card issue has reached the federal circuit courts—first the Ninth, then the Sixth—conservative en banc panels have ended such efforts, though without directly ruling on the *Bush v.*

40. See, e.g., *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (finding a potential equal protection violation in the selective use of punch card machines by Illinois).

41. *Common Cause v. Jones*, No. 01-03470 SVW(RZX), 2002 WL 1766436 (C.D. Cal. Feb. 19, 2002).

42. See *Bush v. Gore*, 531 U.S. 98, 126 n.4 (2000) (Stevens, J., dissenting); CALTECH/MIT VOTING TECH. PROJECT, RESIDUAL VOTES ATTRIBUTABLE TO TECHNOLOGY: AN ASSESSMENT OF THE RELIABILITY OF EXISTING VOTING EQUIPMENT (2001), available at http://www.hss.caltech.edu/~voting/CalTech_MIT_Report_Version2.pdf.

43. Hasen, *supra* note 4, at 395.

Gore question. The liberal-conservative split we now see over how to read *Bush v. Gore*'s equal protection holding echoes the split that first arose, and was quite robust, in 2000 over the courts' handling of the controversy.⁴⁴

Consider the Ninth Circuit litigation first.⁴⁵ When the parties settled the California punch card litigation in 2002, no one expected that a statewide election would again take place in California using punch card ballots; the next scheduled election was March 2004, the date by which the machines would be decertified. Once the unprecedented effort to recall California Governor Gray Davis qualified for the ballot in a special election in October 2003, some questioned whether it was constitutional for the vote to take place using punch card voting machines in some, but not all, California counties.

The ACLU, on behalf of a coalition of voting rights organizations, filed suit in federal court arguing that the selective use of punch card voting machines violated both the Equal Protection Clause of the United States Constitution and section 2 of the Voting Rights Act.⁴⁶ The district court denied the ACLU's request for a preliminary injunction, holding that *Bush v. Gore* mandated only rational basis review of such challenges and that the use of punch cards passed rational basis review.⁴⁷

On September 15th, 2003, less than a month before the election, a three-judge panel of the Ninth Circuit made up of three liberal judges reversed the district court. The court characterized the equal protection issue as a "classic voting rights equal protection claim": "the weight given to votes in non-punchcard counties is greater than the weight given to votes in punchcard counties because a higher proportion of the votes from punchcard counties are thrown out. . . . [T]he effect . . . is to discriminate on the basis of geographic residence."⁴⁸

44. See Cass R. Sunstein, *Introduction to THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 1, 4-8 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (discussing the enduring split of opinion on the merits of the issues in the Florida dispute among judges, experts, and those who know nothing about Florida law).

45. The following paragraphs on the recall are adapted from Richard L. Hasen, *The California Recall Punch Card Litigation: Why Bush v. Gore Does Not "Suck,"* in *CLICKER POLITICS: ESSAYS ON THE CALIFORNIA RECALL* 170 (Shaun Bowler & Bruce E. Cain eds., 2006).

46. Complaint, *Sw. Voter Registration Educ. Project v. Shelley*, 278 F. Supp. 2d 1131 (C.D. Cal. 2003) (No. CV-03-5715 SVM (RZX)); see also Hasen, *supra* note 45, at 175. Governor Davis himself raised the question whether the use of punch card voting machines in only some California counties raised an equal protection problem under *Bush v. Gore*. The California Supreme Court summarily denied his writ raising this and other issues in a decision that was not on the merits. *Davis v. Shelley*, No. S117921 (Cal. Aug. 7, 2003) (denying writ of mandate), available at http://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=0&doc_id=282744.

47. *Sw. Voter*, 278 F. Supp. 2d at 1140-41.

48. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894-95 (9th Cir. 2003), *vacated en banc*, 344 F.3d 914 (9th Cir. 2003).

The court characterized the plaintiffs' claim as "almost precisely the same issue as the Court considered in *Bush*, that is, whether unequal methods of counting votes among counties constitutes a violation of the Equal Protection Clause."⁴⁹ The court stated:

Like the Supreme Court in *Bush*, "[t]he question before [us] is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." Rather, like the Supreme Court in *Bush*, we face a situation in which the United States Constitution requires "some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."⁵⁰

After a lengthy review of the evidence, the court concluded that the use of punch card voting in the recall election failed to meet even rational basis scrutiny. Finally, the panel called California's interest in having the election held within the timeframe set by the California Constitution "weak."⁵¹

A majority of Ninth Circuit judges voted to have a larger eleven-member (en banc) panel rehear the case, and on September 23, just a few weeks before the election, the en banc panel—made up of more conservative judges than the original panel⁵²—reversed the original panel decision in a brief opinion.⁵³ Its entire analysis of the equal protection issue was as follows:

We have not previously had occasion to consider the precise equal protection claim raised here. That a panel of this court unanimously concluded the claim had merit provides evidence that the argument is one over which reasonable jurists may differ. In *Bush v. Gore*, the leading case on disputed elections, the court specifically noted: "The question before the court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." We conclude the district court did not abuse its discretion in holding that the plaintiffs have not established a clear probability of success on the merits of their equal protection claim.⁵⁴

Although the en banc panel remarked that plaintiffs made a "stronger showing" on the voting rights claim, the panel concluded that the district court

49. *Id.* at 895.

50. *Id.* at 895-96 (quoting *Bush v. Gore*, 531 U.S. 98, 109 (2000)).

51. *Id.* at 900.

52. See Henry Weinstein, *Various Legal, Political Factors Can Sway Court*, L.A. TIMES, Sept. 22, 2003, at A14 ("The Clinton appointees who dominate the [en banc] panel range in their legal records from moderately liberal to conservative. . . . The three Republican appointees . . . [include] two staunch conservatives . . . and the court's leading libertarian . . ."); see also Henry Weinstein, *Court Sees Delay as Too Disruptive*, L.A. TIMES, Sept. 24, 2003, at A22 (describing the eleven members of the en banc panel "as ranging from very conservative to moderately liberal").

53. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc).

54. *Id.* at 918 (quoting *Bush*, 531 U.S. at 109). It is interesting that the three-judge panel and en banc panel read *Bush v. Gore*'s sentence about local entities developing different systems "in the exercise of their expertise" to reach opposite results. This is another example of the Rashomonic interpretation of the case.

did not abuse its discretion in concluding that the public interest weighed in favor of holding the election: "If the recall election scheduled for October 7, 2003, is enjoined, it is certain that the state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the election's proceeding on the announced date."⁵⁵ The court left open the possibility of a post-election challenge.⁵⁶

While the en banc Ninth Circuit panel did not expressly say that the three-judge panel reached the wrong decision in its interpretation of *Bush v. Gore* (perhaps to garner the support of the more liberal members of the en banc panel), the message to lower courts was clear enough: they should be wary of attempts to use the case as a club to force states to reform unfair election practices, especially in the context of an ongoing election.

A similar pattern occurred in litigation challenging Ohio's selective use of punch card ballots. After a district court denied plaintiffs' equal protection and Voting Rights Act arguments to halt the use of punch card ballots,⁵⁷ a 2-1 panel of the Sixth Circuit reversed in *Stewart v. Blackwell*,⁵⁸ holding that the selective use of punch cards in fact constituted an equal protection violation under *Bush v. Gore*. The tone of both the majority and dissenting opinions was quite sharp, showing continued bitter divisions about the meaning of the Supreme Court's 2000 decision.

Drawing upon my 2001 article arguing that the Supreme Court would eventually limit *Bush v. Gore*'s holding to its facts,⁵⁹ the dissent took the position that *Bush v. Gore* should not be applied as valid precedent:

Since Professor Hasen's article, the Supreme Court has had ample opportunity to prove him wrong [that the case would ultimately have no precedential value] by explaining, or even citing to, its decision in *Bush v. Gore*. But despite taking a steady load of election-related cases, the Court has not cited *Bush v. Gore* even once⁶⁰

Applying a deferential standard of review, the dissenting judge, Ronald Gilman, would have rejected the equal protection argument.⁶¹ The *Stewart*

55. *Id.* at 918-19.

56. *See id.* at 919-20 ("We must of course also look to the interests represented by the plaintiffs, who are legitimately concerned that use of the punch-card system will deny the right to vote to some voters who must use that system. At this time, it is merely a speculative possibility, however, that any such denial will influence the result of the election.").

57. *Stewart v. Blackwell*, 356 F. Supp. 2d 791 (N.D. Ohio 2004).

58. 444 F.3d 843 (6th Cir. 2006), *superseded en banc* by 473 F.3d 692 (6th Cir. 2007).

59. Hasen, *supra* note 4.

60. *Stewart*, 444 F.3d at 887-88 (Gilman, J., dissenting). Though the Court had decided a number of election law cases, it had not decided any election *administration* cases by this time, making the failure to cite *Bush v. Gore* more understandable. When the Court did decide its first post-2000 election administration case, *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006), the Court again failed to cite *Bush v. Gore*.

61. *Id.* at 894.

majority, however, “reject[ing] the dissent’s claim that Professor Hasen’s article has overruled the Supreme Court’s decision in *Bush v. Gore*,”⁶² held that its equal protection holding was binding precedent:

Murky, transparent, illegitimate, right, wrong, big, tall, short or small; regardless of the adjective one might use to describe the decision, the proper noun that precedes it—“Supreme Court”—carries more weight with us. Whatever else *Bush v. Gore* may be, it is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it.⁶³

The majority then read *Bush v. Gore* as requiring application of strict scrutiny to the question before it,⁶⁴ holding that because of the lesser chance that a vote cast on a punch card machine will be accurately counted, the Equal Protection Clause is violated.⁶⁵ To support its analysis, the court relied heavily on other aspects of my article, including my argument that if we took *Bush v. Gore* seriously, courts should apply strict scrutiny and strike down the selective use of punch card voting machines in only part of a state.⁶⁶

62. *Id.* at 874 (majority opinion).

63. *Id.* at 860 n.8.

64. *Id.* at 862. It also found that the selective use of punch card balloting would fail even rational basis review. *Id.* at 872.

65. *Id.* at 862.

66. As the court notes:

Moreover, the dissent bases its analysis entirely upon Professor Hasen’s suggestion that *Bush v. Gore* is not serious, but fails to acknowledge the second half of Hasen’s article where he concludes that: “In sum, if *Bush v. Gore* indeed has precedential value, it clearly should apply to prevent the use of these different voting systems in the same election.” Hasen, *Bush v. Gore*, 29 Fla. St. U. L. Rev. at 395; see also *id.* at 379, 121 S. Ct. 525 (stating that his article “concludes that, if the case were taken seriously, *Bush v. Gore* should have great precedential value in changing a host of voting procedures and mechanisms, particularly when those procedures and mechanisms are challenged prospectively”). Thus, the dissent’s argument is easily deconstructed. It is premised solely on Professor Hasen’s article suggesting that *Bush v. Gore* should not be given precedential value. Because the dissent concludes that the decision should not be given precedential value (because the Court did not take the case seriously and an apparent inconsistency with other precedent) it does not mention the fact that Professor Hasen goes on to conclude that if *Bush v. Gore* were followed, it would dictate the result we reach here. Unfortunately for the dissent, inferior courts do not have the luxury of suggesting that a Supreme Court decision simply should not be followed without some tenable legal basis. Thus, because the dissent has not endeavored to provide any legitimate basis or principled manner of distinguishing *Bush v. Gore*—and presumably has not adopted Hasen’s argument that “[e]mbarrassment provides the only hope that the case will have precedential value,” Hasen, *Bush v. Gore*, 29 Fla. St. U. L. Rev. at 391—his argument that we simply should not follow the case does not give us any pause.

In the end, the dissent’s reasoning ultimately flounders. The dissent concludes that our decision is “persuasive only to the extent that *Bush v. Gore* is controlling. Neither [our decision or the original Ninth Circuit panel decision in the California recall], in my view, successfully refutes the compelling reasons supplied by Professor Hasen for refusing to ‘take *Bush v. Gore*’s equal protection holding seriously.” Dis. Op. (citing Hasen, 29 Fla. St. U. L. Rev. at 380). The dissent, however, fails to mention Professor Hasen’s ultimate conclusion that “if *Bush v. Gore* indeed has precedential value, it clearly should apply to prevent the use of these different voting systems in the same election.” Hasen, *Bush v. Gore*, 29 Fla. St. U. L. Rev. at 395. Without the luxury or the power to decide which Supreme Court decisions we want to follow, we find Professor Hasen’s ultimate conclusion, that the reasoning of *Bush v. Gore* applies here, to be sound.

Stewart appeared to set up the possibility that the Supreme Court would have to confront the precedential value of *Bush v. Gore* in the context of punch card voting systems. However, the Sixth Circuit voted to hear the case en banc, which under Sixth Circuit rules had the effect of automatically vacating the panel opinion.⁶⁷ The state had been arguing that the case should have been dismissed as moot because the state had made the decision to abandon punch card voting. The panel majority had rejected that argument, but plaintiffs filed a letter with the en banc court conceding mootness—no doubt fearing that the Sixth Circuit, with more conservative than liberal judges,⁶⁸ would agree with the views of the dissenting panel judge. The en banc court, seeing no remaining controversy given plaintiffs' concession, remanded the case to be dismissed as moot.⁶⁹

There is little reason to think that the experiences in the Ninth and Sixth Circuits would be different in most other circuits.⁷⁰ To the extent that federal appellate courts now contain more conservative judges than liberal judges, the chances of litigants using *Bush v. Gore* for successful election reform appear bleak.⁷¹ And the issue does not turn on the specifics of the use of punch card

Id. at 874-76 (footnote omitted).

67. 6TH CIR. R. 35(a).

68. The Sixth Circuit had been seen as a circuit that was closely divided between liberals and conservatives, and it became a focal point in the Senate battle over the confirmation of President Bush's judicial nominees. See Warren Richey, *Conservatives Near Lock on US Courts*, CHRISTIAN SCI. MONITOR, Apr. 14, 2005, at 1 (discussing close divide between liberal and conservative judges on the court in 2005); see also *Nominee for Appeals Court Withdraws*, WASH. POST, Mar. 24, 2006, at A4 (reporting on Democratic filibuster of Sixth Circuit nominee Henry Saad). Of the fourteen active (non-senior) judges on the Sixth Circuit in 2006, eight were appointed by Republican presidents and six by Democratic presidents. See Judges of the U.S. Court of Appeals for the Sixth Circuit, http://www.ca6.uscourts.gov/internet/court_of_appeals/courtappeals_judges.htm. But one of those Democratic appointees, Judge Gilman, was the panel dissenter in *Stewart* (Judges Martin and Cole, the two other panel members, were also appointed by Democratic presidents). Though a Clinton appointee, Judge Gilman also dissented in the *Grutter* affirmative action case when it was before the Sixth Circuit. *Grutter v. Bollinger*, 288 F.3d 732, 815 (6th Cir. 2002) (en banc) (Gilman, J., dissenting), *aff'd*, 539 U.S. 306 (2003). It was a good bet, but by no means certain, that the en banc court would have reversed the panel opinion in *Stewart*.

69. *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007) (en banc).

70. For a look at the ideological composition of the various circuits, see Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 331-33 (2004). With conservative judges dominating more circuits, the chances of a *Bush v. Gore* equal protection claim surviving the en banc process at least in the near future appears to be slim.

71. I am not claiming that conservative judges would vote to hear these cases primarily on ideological grounds, that is, to reverse a more liberal panel's decision in an election reform case. Rather, the cases are likely to be granted because they present important, unresolved issues of constitutional significance. See Micheal W. Giles et al., *Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals*, 68 J. POL. 852, 865 (2006) [hereinafter Giles et al., *Setting a Judicial Agenda*]; see also Micheal

voting. If *Bush v. Gore* does not create an equal protection claim that could be applied in the punch card voting context, it is hard to imagine where it would be used beyond a challenge to a statewide recount conducted according to nonuniform standards.

Moreover, so long as the en banc courts continue to block use of *Bush v. Gore* as a tool for election reform, the Supreme Court will likely have no reason to take a case clarifying the equal protection reach of *Bush v. Gore*, and the precedent can remain moribund without actually being overruled.⁷²

II. THE RISE OF PARTISAN ELECTION ADMINISTRATION LAWS AND THE TROUBLING PUBLIC CONFIDENCE GAP

Even without cajoling from the courts, some states took it upon themselves to upgrade their vote-casting and -counting technology. Congress also helped matters along by providing funding for states through HAVA to phase out antiquated and unreliable technology such as punch card machines.⁷³ But outside the area of voting technology, most legislative bodies have done too little to fix problems or, worse, have made changes in their election laws aimed at assuring partisan advantage. This Part considers legislative and administrative responses to the Florida controversy culminating in *Bush v. Gore*, finding failure in most areas, especially in the rise of partisan election administration. It also points to a troubling party and racial divide in public

W. Giles et al., *The Etiology of the Occurrence of En Banc Review in the U.S. Court of Appeals*, 51 AM. J. POL. SCI. 449, 461-62 (2007) (finding mixed support for the theory that courts grant en banc review for ideological reasons). Once the case is granted, however, the usual split we see between conservatives and liberals over how to read and understand *Bush v. Gore* comes into play.

The issue is somewhat more complicated in the Ninth Circuit, which uses a “special ‘mini-en banc’ procedure,” see Giles et al., *Setting a Judicial Agenda*, *supra*, at 853 n.2, that sets the number of judges on rehearing at eleven. The Ninth Circuit experimented with a fifteen-judge limited en banc panel beginning in January 2006, but it returned to eleven-judge panels in July 2007. See 9TH CIR. R. 35-3. Because the Ninth Circuit has a full panel of twenty-eight judges, it is possible that different draws of mini-en banc panels could have different ideological compositions. See Pamela Ann Rymer, *The “Limited” En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 321 (2006) (“[A] majority of a limited en banc panel can produce a result that is contrary to the known views of the same number, or a greater number, of judges [on the Ninth Circuit].”); Brian T. Fitzpatrick, Op-Ed, *Disorder in the Court*, L.A. TIMES, July 11, 2007, at A15 (“[I]t can be shown mathematically that, as a court grows larger, it is increasingly likely to issue extreme decisions.”); Posting of Judge William A. Norris to SCOTUSblog, *Split the 9th? No, Says Former Circuit Judge*, http://www.scotusblog.com/movabletype/archives/2007/08/split_the_9th_n.html (Aug. 1, 2007, 2:26 PM) (disputing some of Fitzpatrick’s analysis).

72. Cf. Flanders, *supra* note 10, at 144 (“If *Stewart v. Blackwell* is not the case that ultimately forces the Supreme Court to show its hand, some other case will have to be.”).

73. For an overview of HAVA’s assistance and requirements, see Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424 (2004).

confidence in the election process, which may be driven in part by partisan fighting over election administration and a continued lack of confidence of voters in the competence of election officials.

First, the little bit of good news. States made enough changes in their vote-counting technology so that one million fewer votes were “lost” in 2004 (compared to 2000) due to problems with voting technology, ballot design, or voter error.⁷⁴ States moved to a variety of more reliable technologies, much of which were bought and paid for by Congress, and the results were certainly an improvement over the dismal performance of the machines in 2000.⁷⁵

But even the voting technology story is not all rosy. Some jurisdictions rolled out new voting technology too fast. In Denver, Colorado, for example, voters casting ballots in the 2006 general election endured long lines at polling places because a new “electronic poll book” system for checking voter registrations failed to work properly.⁷⁶ The city also saw other major problems, such as those that led to extensive delays in the counting of absentee ballots.⁷⁷ Widespread, more minor problems confronted the country in the 2006 midterm election.⁷⁸

Problems with voting technology continue to plague Florida. The state was, quite naturally, the first one to phase out punch card voting machines, only to have them replaced throughout much of the state by electronic voting machines, known to election administrators as “DRE” machines (for “Direct Recording-Electronic”).⁷⁹ The machines proved to be quite controversial, because many of them did not produce a “paper trail” or any other method of independently verifying that the machines accurately produced votes and were not “hacked” by election officials or outsiders.

The matter came to a head in 2006, after a closely fought contest in Florida’s 13th congressional district.⁸⁰ The hard-fought battle between

74. Charles Stewart III, *Residual Vote in the 2004 Election*, 5 ELECTION L.J. 158, 158 (2006). For an historical overview of voting technology and politics, see ROY G. SALTMAN, *THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE* (2006).

75. See Stewart, *supra* note 74 (“Based on official election returns from the states that report the turnout data necessary to form estimates, the residual vote rate fell from 1.90% in 2000 to 1.06% in 2004.”).

76. See ELECTIONLINE.ORG, BRIEFING: THE 2006 ELECTION 11-12 (2006), available at <http://electionline.org/portals/1/Publications/EB15.briefing.pdf>.

77. *Id.* at 5.

78. See *id.*

79. Clifford A. Jones, *Out of Guatemala?: Election Law Reform in Florida and the Legacy of Bush v. Gore in the 2004 Presidential Election*, 5 ELECTION L.J. 121, 133-34 (2006).

80. For some relevant background, as well as an argument that the House should order a new election in the congressional district, see Richard L. Hasen, *It’s Time for the House to Pick Up the Pieces in Florida’s 13th District*, ROLL CALL, Dec. 6, 2006, <http://electionlawblog.org/archives/hasen-fl13.pdf>.

Republican Vern Buchanan and Democrat Christine Jennings led to a 361-vote victory for the Republican. But approximately 18,000 “undervotes” were recorded in the race, a very high number given the interest in the race. Most of those undervotes occurred in Sarasota County, which used electronic voting machines. One possible theory to explain the undervote is ballot design: the congressional race appeared on the second screen on the DRE display, just above a more prominent display of state races, beginning with governor. Another possibility is that there was some problem with the voting machines’ software. As courts,⁸¹ scholars,⁸² and the House of Representatives⁸³ debate what went wrong in the race and what if anything should be done to the 2006 election results, voters in Sarasota County voted to get rid of their DRE machines,⁸⁴ and Florida’s new governor called for the machines to be junked across the state, to be replaced with machinery that voters have more confidence in, such as optically scanned ballots.⁸⁵

Technology, however, is the *success* story since 2000. In contrast, legislative movement outside the area of technology has been mostly in the wrong direction.

First, states have shown very little interest in fixing ambiguities and gaps in their election codes, despite the fact that *Bush v. Gore* amply demonstrated that such gaps can lead to great controversy as courts are called upon to interpret the elections code in high stakes litigation over who should be declared the winner of a contested election.

Though some of this inertia may be attributable to state legislatures being unaware of particular problems with their election codes,⁸⁶ state legislatures

81. The litigation is ongoing. For court documents related to the case, which is *Jennings v. Elections Canvassing Commission*, 958 So. 2d 1083 (Fla. Dist. Ct. App. 2006), see this webpage at the Election Law @ Moritz website: <http://moritzlaw.osu.edu/electionlaw/litigation/Jenningsv.ElectionsCanvassingCommission.php>.

82. See Laurin Frisina et al., Ballot Formats, Touch Screens and Undervotes: A Study of the 2006 Midterm Elections in Florida (May 7, 2007) (unpublished manuscript), available at <http://www.dartmouth.edu/~herron/cd13.pdf> (attributing most of the undervotes to a ballot design problem); Walter R. Mebane, Jr. & David L. Dill, Factors Associated with the Excessive CD-13 Undervote in the 2006 General Election in Sarasota County, Florida (Jan. 23, 2007) (unpublished manuscript), available at <http://www-personal.umich.edu/~wmebane/smachines1.pdf> (finding that the ballot design theory is insufficiently explanatory for the pattern of undervotes).

83. Aaron Blake, *FL-13 Task Force Will Turn over Investigation to GAO*, THE HILL, May 2, 2007, <http://thehill.com/campaign-2008/fl-13-task-force-will-turn-over-investigation-to-gao-2007-05-02.html>.

84. Paul Quinlan & Patrick Whittle, *Voting Machines Lose Ally*, SARASOTA HERALD-TRIB., Nov. 11, 2006, at A1.

85. Anthony Man, *Crist Calls for Paper in Early Voting*, S. FL. SUN-SENTINEL, Mar. 23, 2007, at 10B.

86. Even so, I have suggested that states conduct periodic “election law audits” to see what clarifications may be made to improve election codes and to decrease the chances that

have also failed to act even when the issues have been brought to light by public controversy. For example, given that there were over *twenty* lawsuits brought challenging one or another aspect of California recall law in 2003, the California legislature has done nothing to fix the obvious contradictions and problems with the California Elections Code. My favorite example is the internal code contradiction on the rules for nominating someone to be a replacement candidate in the event voters choose to recall a sitting governor. The recall rules state that the “usual nomination rules shall apply” to recall elections. And the first of the “usual nomination rules” provides that the rules do not apply to recall elections. The California Secretary of State then applied the rules (which normally apply to *primary* elections) requiring that candidates wishing to run for governor in the recall provide only 65 signatures and \$3,000, leading to the unwieldy 2003 election and ballot featuring 135 candidates for governor, including the child actor Gary Coleman, a porn star, and a watermelon-smashing Gallagher.⁸⁷

More important than this failure to act in the face of obvious problems, however, is the increased partisan divide over election reform legislation. It now is beyond question that there is such a divide, with many Republicans expressing concern about voter “integrity” and the possibility of voter fraud affecting the outcome of elections, and many Democrats expressing concern over voter “access” and the possibility that the government or others will take steps to suppress the votes of the poor, minorities, and others. Some Democrats suspect that the Republican integrity claims are false and are intended to suppress the vote. Some Republicans suspect that Democrats’ concern about access is overblown and is intended to create the conditions where ineligible voters (such as felons or illegal immigrants) are allowed to vote.

It is no exaggeration to say that “election reform,” in the sense of making it easier for people to cast a vote, without intimidation, that will be accurately counted, has become an issue for Democrats and the liberal reform community.⁸⁸ Republicans, in contrast, have focused their attention on voter fraud. There has been little movement for bipartisan cooperation. The most prominent attempt at such cooperation, the Baker-Carter Commission, got mired in controversy concerning its endorsement, over the dissent of three Democratic members of the commission, of a voter identification card.⁸⁹

The country’s partisan divide has manifested itself in a number of ways. For example, Democrats have pushed for election-day voter registration as a means of making it easier for eligible voters to vote, but Republicans have

an election will be within the margin of litigation. Hasen, *supra* note 16, at 954.

87. See Hasen, *supra* note 45, at 170.

88. See Brian Friel, *Remember Sarasota*, NAT’L J., Feb. 24, 2007, at 44-45.

89. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 633 (2007).

opposed this change on grounds that it would allow for more voter fraud.⁹⁰ The partisan divide has been on display most heatedly in the dispute over state voter identification laws.

With the exception of Arizona, which enacted its voter identification law through a voter initiative⁹¹ (aimed more broadly at issues of benefits for illegal immigrants),⁹² every state that has enacted or tightened its requirements for voters to show identification at the polls has done so through the support of a Republican-dominated legislature.⁹³ Democrats have uniformly opposed the efforts to impose new voter identification requirements,⁹⁴ as in Pennsylvania, where the Democratic governor vetoed a new voter identification law passed by the Republican-dominated legislature,⁹⁵ and in Missouri, where the newly elected Democratic Secretary of State has opposed voter identification laws and argued against them in a report on the 2006 election.⁹⁶

Republicans have defended voter identification laws as necessary to combat voter fraud.⁹⁷ But Democrats and civil rights organizations see these

90. See, e.g., Jason Clayworth, *House OKs Same-Day Registration for Voters*, DES MOINES REG., Mar. 21, 2007, at 4B (“Republicans . . . said the proposal is critically flawed because it fails to adequately protect against voter fraud.”).

91. See *infra* note 160.

92. See Jerry Kammer, *Immigration Debate Likely to Intensify*, SAN DIEGO UNION-TRIB., Nov. 22, 2004, at A1.

93. Richard L. Hasen, *Fraud Reform? How Efforts to ID Voting Problems Have Become a Partisan Mess*, SLATE, Feb. 22, 2006, <http://www.slate.com/id/2136776>.

94. For more on the partisan divides in Georgia and Indiana, see Overton, *supra* note 89, at 641 n.49.

95. See Jerome L. Sherman, *Rendell Vows Veto of Voter ID; Governor Says Bill Would Keep Older People, Poor from Polls*, PITTSBURGH POST-GAZETTE, Feb. 21, 2006, at A1; see also Veto Message (H.B. 1318) from Gov. Edward G. Rendell, to the House of Representatives of Pennsylvania, available at <http://www.governor.state.pa.us/governor/cwp/view.asp?A=3&Q=445679> (stating that vetoed measure would disenfranchise voters and is unnecessary to prevent voter fraud).

96. ROBIN CARNAHAN, *VOTERS FIRST: AN EXAMINATION OF THE 2006 MIDTERM ELECTION IN MISSOURI* 5 (2007), available at <http://www.sos.mo.gov/elections/VotersFirst/VotersFirst-FINAL.pdf> (“As in previous elections, the absence of reports of voting impersonation or voting fraud in the 2006 election in Missouri was notable.”); see also *id.* at 15-16 (discussing how some election officials asked voters to produce the wrong type of identification even though the state supreme court had declared Missouri’s new voter photo identification law unconstitutional under the state constitution).

97. See, e.g., Michael Barone, *Message to the Secretaries of State: 1679 and 2006*, Barone Blog, <http://www.usnews.com/blogs/barone/2006/2/6/message-to-the-secretaries-of-state-1679-and-2006.html> (Feb. 6, 2006, 4:36 P.M. ET). The main nongovernmental organization advocating more stringent voting identification laws as a means of combating voter fraud was the American Center for Voting Rights, a group that had a number of ties to the Republican Party. See Sourcewatch, American Center for Voting Rights Legislative Fund, http://www.sourcewatch.org/index.php?title=American_Center_for_Voting_Rights_Legislative_Fund. Recently, the group’s website appears to have been taken down, and the organization no longer operates actively. See Richard L. Hasen, *The Fraudulent Fraud Squad: The Incredible, Disappearing American Center for Voting Rights*, SLATE, May 18,

laws as a way of gaining partisan advantage, because the poor, who are more likely to vote Democratic, have a more difficult time securing voter identification. Poor people tend to drive less (meaning they are less likely to have a driver's license, which is the most common form of identification), and they may not have the money to secure certified copies of documents, such as birth certificates, necessary to obtain a state-issued voter identification.

The debate over voter identification has generated a great deal of heat, but very little light. At its heart are two separate empirical questions: (1) How much impersonation fraud (where one person shows up at the polls claiming to be someone else) takes place that an identification card would detect or deter? (2) How much would a voter identification law deter eligible voters from voting?⁹⁸

On the first question, supporters of voter identification laws have pointed primarily to either anecdotes about problems with voter impersonation fraud or actual fraud related to voter registration.⁹⁹ On closer inspection, many of the anecdotes turn out to be based upon an early or incomplete understanding of the facts, or based upon conduct that does not show actual voter fraud.¹⁰⁰ There is no question that there are few prosecuted cases of vote fraud; the question is whether such fraud is not prosecuted because it does not exist, or is not prosecuted for another reason, such as difficulty of detection, difficulty of proof, or decisions of prosecutors to allocate resources to more serious crimes. As the Caltech/MIT Voting Technology Project recently concluded, "[O]ther than anecdotes and allegations of election fraud, there is little research on contemporary election fraud in the United States."¹⁰¹

The United States Election Assistance Commission, created by Congress in the wake of the 2000 Florida debacle and charged with providing advice on sound election administration, so far has produced nothing to substantiate claims of anything more than a trivial amount of polling place fraud. It issued a

2007, <http://www.slate.com/id/2166589>; Richard L. Hasen, *Implausible Deniability: The Internet Foils Fudging by Three "Voter Fraud" Warriors*, SLATE, June 13, 2007, <http://www.slate.com/id/2168350>.

98. The most comprehensive summary of the literature on these two questions (current through mid-2006) is in Overton, *supra* note 89.

99. The most notable writing in this genre is JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (2004).

100. LORRAINE C. MINNITE, *THE POLITICS OF VOTER FRAUD* (2007), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf. There is some evidence of registration fraud, thanks to the use of private "bounty hunters" to collect completed voter registration cards. But it does not appear that fraudulent registrations lead to many fraudulent votes on Election Day. See Hasen, *supra* note 16, at 967-68.

101. CALTECH/MIT VOTING TECH. PROJECT, *VTP CONFERENCE ON VOTER AUTHENTICATION AND REGISTRATION 14* (2006), available at <http://vote.caltech.edu/events/2006/VoterID/rpt.pdf>.

report in 2006 finding the fraud issue unsettled,¹⁰² but it was criticized for not endorsing the preliminary findings of its hired consultants which found polling place fraud was not a major problem.¹⁰³ That criticism only intensified when someone leaked a copy of the draft report to the *New York Times*, which published the draft report on its website.¹⁰⁴ Congressional hearings¹⁰⁵ and an internal investigation at the Election Assistance Commission followed.¹⁰⁶

Voter fraud even featured prominently in the dispute over the decision of the Bush Administration to fire eight United States attorneys. At least two of the attorneys, one from Washington state and one from New Mexico, were supposedly targeted for termination because of their failure to prosecute voter fraud adequately. Both prosecutors, however, defended their decisions on grounds that there was not enough evidence of voter fraud in their states to support prosecutions,¹⁰⁷ despite a common perception among Republicans that

102. U.S. ELECTION ASSISTANCE COMM’N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FURTHER STUDY 1 (2006) available at http://www.eac.gov/clearinghouse/docs/reports-and-surveys-2006electioncrimes.pdf/attachment_download/file (“It is clear from this review that there is a great deal of debate on the pervasiveness of fraud in elections as well as what constitute the most common acts of fraud or intimidation. There is also no apparent consensus on the meaning of the phrases ‘voting fraud’ and ‘voter intimidation.’ Some think of voting fraud and voter intimidation only as criminal acts, while others include actions that may constitute civil wrongs, civil rights violations, and even legal activities.”).

103. See PEOPLE FOR THE AM. WAY FOUND., WHITEWASHING THE FACTS: EAC REPORT IGNORES KEY DATA (2006); Richard Wolf, *Report Refutes Fraud at Poll Sites*, USA TODAY, Oct. 11, 2005, http://www.usatoday.com/news/washington/2006-10-10-poll-fraud-report_x.htm. For the EAC’s response, see E-mail from Jeannie Layson, Commc’n Dir., U.S. Election Assistance Comm’n to author (Dec. 13, 2006), available at <http://electionlawblog.org/archives/007453.html> (“EAC’s interpretation of HAVA and its determination of what it will study and how it will use its resources to study it are matters of agency policy and decision. These are not, nor should they be, determinations or decisions made by consultants. The EAC has the ultimate responsibility for the reports it issues, and it is incumbent upon the agency to conduct due diligence to ensure reports, data or any other information is complete and accurate before it is adopted by the Commission.”).

104. The article is Ian Urbina, *U.S. Panel Is Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, at A1. The draft report has been published in full by the *Election Law Journal*. See Job Serebrov & Tova Wang, *Voting Fraud and Voter Intimidation, [Draft] Report to the U. S. Election Assistance Commission (EAC) on Preliminary Research and Recommendations*, 6 ELECTION L.J. 330 (2007). The *New York Times*’s leaked copy is available at http://graphics8.nytimes.com/packages/pdf/national/20070411voters_draft_report.pdf.

105. See Press Release, Senator Dianne Feinstein, Senators Feinstein and Durbin Seek Responses from EAC Regarding Allegations of Altered or Delayed Studies (Apr. 13, 2007) (on file with author).

106. See Press Release, U.S. Election Assistance Comm’n, EAC Requests Review of Voter ID, Voter Fraud and Voter Intimidation Research Projects (Apr. 16, 2007) (on file with author).

107. See David Bowermaster, *McKay ‘Stunned’ by Report on Bush*, SEATTLE TIMES, Mar. 13, 2007, at A9 (“‘Had anyone at the Justice Department or the White House ordered me to pursue any matter criminally in the 2004 governor’s election, I would have resigned,’

voter fraud was rampant. A *New York Times* analysis of efforts of the Bush Justice Department over five years to find and prosecute cases of voter fraud revealed only 86 successful prosecutions and no systematic evidence of the kind of impersonation voter fraud that would support the need for a voter identification law.¹⁰⁸ Indeed, many of the prosecutions appeared to be based upon innocent mistakes by voters and not intentional fraud. Of the seventy successful federal prosecutions nationally from 2002 to 2005, only twenty-six involved voters (the rest involved election officials or party or campaign workers), and only five of those twenty-six involved multiple voting,¹⁰⁹ a type of voter fraud that a voter ID law could potentially prevent (if the voting took place in two jurisdictions and the ID was checked against a database connecting the jurisdictions to bar multiple voting). The rest of the convictions were for illegal activities that a voter identification system likely would do nothing to prevent.

One reason to suspect that those legislators who support voter identification laws are not taking the concerns about fraud all that seriously is the fact that such laws tend to *exclude* from the identification requirements votes cast by absentee ballots. There is widespread consensus among those who study voter fraud that the greatest potential for fraud—and certainly the most reported cases of such fraud—involve absentee ballots that are cast outside the presence of election officials.¹¹⁰ If you want to consider anecdotes, consider the

McKay said. ‘There was no evidence, and I am not going to drag innocent people in front of a grand jury.’”); David C. Iglesias, *Why I Was Fired*, Op-Ed, N.Y. TIMES, Mar. 21, 2007, at A21 (“After reviewing more than 100 complaints of voter fraud, I felt there was one possible case that should be prosecuted federally. I worked with the F.B.I. and the Justice Department’s public integrity section. As much as I wanted to prosecute the case, I could not overcome evidentiary problems. The Justice Department and the F.B.I. did not disagree with my decision in the end not to prosecute.”).

108. Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1 (“A handful of convictions involved people who voted twice. More than 30 were linked to small vote-buying schemes in which candidates generally in sheriff’s or judge’s races paid voters for their support.”).

109. *Id.* Professor Minnite supplied the prosecution data to *Times*, and she believes that few if any of the prosecutions would have been prevented by a voter identification card. E-mail from Lorraine Minnite to author (May 7, 2007) (on file with the author).

110. See CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE (2001), available at <http://www.vote.caltech.edu/2001report.htm> (“We have no systematic measures of fraud, but fraud appears to be especially difficult to regulate in absentee systems. In-precinct voting or ‘kiosk’ voting is observable. Absentee voting is not. The prospect for coercion is increased with absentee voting on demand.”); JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS 51-59 (2006) (summarizing concerns about the potential for fraud and coercion with absentee voting). Indiana’s assistant attorney general, Douglas Webber, told EAC interviewers that absentee balloting presented the greatest problem with vote fraud in the state of Indiana. U.S. ELECTION ASSISTANCE COMM’N, *supra* note 102, app. 3 at 5 (2006). This is an interesting observation given Indiana’s recently-passed voter identification law, which exempts absentee ballots. See *infra* note 195 (noting Seventh Circuit opinion discussing whether Indiana’s failure to include

colorful facts of *United States v. McCranie*, a case in which supporters of candidates for sheriff in Dodge County, Georgia, “actually set up tables inside the courthouse at opposite ends of the hall, where supporters on both sides openly bid against each other to buy absentee votes.”¹¹¹ Those seriously concerned about voter fraud should make it harder to cast an absentee ballot, or require strict proof of identity, such as a thumb print, in order to cast a valid ballot, though stopping the selling of votes will require other means of deterrence besides voter identification enforcement.

On the second empirical question at issue in the voter identification debate, that of deterring voting by eligible voters (whom Ed Still has cleverly dubbed “undocumented citizens”),¹¹² those data are also difficult to come by. One measure of the deterrent effect of a voter identification law is the number of people who show up at the polls forgetting their identification and then choosing not to return.¹¹³ Presumably this is something that could be tracked by polling place workers or by researchers looking at the number of provisional ballots that have been cast by voters without identification.

The larger question, however, concerns voters who do not show up at the polls at all. We do not know how many people will be deterred from registering or showing up at the polls because they lack the proper identification.¹¹⁴ The extent of deterrence is likely to differ by state. First, states with identification requirements accept different forms of identification. Some states accept more types of identification than others. A *photo* identification requirement, for example, will be more onerous for many people to produce than a requirement to produce non-photographic forms of identification showing the voter’s address (such as a utility bill).

Of special concern are those voters, including the poor, some of the elderly, and some born on some Native American reservations, who may have special difficulty securing documents such as birth certificates necessary to obtain the state-issued identification required for voting. The extent to which these requirements may deter voting again will depend on each state’s specific

absentee ballots in its voter identification law rendered the law unconstitutional).

111. 169 F.3d 723, 726 (11th Cir. 1999).

112. Edward Still, “Undocumented Citizens,” Votelaw, <http://www.votelaw.com/blog/archives/005065.html> (Mar. 12, 2007, 9:17 P.M.).

113. One study finds twenty-three people in a sample of about 36,000 self-reporting that they were asked for identification before voting in the 2006 election and then were not allowed to vote. Stephen Ansolabehere, *Ballot Bonanza: The First Big Survey of Voter ID Requirements and Its Surprising Findings*, SLATE, Mar. 16, 2007, <http://www.slate.com/id/2161928> (citing Stephen Ansolabehere, *Access Versus Integrity in Voting Identification Requirements* 7 (Coop. Cong. Elections Study, Working Paper 07-01, 2007)). Extrapolating to the U.S. population, the figure could be quite significant. But this research is preliminary and based on self-reporting, and it therefore should be taken with a grain of salt.

114. See Overton, *supra* note 89, at 657-63 (summarizing extant evidence on number of persons without photo identification).

requirements. In Georgia, for example, a new state identification law (later struck down by the courts) did not provide funds for poor voters to get documents such as birth certificates necessary to get a voter identification card, nor did it provide subsidies for voters to go to one of fifty-three centers in the state to get the identification card.¹¹⁵

In Indiana, in contrast, poor voters are allowed to cast a provisional ballot without producing photo identification, if they later appear before an elections official to sign an indigency affidavit.¹¹⁶ It is unclear how much this alternative requirement would deter voting by indigents. Even putting aside the stigmatic effect of seeking a “declaration of indigency,” the indigent voter must cast a provisional ballot and then at a later time present to a circuit court clerk or county election board an affidavit affirming under penalty of perjury that the applicant is indigent and is unable to obtain an identification without the payment of a fee (or has a religious objection to being photographed).¹¹⁷ For example, to file an affidavit, an indigent voter in Gary, Indiana who does not drive and cannot afford a car would have to travel by taxi or private car (because there is no public transportation) from Gary to the county seat of Lake County, Crown Point, at least thirty minutes away.¹¹⁸

Research is only beginning on the question of how much a voter identification requirement may deter eligible voters from voting. A study commissioned by the EAC based on survey data regarding the 2004 election found lower self-reported turnout in states imposing a voter identification requirement than in states not imposing such a requirement, with a more pronounced depressive effect on turnout among African-Americans and Hispanics.¹¹⁹ The EAC released this report under pressure¹²⁰ but disavowed it,

115. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1338 (N.D. Ga. 2005).

116. *See infra* note 190.

117. IND. CODE § 3-11.7-5-2.5, subd. (c) (2007). At a recent forum, Indiana Secretary of State Rokita argued that it was unclear if the new law deterred voting because turnout went up in Indiana compared to the last midterm election. Transcript, AEI-Brookings Election Reform Project, *Is Our Election System Broken? Can We Fix It?*, (Mar. 9, 2007), available at <http://www.aei.org/events/filter.all,eventID.1474/transcript.asp>. Without controlling for other factors, such as change in population and general interest in the election, the turnout figure tells us very little about the deterrent effect of the new law.

118. E-mail from William R. Groth, a plaintiffs’ attorney in the Indiana voter identification litigation, to author (Mar. 28, 2007) (on file with the author).

119. *See* EAGLETON INST. OF POLITICS, RUTGERS UNIV. & MORITZ COLL. OF LAW, OHIO STATE UNIV., *SUMMARIZING A REPORT ON BEST PRACTICES TO IMPROVE VOTER IDENTIFICATION REQUIREMENTS PURSUANT TO THE HELP AMERICA VOTE ACT OF 2002 PUBLIC LAW 107-252* (2006); *see also* Richard Wolf, *Study: Stricter Voting ID Rules Hurt '04 Turnout*, USA TODAY, Feb. 19, 2007, http://www.usatoday.com/news/nation/2007-02-19-voter-id-study_x.htm. The U.S. Election Assistance Commission eventually released the full draft report (though disavowing it). It is posted at <http://www.eac.gov/clearinghouse/reports-and-surveys>.

120. Zachary A. Goldfarb, *Election Panel Faces Partisanship Allegations*, WASH. POST, June 22, 2007, at A17.

citing methodological problems.¹²¹ Regardless of whether that decision was sound, more research is definitely needed on the potential depressive effect of voter identification laws on turnout.

There is also suspicion, which definitely deserves further research, that the imposition of voter identification rules and similar rules is causing a decline in voter confidence among minority voters.¹²² By 2004, it was clear that there was a growing party and racial divide in public confidence in the electoral process. By 2004, 21.5% of Democrats thought the means of conducting the most recent presidential election was “somewhat unfair” or “very unfair,” compared to 2.9% of Republicans.¹²³ In that same election only one-third of African-Americans called the vote “accurate and fair.”¹²⁴

No doubt, some of the disparity is due to the fact that Democrats were on the losing end of the 2000 and 2004 presidential elections, and winners tend to have more confidence in election outcomes than losers.¹²⁵ But the gap in confidence between winners and losers may not explain everything. Just before the 2006 election, when it already appeared that Democrats were likely to do well in the midterm Congressional elections, the gap between Republican and Democratic views persisted. Even more troubling, the percentage of African-American voters who were “not too confident” or “not at all confident” that their votes would be fairly counted nearly doubled from 15% in 2004 to 29% in 2006.¹²⁶

Consider Figure 1 below, a chart from an October 11, 2006 survey by the Pew Research Center for the People & the Press.¹²⁷ The increased partisanship

121. See Press Release, U.S. Election Assistance Comm’n, EAC to Launch Comprehensive Study of Voter ID Laws (Mar. 30, 2007), available at <http://www.eac.gov/News/press/docs/03-30-07-eac-to-launch-comprehensive-study-of-voter-id-laws> (“EAC has concerns regarding the data, analysis, and statistical methodology the Contractor used to analyze voter identification requirements to determine if these laws have an impact on turnout rates.”); see also David Nather, *Election Board Facing Votes of No Confidence*, CQPOLITICS.COM, Apr. 23, 2007, http://www.cqpolitics.com/2007/04/from_cq_weekly_election_board.html (“A second commission report on voter identification laws found that the laws can reduce turnout, particularly among Hispanics. The panel delayed releasing that report for months, then made it public even while refusing to endorse its conclusions.”).

122. Ian Urbina, *Democrats Fear Disillusionment in Black Voters*, N.Y. TIMES, Oct. 27, 2006, at A1 (“Voting experts say the disillusionment [in the African-American community] is the cumulative effect of election problems in 2000 and 2004, and a reaction to new identification and voter registration laws.”).

123. Hasen, *supra* note 16, at 943.

124. *Id.* at 942.

125. See *id.* at 943-44 (noting that Republicans in the state of Washington were much more likely than Democrats to view the 2004 electoral process as unfair after a contested gubernatorial election was decided by state courts in favor of the Democratic candidate).

126. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, DEMOCRATS HOLD ENTHUSIASM, ENGAGEMENT ADVANTAGE: NOVEMBER TURNOUT MAY BE HIGH 6 (2006), available at <http://people-press.org/reports/pdf/291.pdf>.

127. *Id.* The author gratefully acknowledges permission given by Pew to reproduce

Figure 1

Wide Gaps in Confidence about Accurate Vote Tally				
<i>Confident your vote will be accurately counted?</i>				
	Very	Somewhat	Not too/ at all	DK
	%	%	%	%
Total	58	29	12	1=100
White	63	28	8	1=100
Black	30	37	29	4=100
Men	63	24	12	1=100
Women	53	33	12	2=100
18-29	49	36	15	0=100
30-49	61	26	11	2=100
50-64	60	29	11	*=100
65+	55	30	11	4=100
Republican	79	17	3	1=100
Democrat	45	36	16	3=100
Independent	52	32	15	1=100

Based on registered voters.

of the election administration process is a likely culprit in low public confidence in the fairness of the election process. Snafus such as those in Denver or in Florida's 13th congressional district likely also play a role in declining voter confidence.¹²⁸ When it comes to election reform, many state legislatures have spent more energy debating issues like voter identification laws than considering how to take partisanship out of the process of deciding elections.

In 2005, I counted thirty-three state chief elections officers chosen in partisan elections.¹²⁹ That number remains the same in 2007. So far as I am aware, no state has changed its law to make election administration nonpartisan at the state level.¹³⁰ Indeed, the National Association of Secretaries of State has attacked the U.S. Election Assistance Commission, calling in 2004 for the advisory, bipartisan group to be disbanded.¹³¹ By 2007, despite the fact that the EAC has proven to have very little authority and has lacked a leadership role in

this graphic.

128. See *supra* notes 76-85 and accompanying text.

129. Hasen, *supra* note 16, at 974.

130. See *id.* at 983-91 (suggesting how states can change the method of selecting chief elections officers to make election administration less partisan).

131. See *id.* at 961 n.102.

the arena of electoral reform, the association continues to take a position against EAC's very existence.¹³² The current president of the association,¹³³ Indiana Secretary of State Todd Rokita, has been actively fundraising in his state for a presidential candidate,¹³⁴ and he recently gave a speech explaining how the Republican Party can once again prevail in national elections.¹³⁵

Congress, meanwhile, has not fully funded the electoral reforms it authorized in HAVA,¹³⁶ and current proposals for election reform on the federal level are getting mired in presidential politics.¹³⁷ For example, Senator Obama's call for the creation of a "Democracy Index" to rate states on how well they serve their constituents¹³⁸ has apparently received no support from

132. See Transcript, *supra* note 117 (statement of Indiana Secretary of State Todd Rokita).

133. See National Association of Secretaries of State, 2007-2008 Executive Board, http://nass.org/index.php?option=com_content&task=view&id=26&Itemid=192 (last visited, Sept. 29, 2007).

134. *Rokita Flap Haunts Romney*, Advance Indiana, <http://advanceindiana.blogspot.com/2007/04/rokita-flap-haunts-romney.html> (Apr. 20, 2007, 5:05 P.M.). Rokita recently defended partisan election administration on accountability grounds. Ian Urbina, *Voting Officials Face New Rules to Bar Conflicts*, N.Y. TIMES, Aug. 1, 2007, at A1 ("Mr. Rokita said it was better to elect top voting officials rather than appoint them because they were more accountable when they knew they could be voted out of office if they failed to act impartially.").

135. Nate Smith, *Secretary of State Addresses GOP*, WASH. TIMES-HERALD, Apr. 13, 2007, http://www.washtimesherald.com/local/local_story_103114013.html.

136. In a press release, U.S. Senator (and Senate Rules Committee Chair) Dianne Feinstein noted:

To ensure that Congress did not impose an unfunded mandate on the States, HAVA authorized nearly \$4 billion in payments to the States over three fiscal years to implement its requirements. To date, Congress has appropriated over \$3.1 billion and States are in various stages of implementation of the Act. However, Congress failed to appropriate approximately \$798 million in HAVA funds, of which \$724 million are for requirements and \$74 million are for disability access for voting purposes. Consequently, this funding shortfall of millions of dollars has impacted States' ability to fully implement election-related programs. These circumstances will only be further exacerbated by additional unfunded federal mandates for State implementation by the 2008 elections.

The President's budgets failed to include any funding for HAVA requirements payments over the last three fiscal years, FY06-FY08. Similarly, Congress failed to appropriate such funds authorized in HAVA. In addition to the \$600 million authorized for FY05, but not appropriated, Congress continued to underfund HAVA by an additional \$198 million in FY06 and FY07.

Press Release, Senator Dianne Feinstein, Chairman Feinstein Calls for Full Funding of Help America Vote Act in FY08 Budget, (Feb. 28, 2007), *available at* http://www.votetrustusa.org/index.php?option=com_content&task=view&id=2295&Itemid=26.

137. See Transcript, *supra* note 117 (statement of Thomas Mann, Senior Fellow, Brookings Institution).

138. See Press Release, Senator Barack Obama, Obama Introduces Bill to Rank State Election Practices and Performance (Mar. 1, 2007), *available at* http://obama.senate.gov/press/070301-obama_introduce_11/index.php. The bill was based upon ideas put forward in Heather Gerken, *How Does Your State Rank on the Democracy Index?*, LEGAL TIMES, Jan. 1, 2007, at 36.

Republican lawmakers even though one could imagine a revised index, taking into account issues of election “integrity” as well, that potentially could get the support of Republican lawmakers.

In short, aside from fixing the worst problems with election machinery, Congress and the state legislatures have learned very little from the Florida controversy culminating in *Bush v. Gore*. In many ways, save technological improvements in the casting and counting votes, the situation is worse than it was in 2000. Election administration today is more partisan and more contentious than it was before the public had ever heard of “dimpled chads.”

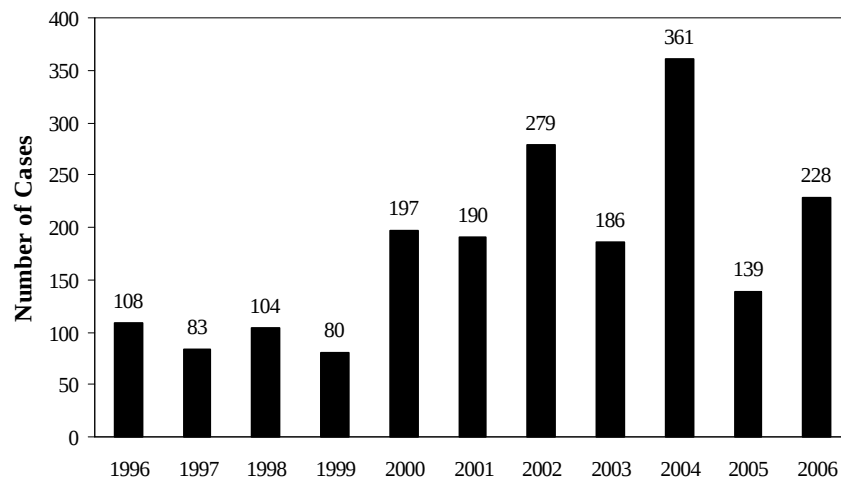
III. MISLEARNING THE LESSONS OF *BUSH V. GORE*: THE SUPREME COURT’S POOR RESPONSE IN *PURCELL V. GONZALEZ* TO THE RISE OF ELECTION LAW AS A POLITICAL STRATEGY

Part I has shown that *Bush v. Gore* thus far has not served a “lemonade from lemons” function to spur state election reform. In fact, the 2000 Florida controversy, as well as the increased partisanship in election administration described in Part II, led to an increase in the amount of election law litigation before the courts. In an earlier study, I showed a large increase in the amount of election law litigation in the courts, from an average of 96 “election challenge” cases per year in the 1996-99 period, to an average of 254 per year in the 2001-04 period.¹³⁹

I have now updated my figures in Figure 2, and the increased litigation trend has continued in 2005 and 2006, albeit not at the same frenzied pace.¹⁴⁰

139. Hasen, *supra* note 16, at 958.

140. As with my last count, *see id.*, this count is based upon a Lexis search of state and federal court databases using a year restriction and “election w/p challenge,” culling out cases that are obviously inapplicable. You can find the cases cited and described in an Excel spreadsheet posted at <http://electionlawblog.org/archives/stanford.xls>.

Figure 2. "Election Challenge" Cases by Year, 1996-2006

The 2005 figures (139 cases) and 2006 figures (228 cases) are comparable to (though somewhat lower than) their counterpart midterm election years of 2001 (190 cases) and 2002 (279 cases) and still much higher than the pre-Florida counterpart midterm years of 1997 (83 cases) and 1998 (104 cases). We can expect a spike again in the 2008 election year, as a number of suits are brought in relation to the presidential primary.¹⁴¹ We are likely to continue to witness election law litigation at much higher levels than in the pre-2000 period.

The rise in election law litigation since 2000 is part of a trend I have termed "election law as . . . political strategy."¹⁴² There seems little question that candidates, parties, and others have lost any inhibition to resort to litigation in the case of a close election. So it is very important for the Supreme Court and lower courts to send appropriate signals about how and when courts should entertain such challenges. Unfortunately, the Court's first post-*Bush v. Gore* opinion on an election administration subject, *Purcell v. Gonzalez*,¹⁴³ sends some very troubling signals, apparent from the Court's decision to issue its opinion quickly, the casual empiricism of its unanimous opinion, and its discouragement of pre-election litigation.

Purcell concerns Arizona's new voter identification law, and it is worth first considering how lower courts handled voter identification questions in the

141. See Charles Anthony Smith & Christopher Shortell, *The Suits That Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251, 251 (2007) (finding a large increase in presidential election litigation since 2000, especially in the 2004 period).

142. Hasen, *supra* note 16, at 944.

143. 127 S. Ct. 5 (2006).

two years before the court decided *Purcell* in cases involving the new Georgia and Missouri voter identification laws.¹⁴⁴

In Georgia, as in other states, the Republican-dominated legislature passed a voter-identification law in the name of fraud prevention over the loud protests of Democrats¹⁴⁵—some of whom noted that the law actually made it simpler to cast an absentee ballot and thus hardly succeeded as a means of combating fraud.¹⁴⁶ Because Georgia is a jurisdiction covered by section 5 of the Voting Rights Act,¹⁴⁷ it must seek approval from the Department of Justice to put its law into effect, and to gain that approval it had to prove that the law would have no discriminatory effect on minority voters.

Career attorneys at the Justice Department concluded that the Georgia ID law was discriminatory and should not be approved,¹⁴⁸ a decision overruled by DOJ political appointees (a fact the public learned when the internal DOJ memo was leaked to the *Washington Post*).¹⁴⁹ The DOJ careerists had found that Georgia offered no proof of a problem with fraud and the careerists' memo concluded that the law would hurt minority voters.

144. The next few paragraphs draw from Richard L. Hasen, *Election Deform: The Supreme Court Messes Up Election Law. Again.*, SLATE, Oct. 24, 2006, <http://www.slate.com/id/2152116>, and Hasen, *supra* note 93.

145. Darryl Fears, *Voter ID Law Is Overturned*, WASH. POST, Oct. 28, 2005, at A03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102702171.html> ("Conservative lawmakers said it was needed to limit elections fraud. Liberal lawmakers said that argument was a smokescreen masking another intent: to maintain Republican power in the state by diluting the minority vote, which typically goes to Democrats.").

146. *Under Rulings, Georgia Can't Require Voter Photo IDs This Year*, USA TODAY, July 12, 2006, http://www.usatoday.com/news/nation/2006-07-12-voter-ID_x.htm?csp=24 ("Republican Gov. Sonny Perdue and other supporters of the IDs had argued they were needed to prevent election fraud. Civil rights groups challenged the law in both federal and state court, arguing that it discriminated against poor, elderly and rural voters. They also argued that voter fraud in Georgia stems from absentee ballot voting, an issue not even addressed by the law.").

147. 42 U.S.C. § 1973c (2000).

148. The internal Department of Justice memorandum, Section 5 Recommendation Memorandum (Aug. 25, 2005), leaked to the *Washington Post*, is posted at <http://www.votingrights.org/news/downloads/Section%205%20Recommendation%20Memorandum.pdf>.

149. Dan Eggen, *Criticism of Voting Law Was Overruled*, WASH. POST, Nov. 17, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504.html>. Some have claimed that this decision was part of a pattern of the Justice Department's political appointees overruling career attorneys and making political decisions. See *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Oversight Hearing on the Civil Rights Division of the Department of Justice Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 110th Cong. (2007) (statement of Joseph D. Rich, Director, Fair Housing Project, Lawyer's Committee for Civil Rights Under Law), available at <http://judiciary.house.gov/media/pdfs/Rich070322.pdf>.

Unsurprisingly, civil rights organizations challenged the Georgia voter-identification law, and a federal district court granted a preliminary injunction against it, finding that the costs associated with obtaining voter identification (even with a fee waiver) made the ID requirement a de facto unconstitutional poll tax.¹⁵⁰ The court also found no evidence of voter fraud in Georgia to sustain the law, except in the area of absentee ballots—where the law actually made voting without identification easier.¹⁵¹

Undeterred, the Georgia legislature passed a new version of the voter-identification law,¹⁵² which its supporters say eases the ability of the poor to obtain a voter ID.¹⁵³ The new law too is currently under court challenge,¹⁵⁴ after courts granted preliminary injunctions enjoining the law's enforcement in 2006.¹⁵⁵

The Missouri legislature also passed a voter identification law,¹⁵⁶ but it was struck down as violating the right to vote protected by the state constitution.¹⁵⁷ Notably, the state of Missouri argued its voter-identification law could be justified to prevent the perception that voter fraud was a serious problem. The Missouri Supreme Court rejected this perception as a basis for the law:

While the State does have an interest in combating those perceptions, where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement. Perceptions are malleable. While it is agreed here that the State's concern about the perception of fraud is real, if this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in

150. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

151. *Id.* at 1361-62.

152. GA. CODE ANN. §§ 21-2-417.1, 40-5-103(d) (2007).

153. *See Under Rulings, Georgia Can't Require Voter Photo IDs This Year*, *supra* note 146.

154. *See id.*

155. *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006); *Lake v. Perdue*, No. 2006CV119207 (Ga. Ct. App. July 7, 2006) (granting temporary restraining order). As this Article went to press, both the federal district court and the Georgia Supreme Court dismissed challenges to the voter identification law on standing grounds. *Common Cause/Ga. v. Billups*, No. 4:05-CV-0201-HLM, slip op. at 128 (N.D. Ga. Sept. 6, 2007), available at <http://alt.cimedia.com/ajc/pdf/polinsider/Photo%20ID%20order%20part%201.pdf> and <http://alt.cimedia.com/ajc/pdf/polinsider/Photo%20ID%20order%20part%202.pdf>; *Perdue v. Lake*, 647 S.E.2d 6 (Ga. 2007). The federal district court opinion also reached the merits, holding that Georgia's revised voter identification law did not violate the constitutional rights of voters. For more on the federal court's view of the merits in the Georgia litigation, see footnotes 179 and 190, *infra*.

156. MO. ANN. STAT. § 115.427 (West 2007); 2006 Mo. Laws 728-32.

157. *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).

the future as a mechanism for further burdening the right to vote or other fundamental rights.¹⁵⁸

The Missouri court concluded that “[t]he protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception.”¹⁵⁹

This brings us to the Supreme Court’s decision in *Purcell*. Arizona voters adopted a new voter-identification law in 2004 as part of Proposition 200¹⁶⁰—a measure aimed primarily at the problem of illegal immigration. Among other provisions (including one that voters provide satisfactory evidence of citizenship at the time of voter registration), the law requires those who vote in person to produce either a photo identification, or two other pieces of identification, showing the voter’s name and address. A coalition of voting-rights organizations filed a complaint alleging that the law violated federal election laws and the U.S. Constitution. A federal district court, without providing any reasoning, denied their request to delay implementing the law pending a full trial on the issues in the case.¹⁶¹ A Ninth Circuit motions panel, also without providing any reasoning, reversed that decision, temporarily halting the voter-identification requirements (as well as its voter-registration requirements).¹⁶² The trial court then belatedly issued its statement of reasons for denying the order.¹⁶³

The state of Arizona then asked Justice Kennedy, who has jurisdiction over emergency appeals from the Ninth Circuit, to stay the Ninth Circuit’s decision. Justice Kennedy referred the question to the entire court.¹⁶⁴ The Court treated the stay request as a petition for certiorari, granted it, and then reversed the Ninth Circuit in a surprise per curiam opinion on a late Friday afternoon soon before the election, allowing the identification requirements to be put into effect pending a full trial on the merits in the case.

The Supreme Court described constitutional interests on both sides of the voter-identification question:

Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. . . . Countering the State’s compelling interest in preventing voter fraud is the plaintiffs’ strong interest in exercising the “fundamental

158. *Id.* at 218.

159. *Id.* at 219.

160. For the text of the proposition, see <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.htm>.

161. See *Purcell v. Gonzalez*, 127 S.Ct. 5, 6 (2006).

162. *Id.*

163. *Id.* at 7.

164. *Id.* at 6.

political right” to vote. Although the likely effects of Proposition 200 are much debated, the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs’ challenges.¹⁶⁵

The Court also signaled its disfavor with last-minute court interventions in the electoral process: “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”¹⁶⁶ The Court seemed especially concerned that the Ninth Circuit gave no reasons for its decision to reverse the district court and stay implementation of Arizona’s voter identification law.

The Court’s decision to reverse the Ninth Circuit is defensible, given the circuit court’s failure to provide any reason for not deferring to a lower court’s decision not to issue the preliminary injunction (though the district court’s failure to timely issue findings of fact and conclusions of law made the Ninth Circuit’s review difficult as well). Justice Kennedy, or the Court, arguably should have granted the stay of the Ninth Circuit’s order, restoring the district court’s opinion to let the election go forward with the identification requirement, pending a trial on the merits.¹⁶⁷ As Justice Stevens noted in his one paragraph concurrence in *Purcell*, allowing the election to go forward with the identification requirement provided the opportunity for the parties to gather evidence about the workings of the law and any possible effect on voter turnout.¹⁶⁸

But in three ways, the Court’s treatment of the *Purcell* case shows that the Court has not internalized the lessons from *Bush v. Gore* and has actually made things worse.

A. The Decision to Quickly Issue an Opinion in the Case

It is quite rare for the Supreme Court to treat a motion for a stay as a petition for certiorari, to grant it, and to issue an opinion without the benefit of

165. *Id.* at 7 (citations omitted).

166. *Id.*

167. The Court also expressly disclaimed that it was deciding anything on the merits. *Id.* at 7.

168. *Id.* at 8 (Stevens, J., concurring). The concurrence reads in full:

Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements. Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.

Id.

further briefing or oral argument.¹⁶⁹ The Court should have learned the lesson from *Bush v. Gore* that rushing through contentious election decisions is fraught with peril. As Justice O'Connor remarked about *Bush v. Gore*, "I don't think what emerged in the last opinion was the Court's best effort. It was operating under a very short time frame, to say the least. Given more time, I think we probably would've done better."¹⁷⁰

Given the sloppy reasoning of *Purcell* (described in the second point below), it is quite plausible that the opinion was rushed. Indeed, given the controversial empirical assumptions contained in the opinion, it is likely that at least the more liberal Justices on the Court did not have time to fully digest the significance and potential negative interpretations of the opinion. Likely the Court decided to rush the opinion out to send a message to lower courts that they should be less willing to entertain litigation that makes last minute changes in election laws (an issue I return to in the third point below).

The Court had two alternatives to issuing the opinion when and how it did. First, Justice Kennedy (or the Court) could have reversed the Ninth Circuit without issuing an opinion. Second, perhaps fearing that this vote would be seen as too political before the upcoming election (or perhaps not, if it were unanimous), the Court could have issued the order, followed by an opinion issued later, after the Court had time to give it more careful attention.¹⁷¹ That opinion could have made the same points about pre-election litigation and a balancing of interests, but it would have given the Court time to develop its arguments more carefully. Other courts have followed the practice of issuing election law opinions *after* the court issued its decision in time-pressed cases,¹⁷² and the Supreme Court should have considered doing so.

169. Orin Kerr termed the Court's treatment of the stay motion the legal equivalent of a "lightning bolt." Posting of Orin Kerr to The Volokh Conspiracy, *Supreme Court Allows Voter ID Law*, <http://volokh.com/posts/1161378321.shtml> (Oct. 20, 2006, 17:05).

170. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 175 (2007).

171. Cf. Rick Hasen, *Redistricting Measure Doesn't Belong on Ballot*, L.A. DAILY J., Aug. 17, 2005, at 8, available at <http://electionlawblog.org/archives/dj0817.pdf> (arguing that the California Supreme Court should follow up its orders in cases involving pending initiatives with later-issued carefully considered opinions to provide much needed guidance to lower courts).

172. See, e.g., *N.J. Democratic Party, Inc. v. Samson*, 814 A.2d 1025 (N.J. 2002), opinion issued, 814 A.2d 1028, stay denied, 537 U.S. 803 (2002), cert. denied, 537 U.S. 1083 (2002) (ordering state election officials to allow the Democratic Party to replace withdrawing U.S. Senate candidate Robert Torricelli with Frank Lautenberg, and issuing opinion after election).

B. *The Court's Endorsement of a Wholly Unsupported Empirical Claim that Threatens Equal Protection Rights in Election Administration Cases*

My most serious objection to *Purcell* is the Court's adoption of a wholly unsupported empirical assumption about the effects of possible voter fraud on turnout and how that unsupported assumption must now be balanced in cases challenging the right to vote.

As noted in Part II, there are two basic empirical questions for the courts to sort out in these cases. First, is there enough evidence of impersonation fraud (where someone shows up at the polls and falsely claims to be registered to vote there) to justify such laws, which no doubt place some burden on the right to vote? Second, how onerous are such laws? The empirical evidence on both fronts is still rather scant, but it is being developed.

Once the Court was going to issue an opinion, it should have said that courts must engage in some kind of balancing (whether under strict scrutiny or a less burdensome standard) of the state's interest in preventing voter fraud with the rights of voters lacking identification (and lacking ease of obtaining such identification) required by the state in order to vote.¹⁷³ The Court even could have said that in the absence of any evidence of *either* voter impersonation fraud *or* voter deterrence due to a voter identification requirement, a court is within its discretion in allowing the state law to go forward until there is proof the law is deterring voters from voting. That would be the time for an appropriate challenge.¹⁷⁴

But the Court did not do so. Instead, the Court stated, *without any proof whatsoever*, that concerns about voter fraud "drive[] honest citizens out of the democratic process and breed[] distrust of our government."¹⁷⁵ The Court further said that the fundamental right to vote of voters lacking identification must be weighed against the interest of those supposedly disillusioned voters who "will feel disenfranchised."¹⁷⁶

The discussion is troubling on a few levels. First, the Court cited no evidence, and I am aware of *absolutely no evidence*, supporting the view that voters are deterred from voting out of fear that their legitimately cast votes will be diluted by the votes of those committing voter fraud.¹⁷⁷ Indeed, the available

173. See Overton, *supra* note 89 (advocating cost-benefit analysis in court determination of constitutionality of voter identification laws). The standard of review in such cases presents a difficult question, one that the Court may have the opportunity to resolve when it hears the *Crawford* case. See *infra* note 202 and accompanying text.

174. Alternatively, the Court could have said that unless the state could produce some evidence of a real threat of voter fraud *that a voter ID law could deter*, such identification laws are unconstitutional.

175. *Purcell v. Gonzalez*, 127 S.Ct. 5, 7 (2006).

176. *Id.*

177. See Michael C. Dorf, *In a Brief, Unsigned New Opinion, the Supreme Court Sends the Wrong Signal on Voter ID and Voter Fraud*, FINDLAW, Nov. 6, 2006,

evidence described in Part II seems to suggest that *voter identification requirements* are more likely to depress turnout than to increase it, and that voter confidence in the electoral process, at least among African-Americans, is decreasing *because of* voter identification requirements. The question has not yet been studied, but the assumption is at least plausible given the evidence. The Court's alternative supposition does not even rely on any suggestive evidence, and I am aware of none.

Moreover, the Court offered no explanation *why* it is appropriate to balance *feelings* of disenfranchisement against *actual* disenfranchisement, whatever the appropriate standard of review. As Alex Keyssar commented soon after the Court issued its opinion in *Purcell*: "FEEL disenfranchised? Is that the same as 'being disenfranchised'? So if I might 'feel' disenfranchised, I have a right to make it harder for you to vote? What on earth is going on here?"¹⁷⁸ Moreover, the Supreme Court did not acknowledge that some voters might "feel" disenfranchised when the state imposes barriers on voting such as a voter-identification law without proof that such laws are necessary to deter voter fraud. At the very least, the Court should have ordered briefing and oral argument on the question, which would have allowed the challengers to bring to the Court's attention the Missouri Supreme Court's important discussion of the issue, which concluded that misperceptions of disenfranchisement through voter fraud cannot trump the fundamental right to vote.¹⁷⁹

<http://writ.news.findlaw.com/dorf/20061106.html> (noting absence of empirical support for Court's assumptions). Public opinion surveys show that a majority of voters support voter identification laws. See Overton, *supra* note 89, at 634. But that support does not by itself show that voters believe such laws are necessary to deter voter impersonation fraud and that the absence of such laws makes it less likely those voters will turn out to vote. Nor does evidence showing that a majority of voters worry about the fairness of the election process mean that voter identification laws would bolster such confidence. But see Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 794 (S.D. Ind. 2006) (drawing such a conclusion from evidence about problems with public confidence).

178. Posting of Alex Keyssar to The Huffington Post, "*Disenfranchised*"? *When Words Lose Meaning*, http://www.huffingtonpost.com/alex-keyssar/disenfranchised-when-_b_32241.html (Oct. 22, 2006, 13:57 EST); see also Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 765 (2007) ("The Court's equation of state denial of the right to vote with voters' *private* decisions not to participate in a process in which they lack confidence represents a breathtaking expansion of the concept of vote dilution.").

179. *Weinschenk v. State*, 203 S.W.3d 201, 218 (Mo. 2006). A federal district court recently blindly followed the troubling balancing language from *Purcell* in upholding Georgia's revised voter identification law. See *Common Cause/Ga. v. Billups*, No. 4:05-CV-0201-HLM, slip op. at 152-53 (N.D. Ga. Sept. 6, 2007), available at <http://alt.cimedia.com/ajc/pdf/polinsider/Photo%20ID%20order%20part%201.pdf> and <http://alt.cimedia.com/ajc/pdf/polinsider/Photo%20ID%20order%20part%202.pdf>. The district court also relied heavily on the Seventh Circuit's *Crawford* decision discussed below. *Id.* at 150-52.

C. The Court's Unnecessarily Broad Discouragement of Pre-Election Litigation

There is certainly something to be said for the Court's statement that "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."¹⁸⁰ (Of course, the Court did not stop to consider that its own eleventh-hour reversal of the Ninth Circuit order "could confuse both poll workers and voters on Election Day.")¹⁸¹ Such concerns on both ends are quite possible. There was ample evidence of confusion in Missouri about voter identification requirements, even though the state Supreme Court had struck down the photo ID requirements months before the election.¹⁸²

But lower courts have already begun reading the Court's statement in *Purcell* more broadly as an argument against pre-election litigation.¹⁸³ I have argued that pre-election litigation is often to be preferred to post-election litigation, at least if the risk of confusion is not too high.¹⁸⁴ When courts get involved in election disputes, however, they run a risk of undermining the public's faith in the electoral process and in the fairness of the courts. To minimize that problem, it makes sense to encourage litigation well *before* elections (that is to say, before the winner is known and everyone will question the biases of the judges) and to discourage litigation *after* the election whenever a suit might have been brought earlier. The risk of confusion as the election approaches should be balanced against the risk of disenfranchisement or other loss of rights that cannot be fixed after an election. If a voter identification law is indeed disenfranchising, there is likely no effective post-election remedy to restore the right to vote.¹⁸⁵ Indeed, in a close election, an unconstitutional law

180. *Purcell*, 127 S.Ct. at 7.

181. Press Release, electionline.org, Nonpartisan Research Group Finds Potential for Trouble at Polls (Oct. 24, 2006), available at <http://electionline.org/Portals/1/Publications/Press.Release.Nov.06.FINAL.pdf>.

182. See CARNAHAN, *supra* note 96, at 15-17 (recounting problems with poll workers asking Missouri voters for the wrong type of identification or requiring voters without identification to cast provisional ballots and noting that the Secretary of State herself was wrongfully asked to provide identification).

183. See, e.g., *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) (relying on *Purcell* to overturn the district court's temporary restraining order blocking enforcement of Ohio's voter identification procedures for absentee voters on grounds that an order "needlessly creates disorder in electoral processes, without any concomitant benefit to the public").

184. Hasen, *supra* note 16, at 991-99.

185. The right to cast a provisional ballot under HAVA means it is at least theoretically possible that some ballots could be cast provisionally before an election by voters without identification, and then a court could order the ballots counted in the event a court declares the identification law unconstitutional after the election. See Edward B.

could make a difference in the outcome. If, as Democrats claim, voter-identification laws fall more heavily on their supporters, such laws could tip the balance in favor of Republicans.

Purcell may have the ultimate effect of moderately reducing the total amount of litigation, which would look like a modest improvement over the status quo. However, *Purcell* achieves that result only by eliminating cases for which the only viable remedy may come through pre-election judicial review.

D. The Ramifications

Purcell is already having bad effects on voter identification decisions. The Seventh Circuit, in a 2-1 decision with the majority opinion written by Judge Posner, recently rejected a constitutional challenge to Indiana's new voter identification requirements.¹⁸⁶ As with the *Purcell* opinion, my objection to the Seventh Circuit opinion in *Crawford v. Marion County Election Board* is primarily with the reasoning in the case and the potential for mischief that the opinion's loose language can create for future election law challenges.

The *Crawford* court noted the paucity of empirical evidence on both sides of the voter identification debate. The state could not point to a single prosecution ever in Indiana of impersonation fraud that a voter identification law could deter or detect.¹⁸⁷ But the plaintiffs could not produce a single plaintiff who would be deterred by the inability to produce voter identification.¹⁸⁸ (They did, however, produce a pro bono expert report from a political scientist whose analysis concluded quite plausibly that the law was likely to deter turnout, especially among the poor, minorities, and the elderly.)¹⁸⁹ As in *Purcell*, the court could have said that in the absence of any

("Ned") Foley, *ID Disparities & Post-Voting Review of Provisional or Absentee Ballots*, ELECTION LAW @ MORITZ, Oct. 25, 2006, <http://moritzlaw.osu.edu/electionlaw/freefair/articles.php?ID=12>. But that remedy would work only for ballots that are actually cast in a system that works effectively to allow the casting of such ballots. It cannot help anyone who was deterred from voting by the voter identification requirement (despite the HAVA right to cast a provisional ballot), or anyone who (improperly) was not offered a provisional ballot, or anyone whose provisional ballot was not properly handled by election officials.

186. *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), cert. granted, No. 07-21, 2007 WL 1999941 (Sept. 25, 2007), consolidated with *Indian Dem. Party v. Rokita*, No. 07-25, 2007 WL 1999963 (Sept. 25, 2007).

187. *Id.* at 955 (Evans, J., dissenting).

188. *Id.* at 951-52 (majority opinion).

189. Affidavit of Marjorie R. Hershey, Exhibit 10, Brief of Indiana Democratic Party, *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/IndianaDemocraticPartyAttachment10.pdf>. In contrast, in the Georgia voter identification case, the plaintiffs submitted the affidavits of a number of voters who alleged they would not be able to vote under Georgia's voter identification law. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1340-42 (N.D. Ga. 2005).

evidence on either side showing burden or benefit, a state identification requirement may remain in place until such time as there is proof the law is deterring voters from voting.¹⁹⁰

But Judge Posner did much more than that in the *Crawford* majority opinion. The opinion did not just say that the burden on voting rights would be small because only a few people would be deterred from voting. Rather, basing his analysis upon the economic model of voting,¹⁹¹ Judge Posner trivialized the right to vote and questioned whether even *complete disenfranchisement* was a serious burden on voters:

190. This was essentially the approach recently taken by a federal district court in upholding Georgia's revised voter identification law. See *Common Cause/Ga. v. Billups*, No. 4:05-CV-0201-HLM, slip op. at 153-55 (N.D. Ga. Sept. 6, 2007), available at <http://alt.cimedia.com/ajc/pdf/polinsider/Photo%20ID%20order%20part%201.pdf> and <http://alt.cimedia.com/ajc/pdf/polinsider/Photo%20ID%20order%20part%202.pdf>. The court, ostensibly relying on *Crawford*, applied a rational basis test: "Although Plaintiffs may argue that no documented cases of in-person voter fraud exist in Georgia, 'the State is not required to produce such documentation prior to enactment of a law.'" *Id.* at 154-55 (quoting *Rokita*, 458 F. Supp. 2d at 826). The *Crawford* court went further, however. It noted that Indiana law provides for a way for indigents to vote without producing photo identification. 472 F.3d at 950. Though such an approach in theory should obviate a poll tax argument against voter identification requirements as accepted in the Georgia case, it is not so clear upon closer inspection that the Indiana law removes the poll tax problem. To take advantage of the indigency exception, a voter must cast a provisional ballot at the polling place and then show up *at another time and place* to fill out an affidavit of indigency. These affidavits are not available at the polling place; instead, the indigent person must make a separate trip to appear before a clerk or election board to sign an affidavit under penalty of perjury that one does not possess a photo identification and that indigency prevents getting one (or that there are religious reasons for not having one's picture taken). This procedure seems to be a pretty onerous burden on the poor, especially those who have to travel back a second time to see an elections official. A less onerous requirement would allow the affidavit to be filled out at the polling place, or a single time with a voter's registration form. The revised Georgia law, in contrast, gave voters the option of signing up for no-excuse absentee balloting without proof of identification. See *Common Cause/Ga.*, *supra*, at 146; see also *id.* at 146-47, 150 (contrasting more onerous nature of earlier Georgia identification law and noting state's earlier failure to publicize the no-excuse absentee voting option).

191. Economic models of voting have had a difficult time explaining why anyone bothers to vote in large elections, where the chances of casting a decisive ballot are extremely small. If voters were acting "instrumentally" in casting their votes to influence the outcomes we would expect to see turnout be the smallest, not the largest, in presidential elections, where the chances of affecting the outcome (Florida 2000 to one side) are extremely small. Many economists, and it appears from *Crawford* that Judge Posner is among them, would explain voting by its "consumption" value, or the pleasure that people get in casting votes—a tautological explanation at bottom (people vote because they like to vote). Given this viewpoint, it is curious that Judge Posner devoted no discussion to the special burdens the law placed on indigent voters; economic analysis should have led the judge to conclude that such voters were especially unlikely to vote under a cost-benefit analysis. For an introduction to the economic model and critiques, see Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2138-46 (1996) (describing and criticizing economic model of voting).

Even though it is exceedingly difficult to maneuver in today's America without a photo ID (try flying, or even entering a tall building such as the courthouse in which we sit, without one), and as a consequence the vast majority of adults have such identification, the Indiana law will deter some people from voting. A great many people who are eligible to vote don't bother to do so. Many do not register, and many who do register still don't vote, or vote infrequently. The benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote), and even very slight costs in time or bother or out-of-pocket expense deter many people from voting, or at least from voting in elections they're not much interested in. So some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote, and a few who have a photo ID but forget to bring it to the polling place will say what the hell and not vote, rather than go home and get the ID and return to the polling place.¹⁹²

"What the hell," indeed. Having found that some (unquantifiable, in Judge Posner's view, but likely small, number of)¹⁹³ voters would in fact be deterred by the requirement, the *Crawford* court nonetheless found no constitutional violation. It held that the law was not all that burdensome, and following *Purcell*'s (empirically unsupported) statement that in cases of voter identification "the right to vote is on both sides of the ledger,"¹⁹⁴ the court concluded it had to judge the Indiana law under a low level of scrutiny.

In response to the plaintiffs' argument that the law was unjustified because there was no proof of voter impersonation fraud, the court wrote:

192. *Crawford*, 472 F.3d at 951 (citation omitted); see also *id.* at 953 (comparing voter fraud to "littering"); Bob Bauer, *Voting Fraud and the Offense of Littering in the Jurisprudence of Richard Posner*, MORE SOFT MONEY HARD LAW, May 3, 2007, http://moresoftmoneyhardlaw.com/updates/voting_rights_act_redistricting_issues.html?AID=989 ("Posner's precise point about littering is that the offenders, like those guilty of impersonation fraud, are hard to catch. Yet the comparison works at a number of levels, also helping the Judge to lower the stakes—and by lowering the stakes, lower the burden carried by legislatures in justifying a particular regulatory solution.").

193. Judge Posner found that the voter identification law was likely to burden Democratic voters over Republican voters, 472 F.3d at 951, but he observed that indigent voters could simply vote using an indigency affidavit and would not necessarily be deterred by the requirement. *Id.* at 950 ("Both the indigent and the nonindigent who does not have (or have with him) a photo ID can, if challenged, cast a provisional ballot and then has 10 days either to file an affidavit of indigency or to procure a photo ID."); *id.* at 952 ("The fewer the people who will actually disfranchise themselves rather than go to the bother and, if they are not indigent and don't have their birth certificate and so must order a copy and pay a fee, the expense of obtaining a photo ID, the less of a showing the state need make to justify the law." (emphasis added)). The judge did not consider the large transaction costs associated with Indiana's rules for indigent voters, requiring two trips (at private expense) to government offices.

Judge Posner's views in *Crawford* form an interesting contrast with his analysis of the 2000 Florida election, in which he compared punch card voting to a "de facto literacy test." POSNER, *supra* note 8, at 259.

194. 472 F.3d at 952 (citing *Purcell*, 127 S. Ct. 5, 7 (2006) (per curiam)).

But that lacuna may reflect nothing more than the vagaries of journalists' and other investigators' choice of scandals to investigate. Some voter impersonation has been found (though not much, for remember that it is difficult to detect) in the states that have been studied, and those states do not appear to be on average more "dishonest" than Indiana; for besides the notorious examples of Florida and Illinois, they include Michigan, Missouri, and Washington (state). Indirect evidence of such fraud, or at least of an acute danger of such fraud, in Indiana is provided by the discrepancy between the number of people listed on the registered-voter rolls in the state and the substantially smaller number of people actually eligible to vote.¹⁹⁵

The court provided no citations of evidence of "notorious" voter impersonation fraud in Florida, Illinois, Michigan, Missouri, or Washington State. As in *Purcell*, the *Crawford* court takes assumptions about voting behavior and turns those assumptions into matters of "fact," without so much as a single citation to evidence to support such assertions.¹⁹⁶ Moreover, as noted above, journalists and the government have been *looking* for examples of impersonation voter fraud. Yet they have been unable to find significant instances of such fraud. At the same time, the government has been able to find

195. *Id.* at 953.

196. Nor was the district court's treatment of this issue any better. The district court cited to fifteen exhibits from the state to reach the conclusion that voter fraud was a major national problem. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 793-94 (S.D. Ind. 2006). Yet virtually all of that evidence was anecdotal, unproven (and in some cases disproved), or unrelated to the kind of fraud (such as absentee ballot fraud) that Indiana's voter identification law would do nothing to deter. See Brief of Brennan Center for Justice at NYU School of Law as Amicus Curiae Supporting Plaintiffs-Appellants and Reversal at 7-18, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007) (No. 06-2218), available at http://www.brennancenter.org/dynamic/subpages/download_file_36780.pdf (analyzing and refuting each piece of evidence cited by the district court in support of its holding on the prevalence of impersonation voter fraud); Rick Hasen, *The Extremely Weak Case of Voter Fraud in Crawford, the Indiana Voter ID Case*, Election Law, <http://electionlawblog.org/archives/008378.html> (May 2, 2007, 8:45 A.M.).

The Seventh Circuit majority's discussion of absentee voting is equally unconvincing. The court wrote:

The plaintiffs complain that the new Indiana law is underinclusive because it fails to require absentee voters to present photo IDs. But how would that work? The voter could make a photocopy of his driver's license or passport or other government-issued identification and include it with his absentee ballot, but there would be no way for the state election officials to determine whether the photo ID actually belonged to the absentee voter, since he wouldn't be presenting his face at the polling place for comparison with the photo.

472 F.3d at 954. The court did not consider the possibility of a law requiring absentee voters to provide a copy of their state driver's license (or other state ID) numbers, or thumbprints with their votes, which could be compared (perhaps on a random basis in an audit) to a thumbprint on file, or some other means of verifying their identities. Moreover, the problem with absentee voter fraud is not impersonation vote fraud, but the sale of votes. Under anything stronger than rational basis review, it would be hard for the state to justify its decision to make voting more difficult in the name of fraud protection for those voters who vote with a system least prone to fraud, while leaving the system with more fraud completely alone.

and successfully prosecute numerous instances of absentee vote fraud and vote buying, which presumably election criminals would take equal steps to cover up.¹⁹⁷

The dissenting judge in *Crawford*, viewing the same (lack of) evidence on both sides, reached diametrically opposite conclusions:

Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic. We should subject this law to strict scrutiny—or at least, in the wake of *Burdick v. Takushi*,¹⁹⁸ something akin to “strict scrutiny light”—and strike it down as an undue burden on the fundamental right to vote.¹⁹⁹

This divide is especially troubling. The two judges in the *Crawford* majority were appointed by Republican presidents while the dissenting judge was appointed by a Democratic president.²⁰⁰ What's worse, the Seventh Circuit recently voted to deny en banc rehearing in *Crawford*, with the vote splitting along party lines (with one exception).²⁰¹ Among other things, the dissenting judges argued that the *Crawford* majority applied the wrong standard of review,²⁰² an issue that is ripe for consideration by the Supreme Court²⁰³ and now raised by the plaintiffs in their petition for writ of certiorari in the Court.²⁰⁴

197. That there would be more absentee voter fraud than impersonation voter fraud is completely unsurprising, given the difficulties of enforcing vote buying deals for voting occurring at polling places with a secret ballot. See FORTIER, *supra* note 110; Richard L. Hasen, Introduction, Symposium, *Internet Voting and Democracy*, 34 LOY. L.A. L. REV. 979, 982 (2001) (noting that institution of the secret ballot may have reduced bribery).

198. 504 U.S. 428 (1992).

199. 472 F.3d at 954 (Evans, J., dissenting) (citation omitted).

200. Rick Hasen, *Initial Thoughts on the Seventh Circuit Indiana Voter Identification Decision*, Election Law, <http://electionlawblog.org/archives/007581.html> (Jan. 5, 2007, 3:19 P.M.).

201. *Id.*; see also Rick Hasen, *Crawford, and the Partisan Affiliation of Judges Deciding the Voter Identification/Election Administration Cases, with a Note on Wikipedia*, Election Law, <http://electionlawblog.org/archives/008213.html> (Apr. 9, 2007, 4:36 P.M.). As this Article was being completed, the Michigan Supreme Court too split along party lines in issuing an advisory opinion on the constitutionality of Michigan's voter identification law. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, No. 130589, 2007 WL 2410868 (Mich. July 18, 2007), available at <http://electionlawblog.org/archives/mich-voter-id.pdf>. The five Republican judges on the panel voted to uphold the law's constitutionality; the two Democrats disagreed. Rick Hasen, *Breaking News: Michigan Supreme Court, On Party Line Vote, Upholds Michigan Voter ID Law Against Constitutional Challenge*, Election Law, <http://electionlawblog.org/archives/008905.html> (July 19, 2007, 10:49 A.M.).

202. *Crawford v. Marion County Election Bd.*, 484 F.3d 437, 437 (7th Cir. 2007) (Wood, J., dissenting from denial of rehearing en banc, joined by Rovner, Evans, and Williams, JJ.) (“[W]hen there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny.”). Echoing the call for stricter review of Indiana's election law because of a bad legislative intent is a recent student note on the case in the *Harvard Law Review*. See Recent Case, *Crawford v. Marion County Election Board*,

I am *not* arguing that the Seventh Circuit judges were consciously making decisions based upon what would be best for the party they support; instead, I am arguing that in the face of a paucity of evidence, the judges may be swayed by beliefs that seem to correlate with those who are members of their party. Judge Posner's majority opinion, for example, goes out of its way both to minimize the extent to which this law is likely to burden voters and to suggest (without any real evidence) that there is a great deal of impersonation vote fraud going on out there that is not easily detected. Judge Evans, in dissent, is the mirror image. He is greatly bothered by what he sees as the potential for voters to be disenfranchised (pointing to some suggestive anecdotes), while dismissing concerns about vote fraud as unsupported by the evidence.

In the end, the performances of the Supreme Court in *Purcell* and the Seventh Circuit in *Crawford* are troubling. The Supreme Court Justices have not learned the important lessons from *Bush v. Gore*. They are not being careful in what they write in the election administration area, and they are encouraging additional litigation based upon unproven and somewhat implausible political assumptions. The Seventh Circuit judges, like the legislators and many others in this debate, cannot seem to avoid using default rules that seem to correlate with one's political leanings for resolving election administration disputes.

CONCLUSION

The 2000 election debacle brought well-deserved attention to the serious problems plaguing our election system. *Bush v. Gore* divided the country at that time, but many hoped that the case and surrounding controversy could spur meaningful reforms to fix serious election administration problems. The case and the Florida controversy have not directly led to meaningful election reform. States and legislatures, aided by congressional funding, have taken steps to improve voting technology, though the transitions to new technologies and

472 F.3d 949 (7th Cir. 2007), 120 HARV. L. REV. 1980, 1983 n.28 (2007) (rejecting my proposed "effects-based" test for judging the constitutionality of election laws and endorsing the impermissible motive test of Professor Pildes).

203. For a look at the complexities of the standard of review issue, see Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics, Part I: Explanations and Opportunities*, 156 U. PA. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=980079>. Two cases on the Supreme Court's October 2007 docket touch on the standard of review issue. See *Wash. State Grange v. Wash. State Republican Party*, 127 S. Ct. 1373 (2007) (granting cert.), consolidated with *Washington v. Wash. State Republican Party*, 127 S. Ct. 1373 (2007); *New York State Bd. of Elections v. Lopez Torres*, 127 S. Ct. 1325 (2007) (granting cert.).

204. Petition for a Writ of Certiorari at 21-25, *Indiana Democratic Party v. Rokita*, 472 F.3d 949 (7th Cir. 2007) (No. 07-25), available at <http://electionlawblog.org/archives/crawford-cert.pdf> (arguing that panel decision uses incorrect standard of review in considering constitutionality of Indiana voter identification law).

election administration incompetence have colored what would otherwise be success on the technology side.

But on the side of reforming elections to create fairer and nonpartisan rules, it appears the country has learned the wrong lessons from the Florida debacle and *Bush v. Gore*. Election administration has become more, not less, partisan. Public confidence in election administration, especially among African-Americans, is at troubling and embarrassingly low levels. Elections more frequently result in litigation than before 2000. And the courts, especially the Supreme Court, have not been careful in addressing election administration claims. The result is likely to be further contentiousness and growing voter distrust of the system by which we cast and count votes for the foreseeable future.

Now more than ever, the country needs to learn the right lessons from *Bush v. Gore*. But it appears *Bush v. Gore*'s moment has passed from public consciousness, replaced instead by partisan recriminations and retrenchment.