EARLY RETURNS ON ELECTION REFORM:
DISCRETION, DISENFRANCHISEMENT, AND
THE HELP AMERICA VOTE ACT

DANIEL P. TOKAJI
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Daniel P. Tokaji*

Introduction

On the morning of November 3, 2004, President George W. Bush led Senator John Kerry by approximately 136,483 votes out of some 5.6 million cast in Ohio, the state upon which the outcome of the election turned.1 This margin was sufficient to overcome any legal challenges that might have arisen from uncounted provisional votes, ambiguously marked "hanging chad" punch card ballots, and lengthy lines that may have discouraged many citizens from voting.2 Had Bush’s morning-after lead been half of what it was, a replay of the legal battles that culminated in Bush v. Gore3—with the Buckeye State rather than the Sunshine State as the backdrop, Ken Blackwell playing the role of Katherine Harris, and provisional ballots joining punch card ballots as the dominant props—would have been almost certain.

The United States was thus fortunate to avoid another protracted post-election fight in 2004. Despite all the litigation and legislative activity devoted to election reform in the preceding four years, serious flaws in the infrastructure of American democracy remained. The only reason that these flaws did not lead to another contested election is because the margin of victory exceeded the margin of litigation.4

After all the attention given to the mechanics of election administration in the wake of Election 2000, one might ask how this could have happened.

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1 Dennis Cauchon, The Election Won’t Be Over in Ohio for Weeks, USA TODAY, Nov. 4, 2004, at 13A (reporting 136,483-vote margin for Bush); John McCormick, Provisional Ballots Couldn’t Erase Bush Advantage, CHI. TRIB., Nov. 3, 2004, at 4 (reporting the same); Lynn Hulsey, Record Numbers Show Up at Polls, DAYTON DAILY NEWS, Nov. 4, 2004, at A1 (reporting turnout of 5.6 million in Ohio, or 69.9%).
2 Adam Liptak, In Making His Decision on Ohio, Kerry Did the Math, N.Y. TIMES, Nov. 4, 2004, at P10.
4 Richard L. Hasen, Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdowns, 62 WASH. & LEE L. REV. (forthcoming 2005) (observing that the 2004 election was outside the margin of litigation, but that it would have been within that margin had the difference between the candidates been 36,000 rather than 136,000 on election night), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=698201; ELECTIONLINE.ORG, THE 2004 ELECTION 1 (2004) (noting that margin of victory in key states in 2004 “exceeded the margin of litigation”), http://www.electionline.org/site/docs/pdf/ERIPBrief9Final.pdf.
The Help America Vote Act of 2002 ("HAVA")\(^5\) promised substantial changes in the way elections are conducted within the United States.\(^6\) The legislation was intended to improve not only the equipment used to cast and count votes, but also the way that registration lists are maintained and polling place operations conducted.\(^7\) In fact, these changes in federal law have arguably made things worse instead of better, at least in the short term. The implementation of HAVA’s new requirements in the areas of voting equipment, provisional voting, registration, and identification proved to be an enormous—if not overwhelming—challenge for many state and local election officials.\(^8\) The high turnout in swing states combined with HAVA’s disruption to the ecology of election systems left many voters feeling confused and frustrated.\(^9\)

Although Ohio’s election received disproportionate attention, it was not the only state to experience difficulties in implementing changes to federal election law. Ohio was instead a microcosm, or perhaps more precisely, a caricature, of what was occurring throughout the United States. The difficulties that received so much attention in 2004 were the product of both the new requirements of HAVA and the growing arsenal of tactics that both major parties have adopted in a relentless effort to squeeze every last vote for their side—and in some cases, to prevent those on the other side from voting.\(^10\)

This Article examines how the process now commonly referred to as “election reform” contributed to the problems that emerged in the 2004 election. It also takes a first stab at assessing what should be done to deal with the problems, old and new, that this election revealed.

Part I explains how, in attempting to resolve the problems raised by the 2000 election, Congress unwittingly created new ones. While Democrats and Republicans agreed on the need for legislation to improve the administration of elections, they disagreed vehemently on the form that such changes should take.\(^11\) For the most part, Democrats advocated expanded access that would enhance equality, while Republicans advocated tougher antifraud measures that would enhance integrity.\(^12\) Faced with the tension between access and integrity, Congress effectively punt. HAVA provided money and imposed

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\(^7\) See id.

\(^8\) See infra Part II.

\(^9\) ELECTOALINE.ORG, supra note 4, at 4–6 (summarizing implementation problems with HAVA’s provisional voting mandate in 2004 election); Michael Powell & Peter Slevin, Several Factors Contributed to ‘Lost’ Voters in Ohio, WASH. POST, Dec. 15, 2004, at A1 (describing how bad instructions led to the rejection of thousands of provisional ballots).

\(^10\) James Dao, The 2004 Campaign: Battlegrounds, N.Y. TIMES, Oct. 31, 2004, § 1, at 27 (noting that both sides had “battalions of lawyers both to watch for election day fraud or intimidation and to prepare post-election litigation”); Lawyers Become Factor in Election, AUGUSTA CHRON., Oct. 30, 2004, at 9A (describing both Democratic and Republican litigation planning efforts in the event of a close election in key states).


\(^12\) Id.; Scott Montgomery, Strategic Muscle Gives Way to Political Will, CQ Wkly., Nov. 30, 2002, at 3132–33.
very general standards, while leaving most of the details of election administration to the states and counties.13

Part II describes the problems inherent in the delegation of discretion to state and local election officials. It focuses on six issues that provoked controversy and litigation: voting equipment, voter registration, provisional voting, identification ("ID") requirements, challenges to voter eligibility, and long lines at polling places. Using Ohio's experience as the focal point, I examine the difficulties that state and county election officials encountered in implementing some of HAVA's new requirements. Not all the problems that emerged in Election 2004, however, were a direct consequence of HAVA. Among the other issues that emerged in Election 2004 was the threatened use of challenges to voter eligibility, either before or on election day. The exceptionally broad discretion permitted under some states' challenge procedures led to the prospect of racially discriminatory challenges. Another problem was the extremely long lines faced by voters—five hours or longer in some places.14 In the event of a closer election, courts might well have been asked to intervene on behalf of those who were discouraged from exercising their right to vote by the inordinately long lines.

Part III draws five lessons from the implementation of election reform in the 2004 election. A recurring theme in the controversies that emerged in Election 2004 was the possibility that the discretion vested in election officials would lead to vote suppression or other forms of unfair treatment. The mere possibility that the game could be rigged by those who control the election machinery presents a grave challenge to public confidence in the democratic process. In light of the constitutional issues raised by intercounty disparities in the administration of elections, the political branches of state government would be well-advised to provide clear guidance on such matters. To the extent possible, that guidance ought to come in the form of legislation, rather than through ad hoc directives issued just weeks, or even days, before the election.

I also consider the role that courts might constructively play in policing the ongoing implementation of election reform. I conclude that the pre-election litigation had a salutary effect of clarifying the rules of the game for election officials, parties, and voters. I also suggest that there may be a place for even more aggressive judicial review of election administration. Whatever the faults of the Supreme Court's decision in Bush v. Gore, the Court was correct to recognize that vesting broad discretion in election officials may lead to inequalities.15 The innovation of Bush v. Gore is to apply


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this line of reasoning to the "nuts-and-bolts" of elections.\textsuperscript{16} Where the state fails to set clear rules in advance of elections, it may be appropriate for courts to intervene to prevent the differential denial of voting rights from occurring behind the veil of discretion.\textsuperscript{17}

I. From Florida 2000 to Ohio 2004

Before examining the election administration problems that emerged in 2004, it is helpful to briefly trace the legal and legislative developments during the preceding four years. This Part begins by describing the research and deliberation that led to the enactment of HAVA. It then summarizes the basic features of HAVA, including its requirements in the areas of voting equipment, registration, voter identification, and provisional voting. It concludes with a discussion of the Election Assistance Commission ("EAC"), the new federal agency created by HAVA to oversee the implementation of some of the new law's requirements.

A. The Road to HAVA

The 2000 election produced a flurry of attention to the "nuts-and-bolts" of democracy.\textsuperscript{18} This inquiry began, of course, with the controversy surrounding Florida's election. Much of the initial attention focused upon the antiquated voting technology used in that election, which resulted in tens of thousands of lost votes throughout the state,\textsuperscript{19} but that attention quickly spread to other aspects of election administration, including voter registration and polling place operations.

The United States Commission on Civil Rights ("Commission"), for example, examined various irregularities in Florida's 2000 election.\textsuperscript{20} The Commission's final report included an analysis of voting equipment, which found that approximately 2.9% of all ballots cast in Florida (approximately 180,000 of 6 million) did not contain a valid vote for president and that "blacks were far more likely than non-blacks to have their ballots rejected."\textsuperscript{21} The Commission also analyzed the serious problems in Florida's voter registration lists, which resulted in thousands of individuals—a disproportionate number of them African Americans—having been excluded from the voting rolls.\textsuperscript{22} According to the Commission, "countless eligible voters" were wrongly
denied cases in which the Supreme Court has looked with disfavor on schemes that delegate overly broad discretion to official decision makers).

17 See Tokaji, supra note 15, at 2522–23 (emphasizing the danger of "government decisionmakers . . . suppressing disfavored viewpoints and disfavored speakers behind a veil of discretion").
20 U.S. COMM'N ON CIVIL RIGHTS, supra note 19, at xi.
21 Lichtman, supra note 19, at 3.
22 U.S. COMM'N ON CIVIL RIGHTS, supra note 19, at 22–24.
nied the opportunity to vote or purged from registration lists due to errors on the part of state and local election officials in Florida.\textsuperscript{23} The Commission further found that "Florida's overzealous efforts to purge voters from the rolls, conducted under the guise of an anti-fraud campaign, resulted in the inexcusable and patently unjust removal of disproportionate numbers of African American voters from Florida's voter registration rolls for the November 2000 election."\textsuperscript{24}

Despite the general recognition that voting machines were only one part of the problem in Florida's 2000 election, the litigation that followed that election focused primarily on voting equipment—principally, the notorious prescored punch card system (also known as the Votomatic) used in many Florida jurisdictions in 2000.\textsuperscript{25} The American Civil Liberties Union ("ACLU") brought lawsuits in Florida, Georgia, Illinois, California, and Ohio.\textsuperscript{26} All of these cases alleged that the use of punch card machines violated equal protection because voters using punch cards were more likely to have their votes discarded than voters using more reliable types of voting equipment.\textsuperscript{27} In making this claim, the ACLU relied on Bush v. Gore's requirement that "equal weight" be "accorded to each vote," and "equal dignity" to each voter.\textsuperscript{28} In addition, each of these cases included a claim that the use of punch card voting equipment resulted in the disproportionate denial of minority votes, in violation of section 2 of the Voting Rights Act.\textsuperscript{29} Two of the ACLU cases (the ones brought in California and Illinois) resulted in published opinions that found the complaints sufficient to state claims under both the Fourteenth Amendment and the Voting Rights Act.\textsuperscript{30}

While these cases were pending, numerous reports were undertaken that took a wide-ranging and critical look at the United States' election systems.\textsuperscript{31} These reports took a hard look at the faulty voting equipment used in many parts of the country—particularly the prescored punch card machine that at-

\textsuperscript{23} \textit{Id.} at 77.

\textsuperscript{24} \textit{Id.} at xiv.


\textsuperscript{28} Bush v. Gore, 531 U.S. 98, 104 (2000); \textit{see, e.g.}, \textit{Black}, 209 F. Supp. 2d at 899.


\textsuperscript{31} \textit{See, e.g.}, CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 1 (2001); NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 1 (2001); SURVEY RESEARCH CTR & INST. OF GOVERNMENTAL STUDIES, UNIV. OF CAL., BERKELEY, COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES 1 (2001).
tracted so much attention during the Florida recount process and led to the decision in *Bush v. Gore*. Not all reports conducted in the wake of the 2000 election were as forceful as the Commission’s with respect to the racial impact of election administration practices. But virtually all of the post-2000 studies found a pressing need for improvement, going well beyond the equipment used for voting.

Typical of the assessments made in the wake of the 2000 election was the report of the Caltech/MIT Voting Technology Project, released in July 2001. That report found that “between 4 and 6 million votes were lost in the 2000 election.” While faulty voting equipment and confusing ballot layouts accounted for 1.5 to 2 million of those lost votes, the Caltech/MIT report found that other sources probably had a greater impact. An estimated 1.5 to 3 million votes were lost to registration problems and up to 1 million more due to inadequate “polling place operations.” The report’s recommendations included replacement of punch card voting equipment, as well as changes in the way that voter registration is handled—such as implementing a system that allows voters easily to check their registration information and aggressively using provisional ballots when there are registration problems. The report described provisional ballots as “a ‘fail safe’ method that can be used when a potential voter’s registration status is challenged at the precinct.”

The Caltech/MIT report estimated that the implementation of provisional voting could cut in half the number of votes lost due to registration errors. The report also examined problems in polling place operations, including the lengthy lines found in some of the approximately 200,000 polling places throughout the country. The report recommended that data be collected on, for example, the number of voters at different times of the day and wait times, in an effort to assess problems and identify potential improvements.

Perhaps the most influential report issued after the 2000 election was that of the National Commission on Federal Election Reform, jointly chaired by former Presidents Jimmy Carter and Gerald Ford and commonly known as the “Carter-Ford Commission.” The Carter-Ford Commission’s recommendations provided the starting point for the election reform legislation that ultimately became HAVA. Issued in August 2001, the Carter-Ford Commission report examined a wide range of issues, including voting equip-

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34 *Id.* at 3.
35 *Id.* at 8–9.
36 *Id.* at 17.
37 *Id.* at 26.
38 *Id.* at 29–30.
39 *Id.* at 30.
40 *Id.* at 32.
41 *Id.* at 35.
ment, early voting, absentee voting, vote-by-mail, ID requirements, and felon disenfranchisement.

The report's recommendations included:

- implementing statewide voter registration systems tied to driver's license and Social Security numbers;
- requiring an affirmation on every registration form that voters are U.S. citizens;
- allowing that any voter who appears at the polling place and claims to be qualified to vote in the state be allowed to cast a provisional ballot to be counted for those races in which the individual is eligible to vote;
- holding presidential and congressional elections on a national holiday;
- adopting procedures to simplify voting for citizens overseas, including those in the military;
- restoring voting rights for felons who have completed their sentences, including probation or parole;
- increasing federal enforcement of voting rights, including the principle of one person, one vote;
- issuing state-by-state “benchmarks” for voting system performance expressed in terms of residual votes (overvotes plus undervotes);
- developing a “comprehensive” set of nonbinding voting equipment standards;
- providing federal matching funds to the states for election system improvements;
- creating a new federal agency, the Election Assistance Commission, to develop “voting system standards,” “oversee the implementation of these standards,” and “maintain a national clearinghouse of information.”

Running through the various recommendations of the Carter-Ford Commission was the idea that Congress should enact legislation that sets forth basic policy objectives and authorizes funding, but that leaves the details of election administration to state and local government entities. A majority of the Carter-Ford Commission believed that the means of achieving the basic objectives should be left “to the discretion of the states.” A minority, however, urged a more active role for the federal government, including the promulgation of mandatory standards for voting equipment and a requirement that all voters, prior to the election, be provided with a “sample ballot.”

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45 Id. at 50–58.
46 Id. at 28–33, 38–39.
47 Id. at 43–44.
48 Id. at 42–43.
49 Id. at 43–44.
50 Id. at 31–33.
51 Id. at 44–45.
52 Id. at 6–14.
53 Id. at 13.
54 Id. at 78–81.
The Carter-Ford Commission’s recommendations provided the basic ingredients of what ultimately became HAVA. Even before enactment of HAVA, however, a handful of states moved forward with election reform legislation. Among the states enacting legislation was Florida, which passed the Florida Election Reform Act of 2001, requiring the replacement of punch card voting equipment by 2002.\textsuperscript{55} The new law also provided funding for “new voting equipment, ... poll worker training, voter education, and creation of a voter registration database.”\textsuperscript{56} Georgia and Maryland also enacted legislation in 2001, a key component of which was conversion to uniform statewide voting equipment.\textsuperscript{57} In early 2002, California voters approved Proposition 41, the Voting Modernization Bond Act of 2002, which authorized a $200 million bond issue for new voting equipment.\textsuperscript{58}

Although efforts to pass federal legislation began in 2001, it took Congress considerable time to enact what eventually became HAVA.\textsuperscript{59} The ultimate product was a bipartisan compromise, spearheaded by Representatives Bob Ney and Steny Hoyer in the House, and Senators Chris Dodd and Mitch McConnell in the Senate.\textsuperscript{60} The delay in enacting HAVA resulted from disagreements over several issues. Foremost among these were the imposition of federal requirements on the states and the proposal to require first-time voters registering by mail to show identification at the polling place.\textsuperscript{61} As Representative Hoyer put it, “‘Everyone agrees that we should make it easier to vote ... and we should make it harder to cheat.’”\textsuperscript{62} The difficulty was determining how to make the voting system open and accessible to all eligible citizens, yet resistant to fraud and error. Put another way, Congress’s challenge was to promote access while enhancing integrity.\textsuperscript{63}

Largely due to the intensive efforts of HAVA’s principal co-sponsors to forge a compromise, House and Senate conferees reached an agreement in October 2002.\textsuperscript{64} The bill passed the House and Senate later that month and was signed into law on October 29, 2002.\textsuperscript{65}

\textsuperscript{56} Tokaji, supra note 25, at 1730–31.
\textsuperscript{58} Voting Modernization Bond Act of 2002, Cal. Elec. Code §§ 19230–19245 (West 2003); see Julie Tamaki et al., New Challenge to Legislative Term Limits Vowed, L.A. Times, Mar. 7, 2002, at B7 (reporting that Proposition 41 received 51.5% of the vote).
\textsuperscript{59} See Shambon, supra note 6, at 427–28.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 428.
\textsuperscript{62} David Nather, Election Overhaul May Have to Wait in Line Behind Other ‘Crisis’ Issues, CQ Wkly., July 27, 2002, at 2034 (quoting Representative Hoyer).
\textsuperscript{63} For helpful commentary on the access/integrity debate, see Spencer Overton, Integrity vs. Access: Preventing Voter Fraud or Suppressing Voters? (Feb. 26, 2005) (unpublished book chapter, on file with author).
\textsuperscript{64} Shambon, supra note 6, at 428.
\textsuperscript{65} Id.
B. The Basic Requirements of HAVA

HAV A enacts into law some of the recommendations made by the Carter-Ford Commission report and other studies that examined the United States' voting systems in the wake of the 2000 election. Its key components are:

1. Title I, which authorizes $325 million for election administration improvements and another $325 million for the replacement of punch card and lever voting machines.\(^{67}\)

2. Title II, which creates the Election Assistance Commission and authorizes $3 billion over three years to implement the Act's requirements.\(^{68}\)

3. Title III, which establishes new requirements in the areas of voting technology, registration databases, provisional voting, and voter identification.\(^{69}\)

In this Section, I focus mainly on the requirements contained in Title III. Some of these provisions seek to expand access for those whose voting rights have been compromised or denied in the past, including people mistakenly left off registration lists and those in jurisdictions using unreliable voting equipment.\(^{70}\) In addition, Congress included requirements aimed at ensuring equal access to the vote for people with disabilities and non-English-proficient voters.\(^{71}\) At the same time, much of HAVA is designed to make it harder to cheat, by preventing fraud in the voting process. Among the provisions of HAVA tailored to serve this end are those that require a paper audit trail by which to conduct manual audits\(^{72}\) and the creation of a statewide voter registration database.\(^{73}\) Four of HAVA's most important mandates are discussed below—specifically, the requirements concerning voting equipment, registration databases, the identification requirement, and provisional voting.

1. Voting Equipment Standards

The portions of HAVA that have received the most attention are those concerning voting equipment. HAVA does not prohibit punch card ballots, lever machines, or any other particular voting equipment; in fact, Title III of HAVA specifically provides that it shall not be interpreted to prohibit jurisdictions from using the same kind of voting equipment that they used in November 2000.\(^{74}\) Instead, HAVA provides funds for the replacement of punch

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\(^{67}\) Shambon, supra note 6, at 428; see also infra notes 78–81 and accompanying text.

\(^{68}\) Shambon, supra note 6, at 428–29; see also infra Part I.C.

\(^{69}\) Shambon, supra note 6, at 429–30.

\(^{70}\) See infra Parts I.B.4., I.B.1.

\(^{71}\) See infra notes 86–89 and accompanying text.

\(^{72}\) See infra note 86 and accompanying text.

\(^{73}\) See infra Part I.B.1.

card and lever systems, while imposing some general and basic requirements that all voting systems must meet.

Title I of HAVA creates a fund to be used for the “buy out” of punch card and lever voting machines. States qualifying for funds under this section of HAVA are supposed to ensure that all punch card and lever voting machines in qualifying precincts are replaced by the November 2004 election. A state may obtain a waiver, however, if it certifies that it will not for good cause meet this deadline. In the event of a waiver, the equipment must be replaced in time for the federal elections in 2006. Twenty-four states sought a waiver, out of a total of thirty that received HAVA money for the replacement of punch card and lever equipment.

The other portion of HAVA dealing with voting equipment is section 301, which is part of HAVA’s Title III. This section requires that voting systems allow voters to verify their choices and provide them the opportunity to correct their choices before votes are cast. Voting systems must also notify voters of overvotes. This is commonly known as “notice” or “second chance” technology. While this provision would seem to ban many current systems, HAVA also provides that jurisdictions using paper-based systems (such as punch cards) may meet this requirement through a voter education program that gives instructions on how to correct mistakes and informs voters of the effect of overvoting. Thus, HAVA does not require that voting systems provide actual notice and the opportunity to correct mistakes.

HAVA does require that all voting systems have an “audit capacity,” and that they produce a “permanent paper record” that can be used for manual audits. People with disabilities must also be accommodated through voting machines that “provide[] the same opportunity for access and participation (including privacy and independence) as for other voters.” Jurisdictions can meet this requirement by providing at least one direct record electronic unit or other accessible voting machine in each polling place.

noted below, however, a condition of receiving funds under Title I of HAVA is to replace punch card and lever voting systems in those precincts that use them.

75 Id. § 15302(g).
76 Id. § 15481(g).
77 Id. § 15302(g)(1).
78 Id. § 15302(g)(3)(A).
79 Id. § 15302(a)(3)(B).
80 Id.
82 42 U.S.C.A. § 15481.
83 Id. § 15481(a)(1)(A), (d).
84 Id. § 15481(a)(1)(A)(iii).
85 Id. § 15481(a)(1)(B).
86 Id. § 15481(g)(2).
87 Id. § 15481(g)(3)(A).
88 Id. § 15481(a)(3)(B).
tems must also allow alternative language access for people whose primary language is not English. These requirements take effect January 1, 2006.

2. **Statewide Registration Database**

Another key component of HAVA is the requirement that each state establish a computerized statewide voter registration list. This database must include the name and registration information for every registered voter within each state and assign a "unique identifier" to each registered voter. The list is to be coordinated with other agency databases within each state, and accessible electronically to local election officials.

HAVA also regulates the maintenance of these electronic lists, requiring states to ensure that the name of each voter appears on the list, and that the names of voters who are not registered and duplicate names be eliminated. This section of HAVA further requires that voters provide either their driver's license number or the last four digits of their Social Security number—or, in the case of voters who have neither, that they be assigned identifying numbers. States' chief election officials are required to establish agreements with their state motor vehicle agencies (who also must enter into agreements with the commissioner of Social Security), through which identification numbers can be "matched" to verify identity.

The effective date of HAVA's statewide registration list requirement was January 1, 2004, but was extendable by waiver for good cause to January 1, 2006. Forty-four states, including Ohio, sought a good-cause extension.

3. **The ID Requirement**

One of the most controversial requirements of HAVA was the provision mandating that certain first-time voters present identification at the polls. The requirement applies to those who registered to vote by mail after January 1, 2003, and have not previously voted in a federal election within the state or jurisdiction, unless they provided a copy of photo identification or other proof of name and address at the time they mailed in their registration forms. Voters are exempt from the ID requirement if they provided their driver's license number or the last four digits of their Social Security number at the time of registration, and their identification information is verified.

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90 42 U.S.C.A. § 15481(d).
91 *Id* § 15483(a).
92 *Id* § 15483(a)(1)(A).
93 *Id* § 15483(a)(1)(A)(iv)-(v).
94 *Id* § 15483(a)(2)(B).
95 *Id* § 15483(a)(5)(A).
96 *Id* § 15483(a)(5)(B).
97 *Id* § 15483(d)(1).
98 U.S. Election Assistance Comm'n, Meeting Minutes 8 (Aug. 10, 2004) (stating that forty-four states including the District of Columbia had sought and obtained waivers).
99 *Electionline.org*, supra note 81, at 17.
through the statewide registration database.\textsuperscript{101} Furthermore, those whose registration forms were delivered by hand rather than by mail are not subject to the ID requirement.\textsuperscript{102} The ID requirement thus applies to a narrow category of first-time voters.

Those who are subject to the ID requirement must, at the time of voting, present either (a) a valid photo ID, or (b) a "current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."\textsuperscript{103} Accordingly, those who do not have photo identification are allowed to present other proof of their identity and place of residence. The ID requirement became effective for the 2004 elections.\textsuperscript{104}

4. \textit{Provisional Voting}

Provisional voting allows citizens whose names do not, for whatever reason, appear on registration lists to cast a conditional ballot.\textsuperscript{105} Election officials are required to notify those who appear at the polling place, but whose names do not appear on the registration list, that they are entitled to cast a provisional ballot.\textsuperscript{106} In addition, HAVA requires that voters subject to the ID requirement be permitted to cast provisional ballots if they do not have identification when they come to the polls.\textsuperscript{107}

These voters must be allowed to cast a provisional ballot if they sign a written affirmation stating that they are "a registered voter in the jurisdiction" and "eligible to vote in that election."\textsuperscript{108} If the voter is thereafter determined eligible, then his or her vote must be counted.\textsuperscript{109} HAVA also requires that states establish a publicly available information source—such as a website or toll-free hotline—that voters may access to determine if their votes were counted.\textsuperscript{110}

Although provisional ballots have been used in some states in the past,\textsuperscript{111} HAVA is the first federal law to require their use nationwide. HAVA requires officials to follow the following procedures:

1. \textit{Notification} – An individual whose name does not appear on the voter registration list must be notified that he or she is entitled to cast a provisional ballot.\textsuperscript{112}

\begin{itemize}
  \item \textsuperscript{101} \textit{Id.} § 15483(b)(3)(B).
  \item \textsuperscript{102} \textit{Id.} § 15483(b)(1)(A) (specifying that this section applies to those who registered "by mail").
  \item \textsuperscript{103} \textit{Id.} § 15483(b)(2)(A).
  \item \textsuperscript{104} \textit{Id.} § 15483(d)(1)(A) (stating that the requirement became effective January 1, 2004).
  \item \textsuperscript{105} \textit{Id.} § 15482(a).
  \item \textsuperscript{106} \textit{Id.} § 15482(a)(1).
  \item \textsuperscript{107} \textit{Id.} § 15483(b)(2)(B).
  \item \textsuperscript{108} \textit{Id.} § 15482(a)(2).
  \item \textsuperscript{109} \textit{Id.} § 15482(a)(4).
  \item \textsuperscript{110} \textit{Id.} § 15482(a)(5)(B).
  \item \textsuperscript{111} \textit{NAT'L COMM'N ON FED. ELECTION REFORM, supra} note 31, at 35 (stating that nineteen states used provisional voting to comply with the National Voter Registration Act's requirements).
  \item \textsuperscript{112} \textit{42 U.S.C.A.} § 15482(a)(1).
\end{itemize}
2. **Affirmation** – In order to cast a provisional ballot, the voter must affirm that he or she is (a) registered in the jurisdiction, and (b) eligible to vote in the election.\(^{113}\)

3. **Transmittal** – Poll workers must transmit the provisional ballot or the information in the affirmation to the appropriate state or local election official.\(^{114}\)

4. **Counting** – If the election official determines that the individual is eligible to vote, the provisional ballot should be counted.\(^{115}\)

5. **Confirmation** – Election officials must establish a free access system allowing provisional voters to ascertain whether or not their provisional ballots were counted and if not, the reason why not.\(^{116}\)

These procedures were required to be in place in time for the 2004 elections.\(^{117}\)

HAVA’s provisional voting assumes special importance in light of the requirement that some first-time voters show identification at the polling place.\(^{118}\) As noted above, this ID requirement applies to people who registered by mail, but have not previously voted in federal elections. The first-time voter who does not present appropriate documentation must be allowed to cast a provisional ballot, which must be verified in accordance with the procedure described above. This procedure, known as "fail-safe voting,"\(^{119}\) is meant to ensure that citizens who do not bring the proper documentation will nevertheless have their votes counted, if they are in fact eligible to vote.

C. **The Election Assistance Commission**

HAVA delegates significant implementation responsibilities to the newly created Election Assistance Commission ("EAC"). The EAC consists of four members, appointed by the president and confirmed by the Senate,\(^{120}\) and can only act with the approval of three of those members.\(^{121}\) As one commentator put it, "The EAC was designed to have as little regulatory power as possible."\(^{122}\) HAVA expressly denies the EAC "authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government,"\(^{123}\) except in certain narrowly prescribed circumstances.\(^{124}\)

\(^{113}\) Id § 15482(a)(2).

\(^{114}\) Id § 15482(a)(3).

\(^{115}\) Id § 15482(a)(4).

\(^{116}\) Id § 15482(a)(5)(B).

\(^{117}\) Id § 15482(d) (stating that the requirements became effective on January 1, 2004).

\(^{118}\) See supra notes 99–104 and accompanying text.


\(^{120}\) Id. § 15323(a)(1).

\(^{121}\) Id § 15328.

\(^{122}\) Shambon, supra note 6, at 428.

\(^{123}\) 42 U.S.C.A. § 15329.

\(^{124}\) Specifically, HAVA authorizes the EAC to prescribe regulations needed to develop a mail-in registration form for federal elections and regulations needed to prepare a biennial report to Congress Id. § 1973gg-7(a)(2), (3). The EAC is also empowered to provide information to the states regarding their responsibilities under the National Voter Registration Act (commonly known as "Motor Voter") Id § 1973gg-7(a)(4).
While the EAC does not generally have the power to impose binding requirements on state and local election officials, it does have the power—and indeed the responsibility—to conduct research and to issue nonbinding guidance. Among the EAC’s duties are to develop and adopt voluntary guidelines on provisional voting, statewide voter registration databases, and mail-in registration;\textsuperscript{125} to adopt voluntary guidelines on voting equipment;\textsuperscript{126} to conduct studies on election administration;\textsuperscript{127} and to research methods to improve access for voters with disabilities and those who are not proficient in English.\textsuperscript{128}

As written, HAVA requires that some of its requirements go into effect in 2004 and others in 2006. Each state is required to develop a plan explaining how it will comply with the requirements of HAVA.\textsuperscript{129} All of these plans were submitted to the EAC and have now been published in the \textit{Federal Register}.\textsuperscript{130} As noted above, however, forty-four states and territories have obtained extensions of the requirements for statewide databases, while twenty-four have obtained an extension on the deadline for voting equipment replacement.

The implementation of HAVA has proceeded more slowly than many people had anticipated at the time of the law’s enactment for at least two reasons. First, the members of the EAC were not selected on the timetable that HAVA mandated. Although HAVA required that the EAC’s members be appointed by February 26, 2003 (120 days after HAVA’s enactment),\textsuperscript{131} the nominees were not formally nominated by the president until October 2003 and were not confirmed by the Senate until December 9, 2003.\textsuperscript{132}

The second reason for delay is that Congress did not fully fund HAVA in fiscal year 2003. Although all of the $650 million in Title I money (half of it for the buyout of punch card and lever machines) was appropriated, only $833 million of the authorized $1.4 billion in Title II funds was appropriated in fiscal year 2003.\textsuperscript{133} In addition, the early functioning of the EAC was hampered by Congress’s failure to fully fund this new agency. In fiscal year 2004, only $1.8 million was appropriated for the EAC’s functioning, even though HAVA authorized a $10 million annual budget.\textsuperscript{134} Because of the delays in establishing the EAC and appropriating funding, states were reluctant to

\textsuperscript{125} \textit{Id.} § 15501(a).
\textsuperscript{126} \textit{Id.} § 15322(1).
\textsuperscript{127} \textit{Id.} § 15322(3).
\textsuperscript{128} \textit{Id.} § 15441(a).
\textsuperscript{129} \textit{Id.} § 15403(b).
\textsuperscript{130} Publication of State Plans Pursuant to the Help America Vote Act, 69 Fed. Reg. 14,001–15,232 (Mar. 24, 2004). The Leadership Conference on Civil Rights, Brennan Center for Justice, and Demos have prepared a summary of the status of HAVA implementation in all fifty states. See \textsc{Brennan Ctr. for Justice} et al., \textsc{HAVA Implementation in the 50 States}, http://www.civilrights.org/issues/voting/hava_chart.pdf (n.d.).
\textsuperscript{131} 42 U.S.C.A. § 15323(a)(4). HAVA was signed into law on Oct. 29, 2002.
\textsuperscript{132} Electionline.org, supra note 81, at 21.
\textsuperscript{133} Shambon, supra note 6, at 437.
\textsuperscript{134} \textit{Id.} at 438.
move forward, given that they lacked certainty that they would be given the financial resources needed to pay for election reform.135

The consequence is that election reform was still a work in progress at the time of the 2004 election. While HAVA promised significant changes in the way that the United States conducts elections, that promise was not completely realized by 2004.

II. Litigating Election Reform: The Case(s) of Ohio

As sensible as HAVA’s requirements might appear on paper, they have proven an enormous challenge to implement in practice. The 2004 election exposed ambiguities in some of the law’s requirements, which gave rise to partisan controversy and litigation in the weeks leading up to November 2, 2004. This Part discusses some of the difficulties that arose in the implementation of HAVA during 2004, using Ohio’s experience as the focal point.

The weeks and months preceding the 2004 general election in Ohio saw intense controversy over six issues: (1) voting equipment, (2) registration forms, (3) provisional voting, (4) the ID requirement, (5) challenges to voter eligibility, and (6) long lines. All of these issues led to litigation, either before or on election day. With respect to the first four issues, the controversies concerned disagreement over the meaning and scope of HAVA’s requirements. The last two issues, on the other hand, were not expressly addressed by HAVA, but can be expected to result in further difficulties if not addressed in the future.

I concentrate on Ohio for two reasons. First, because Ohio was a pivotal swing state in the 2004 election—and, as it turned out, was the state on which the outcome of the presidency turned—hitches and glitches in implementing election reform received greater attention than they did in other states. Second, election officials in Ohio appear to have had an especially difficult time implementing the new requirements of HAVA. This is partly due to the state legislature’s failure to enact legislation to implement the federal law’s core requirements and partly due to the secretary of state’s guidance (or in some cases lack of guidance) to county boards of election. While Ohio may not be a typical case, its experience illustrates some problems that Congress appears not to have anticipated fully when it enacted HAVA.

A. Voting Equipment

Ohio’s failure to replace its punch card voting equipment resulted in tens of thousands of lost votes in Election 2004. Ohio received funds under Title I of HAVA, thereby obligating itself to replace its punch card and lever voting equipment. While HAVA required the replacement by 2004, Ohio was among the forty-four states that obtained a waiver extending this due date until 2006.136

135 Id.; see also ELECTIONLINE.ORG, supra note 81, at 21–22 (describing HAVA funding delay and shortfall).
136 See supra notes 78–81 and accompanying text.
The result was that approximately seventy percent of voters used the same prescored punch card voting machines that had caused so many problems in Florida four years before.\textsuperscript{137} As in prior elections, punch card ballots resulted in a higher percentage of ballots that did not register a valid vote for president than did other systems.\textsuperscript{138} Of the almost 95,000 ballots in Ohio for which no presidential vote was recorded, over 76,000 were cast by voters using punch card ballots.\textsuperscript{139} Statewide, counties using punch cards as their primary voting system had a residual vote rate (combined overvotes and undervotes) of 1.84%, compared to 1.25% for counties using electronic voting machines and 1.01% for those counties using optical scan ballots as their primary system.\textsuperscript{140} As in prior elections, it appears that punch cards resulted in significantly more lost votes than other types of voting equipment. The residual vote rate for Ohio's punch card ballots was down from 2000, in which that type of system resulted in a 2.3% residual vote rate,\textsuperscript{141} but still significantly higher than that of other systems.

After all the problems with punch card equipment that came to light in the aftermath of the 2000 election, it is worth asking why Ohio failed to replace its punch card voting equipment in time for the 2004 election. The answer to this question demonstrates the practical limitations of litigation. It


\textsuperscript{138} Tokaji, \textit{supra} note 137.

\textsuperscript{139} \textit{Election Law @ Moritz, Ohio Presidential Race 2004: Residual Votes by County}, \url{http://moritzlaw.osu.edu/electionlaw/docs/2004pres-votes-residuals-all.pdf} (last visited June 4, 2005); \textit{Election Law @ Moritz, Ohio Presidential Race 2004: Residual Votes by County (Punch Card Ballots)} \url{http://moritzlaw.osu.edu/electionlaw/docs/2004pres-votes-residuals-punch.pdf} (last visited June 4, 2005).

\textsuperscript{137} Tokaji, \textit{supra} note 137. These statistics may actually overstate the residual vote rate with electronic voting machines and understate the residual vote rate with punch cards. Some Ohio counties use different equipment for absentee and provisional voting than for regular precinct voting, yet the data thus far available does not disaggregate residual votes cast by those using these different types of equipment. \textit{Id.} For example, in Franklin County (where Columbus is located), most voters who appeared at their polling place used electronic voting machines. But absentee voters and those who cast provisional ballots used the punch cards in Franklin County. Overall, Franklin County had a 1.45% residual vote rate in the 2004 election. At this time, information is not available that would allow a determination of how many residual votes were cast using punch cards and how many were cast using electronic voting machines. It is very likely, however, that this residual vote rate is being driven up by provisional and absentee voters using punch cards. That was also true in the 2000 election, when Franklin County had an overall residual vote rate of 0.89%. This overall number obscured the fact that Franklin County voters using electronic voting machines registered a very low 0.6% residual vote rate, while those using punch cards had a whopping residual vote rate of 3.6%—about six times as high. Accordingly, it is highly probable that the performance of punch cards in Franklin County is considerably worse than the 1.45% overall residual vote rate would indicate, while the performance of electronic voting is much better. (This discussion appears in substantially similar form by the author in \textit{Id.})

\textsuperscript{141} Stewart, 356 F. Supp. 2d at 824–27 app. III.
also shows how well-intentioned rules—in Ohio’s case, a law mandating a “voter verified paper audit trail”—can inhibit the replacement of inferior voting equipment.

In 2002, the ACLU of Ohio brought a class action lawsuit against Ohio Secretary of State J. Kenneth Blackwell and election officials in four counties, arising from the continuing use of punch cards and other allegedly unreliable voting equipment.142 Stewart v. Blackwell, like the other ACLU cases noted above in Part I.A., alleged that the continuing use of this equipment violated equal protection under Bush v. Gore and other cases.143 Relying on evidence showing higher residual vote rates among voters using punch card equipment than those using other types of equipment, the plaintiffs in Stewart argued that their right to have their votes counted on equal terms with other citizens had been denied.144 In addition, the Stewart complaint alleged that the use of punch card voting equipment in three urban counties violated section 2 of the Voting Rights Act.145 Plaintiffs cited precinct-level data from these counties in an effort to show that the punch card voting system resulted in higher rates of uncounted votes within heavily African American precincts than in other precincts.146 In a ruling issued after the 2004 election, U.S. District Judge David Dowd rejected both claims,147 and the case is presently on appeal.

As noted above, HAVA did not mandate the elimination of punch cards or any other type of voting equipment but instead set minimal standards for voting equipment while providing financial incentives—in the form of $325 million available under Title I—for states to replace their punch card and lever voting equipment.148 In addition, it required states to make at least one disability-accessible voting system available at each polling place by 2006.149 At present, electronic voting provides disability access that other systems do not.150

Ohio received over $30 million in federal funds for the replacement of this equipment.151 Under Title I, states accepting such funds were required to replace their punch card and lever voting equipment by 2004, but could upon request obtain a waiver of this requirement until 2006.152 The State of Ohio’s 2003 HAVA implementation plan indicated the state’s intent to replace its punch card and lever machine voting equipment by 2004 in all seventy-one of the eighty-eight Ohio counties that were still using those

142 Id. at 794–95. The author is co-counsel for the plaintiffs.
143 Id. at 795.
144 Id.
146 Id.
147 Stewart, 356 F. Supp. 2d at 807–09.
148 See supra notes 74–77 and accompanying text.
150 Tokaji, supra note 25, at 1768–72.
152 See supra notes 78–80 and accompanying text.
systems. Although Secretary of State Blackwell did not admit that the use of punch cards violated the Fourteenth Amendment or Voting Rights Act, as alleged by the Stewart plaintiffs, he nevertheless acknowledged that the state risked a "Florida-like calamity" if it continued to use punch cards in the 2004 election.

Although the underfunding of HAVA in fiscal year 2003 may have had some impact on Ohio's failure to replace its punch card equipment in time for the 2004 election, the most significant causal factor was the concern surrounding the implementation of electronic voting technology. In 2003, Secretary of State Blackwell gave Ohio's punch card counties the option of moving to electronic or precinct-count optical scan voting equipment. Both types of equipment provide "second chance" voting—that is, they provide notice and the opportunity to correct errors before casting votes. With contemporary electronic voting technology, this takes the form of a review screen on which all the voter's choices are displayed before casting his or her vote. With precinct-count optical scan technology, the voter places the hand-marked ballot through a counter, located at the precinct, which can be programmed to notify the voter in the event of an overvote. Ohio's punch card counties had the option of moving to either type of system. Then, in July 2004, the Ohio legislature passed a law requiring that all voting equipment used in the state have a "voter verified paper audit trail" by 2006. For electronic voting systems, this would have required that each unit have an attached printer that could generate a hard copy of the electronic ballot at the time of voting, which the voter could review before casting his or her vote.

Because none of the systems that the counties had selected offered this option, the counties wishing to convert to electronic voting systems were left with the choice of either (1) moving forward with the purchase of their chosen paperless system in hopes that it could be retrofitted with a printer attachment by 2006, or (2) standing pat with their existing punch card systems. Not surprisingly, all but four of the counties eligible to replace their existing equipment elected to stand pat. And by that time, it was too late for the plaintiffs in Stewart to compel the replacement of punch card machines by election day without risking a rushed and unsuccessful transition. To make matters worse, of the counties that chose to move forward, three had selected

154 Letter from J. Kenneth Blackwell, Ohio Secretary of State, to Doug White, President, Ohio Senate 3 (Feb. 26, 2004) (on file with author).
155 Nola M. Haug, Office of Ohio Secretary of State, Maryland/Ohio Security Assessments Gap Analysis 1 (2004); see also Ray Cooklis, No Votes for Chad: Debate over Electronic Balloting Slows Reform, Cincinnati Enquirer, Mar. 28, 2004, at F1.
156 Tokaji, supra note 25, at 1721–24; see also Ohio Sec'y of State, supra note 153, at 26–27 (describing second-chance systems), reprinted in 69 Fed. Reg. at 14,891–92.
157 Tokaji, supra note 25, at 1723.
158 Id. at 1722; see also id. at 1721–24 (describing both of these systems in more detail).
159 Haug, supra note 155, at 1.
161 Jim Provance, 4 Counties Adopt Electronic Voting, Blade (Toledo), June 8, 2004, at A3.
an electronic voting system manufactured by Diebold.\textsuperscript{162} But in the late summer of 2004, Secretary Blackwell announced that Diebold systems could not be used because of security concerns.\textsuperscript{163} Thus, those three counties were also compelled to continue using their existing equipment. Consequently, only one county that had used punch cards in 2000 replaced its system in time for the 2004 election.

The result of Ohio's failure to replace its punch card voting equipment was that over 76,000 residual votes were cast with punch cards in November 2004.\textsuperscript{164} Although a small percentage of these were probably intentional, a substantial majority were not. Surveys conducted of prior presidential elections reveal that somewhere between 0.23% and 0.77% of voters intentionally undervote in every election.\textsuperscript{165} Using this as a baseline, somewhere between 44,000 and 67,000 votes were probably lost due to the use of punch cards in 2004.\textsuperscript{166} George W. Bush's margin of victory in Ohio made this vote loss inconsequential. In a closer election, however—for example one in which the margin was 20,000 votes or fewer—those lost votes might have been decisive.

B. Registration Forms

In the weeks leading up to November 2, three issues related to the handling of registration forms arose in Ohio: (1) whether to accept registration forms on which the applicant had failed to check boxes regarding citizenship and age; (2) whether to accept registrations in which the applicant had failed to provide a driver's license number or the last four digits of his or her Social Security number; and (3) whether the state could refuse to accept registration forms that were not on heavy-stock paper. As described below, each of the three issues demonstrates the complications that can be created by seemingly simple new registration requirements. They also demonstrate how the exercise of discretion by election officials can, either purposefully or inadvertently, result in the denial of some citizens' votes.

1. Citizenship and Age Boxes

The first issue arose from an ambiguity in HAVA's new rules regarding mail-in registration forms. Under the National Voter Registration Act of 1993 (commonly known as “Motor Voter”),\textsuperscript{167} states are required to accept a standardized mail-in registration form.\textsuperscript{168} Under HAVA, those forms must contain two additional questions: first, whether the applicant is a citizen of


\textsuperscript{163} Id.

\textsuperscript{164} Tokaji, supra note 137.


\textsuperscript{166} In Ohio, turnout was over 5.7 million, and approximately 72% of voters used punch card ballots (for a total of around 4.1 million). Given these statistics, intentional undervotes would represent between about 9000 and 32,000 of the residual votes cast with punch cards.


\textsuperscript{168} Id. § 1973gg-4.
the United States, and second, whether the applicant is eighteen years or older.\textsuperscript{169} HAVA further provides that the form instruct those who check "no" to either of these questions not to complete the form.\textsuperscript{170} At the bottom of the form, however, is an affirmation that requires the individual to declare under penalty of perjury that he or she is a citizen of the United States and will be at least eighteen years old by the time of the next election.\textsuperscript{171}

The problem that arose in the implementation of this seemingly straightforward requirement is what to do with registration forms in which the citizenship or over-eighteen box has been left unchecked. HAVA provides that, if the citizenship question is not answered, "the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law)."\textsuperscript{172} Although this provision makes clear that voters must be allowed to complete the form before the next election, the question left open is whether voters should be added to registration lists and allowed to vote in this election if they have failed to check the proper boxes but have signed the affirmation attesting to their citizenship and age. HAVA is silent on this question.

Relying on guidance from the EAC, Secretary of State Blackwell issued a directive less than two months before the election, requiring county boards of election to accept voter registration applications even if the citizenship and over-eighteen boxes were not checked.\textsuperscript{173} Left unclear was how many registration applications with unchecked boxes had been rejected before that date and what should be done about those rejected applications.

2. \textit{Identifying Number Box}

The second registration issue had to do with the new box on the registration form ("Box 10" in Ohio)\textsuperscript{174} requiring voters to fill in their driver's license number or the last four digits of their Social Security number. The inclusion of the ID number box is the consequence of HAVA's mandate that each state create a computerized statewide voter registration database.\textsuperscript{175} As explained above, HAVA requires the creation of statewide registration databases, which are to be coordinated with Social Security and state motor vehicle agency lists.


\textsuperscript{170} Id. § 15483(b)(4)(A)(i)ii).

\textsuperscript{171} See Directive No. 2004-31 from J. Kenneth Blackwell, Ohio Sec'y of State, to All County Board of Elections Members, Directors, and Deputy Directors 1 (Sept. 7, 2004).

\textsuperscript{172} 42 U.S.C.A. § 15483(b)(4)(B)


\textsuperscript{175} See supra notes 91–98 and accompanying text.
The problem for states and counties in implementing HAVA’s requirement is that when the ID number box is left blank, it is not clear on the face of the registration form whether it has been left blank because (a) the applicant does not have a driver’s license or Social Security number, or (b) the applicant has neglected or refused to provide this information. If it is the latter, then HAVA directs that the registration application not be accepted; but if it is the former, then the registration form should be accepted, and the applicant must be assigned a unique identifying number.176 Prior to the election, the EAC issued a policy statement allowing “State-specific instructions” for the ID number box, effectively delegating authority to the states.177

To further complicate matters, there is an interplay between the information required in the ID number box and HAVA’s identification requirement. As noted above, the ID requirement applies to certain first-time voters who register by mail.178 Those who register by mail and provide their driver’s license number or the last four digits of their Social Security number with that form are exempt from the requirement to show ID at the polls, provided that the identifying number can be matched against an existing state record.179 Voters who register in person are not subject to the requirement of showing ID at the polls—but are still required to provide their driver’s license number or the last four digits of their Social Security number, if they have one.180 Congress apparently believed that there was a lesser risk of in-person registrants engaging in fraud, and therefore limited the requirement to show ID to those who registered by mail.

It may come as no surprise that these rather convoluted requirements produced substantial confusion among election officials. Ohio was no exception. Although HAVA actually imposes more stringent requirements on those who register by mail than on those who register in person, the Ohio secretary of state issued guidance on the ID number box that treats mail-in registrations more favorably than hand-delivered registration forms. A memorandum issued in December 2003 stated that mail-in registrations should be considered valid, even if the ID number box is left blank.181 When the voter appears at the polls, the missing information is to be obtained.182

In an ironic twist on what HAVA contemplated, the Ohio secretary of state’s memorandum directed that hand-delivered registration forms not be accepted if the ID number box is left blank.183 The memorandum states that those voters who lack a driver’s license or Social Security number be directed to write “None” in the box, in which case their registrations should be processed.184 But in some cases, forms were hand-delivered to registration

176 42 U.S.C.A. § 15483(a)(5)(A)
177 ELECTION ASSISTANCE COMM’N, STATEMENT OF POLICY REGARDING NATIONAL MAIL VOTER REGISTRATION FORM 1 (2004)
178 See supra notes 99–104 and accompanying text.
180 Id. § 15483(b)(2)(A).
181 Memorandum from Dana Walsh, Director of Election Reform, to County Boards of Elections 1 (Dec. 31, 2003) (on file with author).
182 Id.
183 Id. at 2.
184 Id.
offices by third-party registration groups, such as the parties or nonprofit organizations. Moreover, there is no guarantee that those accepting registration forms at public libraries, motor vehicle offices, or even boards of elections will instruct voters lacking a Social Security or driver's license number to write in "None."

The surprising consequence of Secretary Blackwell's memorandum was that registration forms with the ID number box left blank would be accepted if they arrived by mail (with the voter given the opportunity to present identification at the polling place), but rejected if delivered in person. Concerned that this memorandum would result in the unfair rejection of hand-delivered registration forms, the Lucas County Democratic Party brought suit against Secretary of State Blackwell in October 2004 to challenge this requirement. Without ruling on the merits, U.S. District Judge James Carr denied a preliminary injunction on the ground that plaintiffs had waited too long to bring suit. Judge Carr concluded that, given the late date, it would be impossible to provide effective relief even if plaintiffs could prevail on the merits. Thus, Blackwell's directive stood, and an as-yet-unknown number of hand-delivered registration forms were rejected because they did not include a driver's license or Social Security number.

3. Paper Weight

One of the oddest controversies to emerge anywhere in the country in the weeks leading up to Election 2004 was Ohio Secretary of State Blackwell's September 2004 directive requiring that Ohio registration forms be printed on "white, uncoated paper of not less than 80 lb. text weight" (i.e., the heavy-stock paper used for cards). Forms on lighter paper weight were to be considered applications for registration forms, in which case the applicant was to be sent a registration form on the proper paper weight. While the official registration forms were printed on heavy-stock paper, the effect of the directive was to preclude voters from using photocopied forms.

Further complicating matters, the directive provided that certain federal voter registration forms be accepted even on lighter paper weight. Although HAVA is silent on the question of the paper weight of registration forms, commentators argued that the directive violated the Voting Rights Act. Under the Voting Rights Act, "[n]o person acting under color of law" may deny a person the right to vote "because of an error or omission on any . . . paper relating to any . . . registration . . . if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." Some local election officials stated their intent to

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185 See id
187 Id.
188 Id. at 864–65
190 Id.
191 Id.
192 Voting Rights Act, 42 U.S.C. § 1971(a)(2)(B) (2000); see Mary Beth Beazley & Edward
accept registration forms regardless of the paper weight on which they were printed, despite Blackwell’s directive. 193

In the face of these objections, Secretary Blackwell backed down and, in late September, announced that registration forms on lighter-weight paper should still be processed. 194 Still unknown is whether any registration forms were left unprocessed in reliance on Blackwell’s original directive, and whether any voters were discouraged from voting by the initial rejection of their registration form on this ground.

C. Provisional Voting

No subject provoked greater contention during the 2004 election season than the subject of provisional voting. There has been litigation in at least six states (Arizona, Colorado, Florida, Michigan, Missouri, North Carolina, and Ohio) over whether voters appearing in the “wrong precinct" should have their provisional ballots counted. 195 Ohio also saw litigation on election day regarding the failure to provide provisional ballots to voters who had applied for, but never received, absentee ballots. 196 Another lawsuit was filed on the day of the election regarding the vague standards for determining whether provisional ballots should be counted in the State of Ohio. 197 These controversies are a direct result of Congress’s decision not to spell out clearly the requirements for provisional voting, but instead to leave implementation details to the states.

I. The “Wrong Precinct” Issue

The issue that provoked the most controversy in Election 2004 was whether provisional ballots may be cast or counted if the voter appears in the ...

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194 Grant Segall, Voter Forms Will Carry Equal Weight, State Says, PLAIN DEALER (Cleveland), Sept. 30, 2004, at B1 (noting Cuyahoga County’s consideration of plan to tape registration forms to heavier paper).
197 See infra notes 217–23 and accompanying text.
wrong precinct. In Ohio, this issue arose from a directive that Secretary of State Blackwell issued on September 16, 2004.\textsuperscript{198}

The secretary of state’s directive provided that voters would not be issued a provisional ballot unless the poll workers were able to confirm that the voter was eligible to vote at the precinct at which he or she appeared.\textsuperscript{199} In support of this requirement, the directive cited an Ohio pre-HAVA law that made residency within the county and precinct a qualification for voting.\textsuperscript{200} In addition, the directive cited an Ohio pre-HAVA statute allowing provisional voting at the polling place only for those who moved from one precinct to another.\textsuperscript{201} Because the Ohio legislature did not enact any laws implementing HAVA’s provisional voting requirement, Secretary Blackwell relied on these statutes in concluding that voters should not be issued provisional ballots unless their eligibility to vote within the precinct could be confirmed. For those voters appearing at the wrong precinct, poll workers were directed to contact their county boards of elections to ascertain the correct precinct.\textsuperscript{202}

Two lawsuits were brought before the election to challenge Blackwell’s directive that voters not be given a provisional ballot unless their residency within the precinct could be confirmed.\textsuperscript{203} In Sandusky County Democratic Party v. Blackwell, U.S. District Judge Carr issued a preliminary injunction against this directive, concluding that HAVA’s provisional voting standards were more expensive than those applicable under pre-existing state law.\textsuperscript{204} Under HAVA, Judge Carr noted, provisional voting was not limited to those who moved but applied to anyone who appeared at the polling place and found his or her name not on the registration list.\textsuperscript{205}

On the “wrong precinct” question, Judge Carr relied on the provision of HAVA requiring that voters be allowed to cast a provisional ballot if they affirm that they are registered “‘in the jurisdiction in which the individual desires to vote.’”\textsuperscript{206} In dispute was whether the term “jurisdiction” referred to the county or the precinct within which the individual sought to vote.\textsuperscript{207} If jurisdiction meant county, as plaintiffs contended, then voters appearing at the wrong precinct within their home county should be allowed to cast a provisional vote.\textsuperscript{208} If on the other hand jurisdiction meant precinct, as defendants argued, then election officials would not be required to allow a

\begin{footnotes}
\item[198] Directive No 2004-33 from J. Kenneth Blackwell, Ohio Sec’y of State, to All County Boards of Elections 1 (Sept. 16, 2004).
\item[199] Id.
\item[200] Id. (citing OHIO REV. CODE ANN. § 3503.01 (Anderson Supp. 2003)).
\item[201] Id. (citing OHIO REV. CODE ANN. § 3503.16 (Anderson Supp. 2003)).
\item[202] Id. at 2.
\item[204] Sandusky County Democratic Party, 339 F. Supp. 2d at 989, 998.
\item[205] Id. at 988–90.
\item[206] Id. at 988 (quoting 42 U.S.C. § 15482(a)(2) (2000)).
\item[207] Id. at 990
\item[208] Id.
\end{footnotes}
provisional ballot to be cast by voters appearing at the wrong precinct. Judge Carr sided with the plaintiffs, concluding that the term "jurisdiction" should be interpreted in the same way as the term "registrar's jurisdiction" as used in the National Voter Registration Act—that is, to mean the entity responsible for maintaining the voter registration rolls. Based upon this reading of HAVA, Judge Carr concluded that voters appearing at the wrong precinct should be allowed to cast provisional ballots and have their votes counted, at least for those federal contests for which they were eligible to cast votes.

The United States Court of Appeals for the Sixth Circuit reversed in part and affirmed part. The court agreed with Judge Carr with respect to that portion of Blackwell's directive requiring poll workers to determine "on the spot" whether a voter resided within the precinct and "empowering poll workers to deny" wrong-precinct voters a provisional ballot altogether. But the Sixth Circuit disagreed with Judge Carr's conclusion on the meaning of the term "jurisdiction." While noting the ambiguity of the term, the Sixth Circuit concluded that Congress had intended to leave it to the states to determine whether or not to count provisional ballots cast by voters appearing at the wrong precinct. Thus, the state could require that a provisional ballot be issued only to those who affirm that they reside not only in the county where they appear, but also within the precinct at which they appear. The Sixth Circuit further concluded that provisional ballots need not be counted in any election under Ohio law if cast in the wrong precinct. The upshot of the Sixth Circuit's ruling, then, was that voters must be allowed to cast a provisional ballot if they sign an affirmation that they reside in the precinct at which they appear to vote; the requirement that poll workers "confirm" eligibility at the polling place was eliminated. Those provisional ballots would only be counted, however, if the voter was subsequently determined to be a resident of that precinct.

2. Provisional and Absentee Ballots

The second provisional voting issue that provoked litigation was whether voters who had applied for, but had not cast, absentee ballots were entitled to cast provisional ballots. On the morning of November 2, 2004, a Toledo voter, Sarah White, brought a class action lawsuit against Secretary of State Blackwell and the Lucas County Board of Election. The complaint alleged that the plaintiff had requested an absentee ballot over a month before the
election but never received it.\textsuperscript{218} After the secretary of state’s office failed to provide any guidance to counties on whether voters in those circumstances should be allowed to cast provisional ballots, an attorney for Lucas County wrote to obtain clarification.\textsuperscript{219} On the Saturday before the election, the secretary of state’s office responded by e-mail, indicating that voters would not be allowed to cast provisional ballots under those circumstances.\textsuperscript{220}

At 3:01 p.m. on election day, U.S. District Judge David A. Katz issued a temporary restraining order requiring that provisional ballots be issued to voters in Ms. White’s position.\textsuperscript{221} In support of this order, the court cited HAVA’s requirement that any voter affirming his or her eligibility to vote in the jurisdiction be allowed to cast a provisional ballot.\textsuperscript{222} The court directed the Lucas County Board of Elections to inform all precincts of this requirement and Secretary of State Blackwell to apprise all counties of it.\textsuperscript{223} Given the late hour at which the order was issued, it is unknown how many polling places actually received this notice, and how many voters were denied a provisional ballot before the temporary restraining order issued.

3. Standards for Counting Provisional Ballots

Had Bush been leading in Ohio by half of the 136,000-vote margin that existed after all precincts had reported, a major fight over the counting of provisional ballots would have been a virtual certainty. Both the standards and the procedures by which provisional ballots are counted would have been in dispute.

HAVA defers to state law, providing that a provisional ballot shall be counted if state and local election officials “determine[ ] that the individual is eligible under State law to vote.”\textsuperscript{224} In Ohio, however, the state legislature did not enact any post-HAVA legislation setting forth the conditions and procedures according to which these determinations should be made for provisional ballots. Thus, state law provides precious little guidance on this critical question.

Under pre-HAVA law, Ohio voters are eligible if they are over age eighteen, citizens of the United States, have resided in the state for at least thirty days before the election, and are current residents of the county and precinct within which they offer to vote.\textsuperscript{225} But Ohio law does not say how election

\textsuperscript{218} Id. at 5–6.
\textsuperscript{219} E-mail from John Borell, Assistant Lucas County Prosecuting Attorney, Supervisor, Civil Division, to Keith Scott, HAVA Attorney, Office of J. Kenneth Blackwell, Ohio Secretary of State 1 (Oct. 30, 2004), reprinted in Complaint for Declaratory and Injunctive Relief at exhibit 2, White, No. 3:04 CV 7689.
\textsuperscript{220} E-mail from Keith Scott, HAVA Attorney, Office of J. Kenneth Blackwell, Ohio Secretary of State, to John Borell, Assistant Lucas County Prosecuting Attorney, Supervisor, Civil Division 1 (Oct. 30, 2004), reprinted in Complaint for Declaratory and Injunctive Relief at exhibit 2, White, No. 3:04 CV 7689.
\textsuperscript{222} Id. at 3–4.
\textsuperscript{223} Id. at 4.
\textsuperscript{225} OHIO REV. CODE ANN. § 3503.01 (Anderson 1996).
officials should go about making these determinations because no statutes were enacted implementing HAVA's provisional voting requirements. The counting of provisional ballots would likely have been governed by a state law providing that county boards of elections have responsibility for the counting and tallying of votes. Each board of elections consists of four members, split evenly between the parties. In the event of disagreements over whether a particular ballot should be counted, three members must agree in order for the vote to count. Put another way, a tie goes against the voter.

Ohio statutes leave completely unanswered the question of what standards and procedures the county boards of election should apply in determining whether a particular voter was in fact eligible. The only guidance on this question that existed, as of the date of the general election, was a two-page directive that Secretary of State Blackwell issued just four days before the election. This directive provided that, before the provisional vote is counted, the board of elections must confirm that the voter: (1) was registered somewhere in Ohio at least 30 days before the election; (2) "did not vote from a former address or by absentee ballot"; (3) "voted in the correct precinct"; (4) "completed and signed" the affirmation required by HAVA; and (5) in the case of voters subject to HAVA's ID requirement, presented proof of identity by the close of polls. The directive states that this information is to be verified starting "immediately following the election" and must be complete "by the conclusion of the official canvass." Further states that "if any of this information cannot be verified, the ballot cannot be counted." But it provides no direction on how county boards should go about verifying that these criteria are satisfied. For example, is it sufficient that a voter affirms that he or she was registered at least thirty days before the election? Or is some documentary proof required? In the event that no registration form can be located, should it be assumed that the voter was lying under oath in affirming that he or she was registered at least thirty days before the election? Or should cases in which evidence, other than the voter's signed affidavit, is lacking be decided in favor of the voter?

Based upon the secretary of state's failure to articulate clear standards for counting provisional ballots, an Ohio voter brought suit on the day of the election. The complaint in Schering v. Blackwell was brought on behalf of a voter who cast a provisional ballot on election day, and alleges that the secretary of state's provisional voting directive "provides little more than
vague generalities concerning provisional ballots."\textsuperscript{234} Relying on \textit{Bush v. Gore}, the complaint asserts that the failure to set "specific standards" to ensure the uniform treatment of provisional ballots violates equal protection.\textsuperscript{235}

Reports alleged that this challenge was actually brought at the behest of the Republican Party,\textsuperscript{236} which may have been concerned that the absence of specific and uniform statewide standards would lead to relatively lenient standards being applied in predominantly Democratic counties, with more stringent standards being applied elsewhere. Within a few days after the election, however, the Ohio Democratic Party filed a motion to intervene on the plaintiff's side.\textsuperscript{237} The case is still pending as this Article goes to press.

\textbf{D. The ID Requirement}

A pivotal component of HAVA's access/integrity compromise was that a narrow class of voters provide identification when they appear to vote.\textsuperscript{238} The implementation of this requirement also resulted in unforeseen complications during the 2004 election.

Under HAVA, the following may be presented at the polling place to satisfy the ID requirement: (a) a copy of "a current and valid photo identification" or (b) "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."\textsuperscript{239} Notably, this list is open-ended insofar as it does not specifically limit the types of photo identification or the "other government document[s]" that satisfy the ID requirement.

In an effort to ensure statewide uniformity, some states have promulgated exhaustive and inclusive lists of what documents are acceptable.\textsuperscript{240} Other states, including Ohio, have not done so. The absence of standards may lead to ambiguity and intrastate disparities. Should a student ID, for example, suffice? What about a bus pass? These issues may be especially salient for voters who lack traditional forms of identification. If a student is enrolled at a public university, will a printout from the registrar's office showing her address suffice? The lack of specific standards leaves discretion in the hands of local election officials and poll workers, and may result in the dissimilar treatment of similarly situated individuals from county to county—or even from precinct to precinct.

In addition to the types of ID that are accepted, there are open questions surrounding the treatment of voters who are subject to the ID requirement but do not present identification at the time of voting. HAVA requires

\begin{flushleft}
\textsuperscript{234} \textit{Id.} at 2, 4.  \\
\textsuperscript{235} \textit{Id.} at 1–2.  \\
\textsuperscript{237} Intervenor-Plaintiff the Ohio Democratic Party's Motion to Intervene at 1, \textit{Schering}, No. 1:04-cv-755, http://moritzlaw.ohio-state.edu/electionlaw/docs/Schering/intervene.pdf.  \\
\textsuperscript{238} \textit{See supra} notes 99–104 and accompanying text.  \\
\end{flushleft}
that those voters be allowed to cast a provisional ballot.\textsuperscript{241} The question that HAVA does not answer, at least not completely, is under what circumstances the provisional ballots of voters lacking ID should actually be counted.

Prior to the election, Secretary of State Blackwell announced that those provisional ballots would only be counted if voters subject to the ID requirement presented ID or other proof of name and address by the time the polls closed.\textsuperscript{242} The League of Women Voters and other voting rights groups challenged the directive, arguing that it rendered this provision of HAVA a nullity.\textsuperscript{243} If voters present ID at the polling place, there is absolutely no need for provisional voting because, under HAVA, those voters are already entitled to cast regular ballots. Thus, the effect of this directive is to make a sham of HAVA’s requirement that voters without the required ID be allowed to cast provisional ballots. In response, Secretary Blackwell altered his position, stating that provisional ballots would be counted if voters either presented documentary proof of their identity or provided their driver’s license number or the last four digits of their Social Security number, by the end of the voting day.\textsuperscript{244} Based on this representation, the district court rejected the HAVA-based challenge to Ohio’s treatment of provisional voters subject to the ID requirement.\textsuperscript{245}

\textbf{E. Challenges to Voter Eligibility}

Among the most heavily litigated issues to emerge in the days leading up to the 2004 presidential election was not addressed by HAVA at all. Under the laws of some states, the qualifications of voters may be challenged by representatives of the parties or candidates.\textsuperscript{246} Two types of challenges are permitted under Ohio law: pre-election challenges and election day challenges.\textsuperscript{247} Although both types of challenges have been permitted by Ohio law for many years, their extensive use in the 2004 election provoked an unprecedented legal fight. The prospect of partisan challenges to voter eligibility spawned five distinct legal actions in Ohio.

\textbf{1. Pre-election Challenges}

Ohio law allows a pre-election challenge to be made by any qualified elector against another voter, either by letter or by appearing at the board of elections.\textsuperscript{248} Challenges must include a statement of the reasons why they are

\textsuperscript{241} 42 U.S.C.A. § 15483(b)(2)(B)(i).
\textsuperscript{242} Directive No. 2004-07 from J. Kenneth Blackwell, Ohio Sec’y of State, to All County Boards of Elections Members, Directors, and Deputy Directors 3–4 (Feb. 20, 2004).
\textsuperscript{244} See id. at 827 (citing affidavit from Ohio Director of Elections from the Office of the Secretary of State).
\textsuperscript{245} Id. at 828–31.
\textsuperscript{246} See, e.g., N.C. GEN. STAT §§ 163-8, 163-87 (2003) (permitting any registered voter to challenge the qualifications of any person to vote); N.D. CENT. CODE § 16.1-06-06 (2004) (allowing each party to have one challenger per polling place who can request that the election board challenge any person attempting to vote).
\textsuperscript{248} Id. § 3505.19.
made, but the statute provides no other definition of the standards that should govern them.\textsuperscript{249} It does provide that there be a "public hearing" on any challenge, at which the board of election is to make a determination as to the voter's eligibility.\textsuperscript{250} In the event the voter is determined unqualified, his or her name is to be removed from the registration lists.\textsuperscript{251}

On Friday, October 22, 2004, eleven days before the election, Republican Party representatives filed approximately 35,000 challenges against voters throughout the State of Ohio, almost half of whom were in Cuyahoga County (the Cleveland area).\textsuperscript{252} The alleged basis for these challenges was that the Republican Party had mailed postcards to each of these voters, which had been returned as undeliverable.\textsuperscript{253} Although the Republicans quickly withdrew thousands of these challenges, they declined to withdraw some 23,000.\textsuperscript{254} This compelled Secretary of State Blackwell to issue some basic guidelines for handling challenges on October 26, one week before election day.\textsuperscript{255} Without citing HAVA, Secretary Blackwell's directive modified the state statute's requirements in order to conform (as closely as possible) to HAVA. Rather than removing voters who were successfully challenged from the rolls entirely, county boards of election were instructed to remove them "on a conditional basis."\textsuperscript{256} Should successfully challenged voters thereafter appear at the polling place, Blackwell directed that they be given a provisional ballot and sign "all affirmation statements as required by law" (presumably meaning HAVA).\textsuperscript{257} He further directed that boards of election make a postelection determination as to whether the voters were in fact eligible.\textsuperscript{258} Blackwell's directive also addressed the requirements for a public hearing, noting that counties were free to consolidate the hearings, but that each challenged voter was entitled to "appear and testify, call witnesses, and be represented by counsel."\textsuperscript{259}

The prospect of conducting these challenges within days of the election was a daunting one, particularly for urban counties such as Cuyahoga that faced the burden of scheduling some 17,000 hearings. Counties were spared this burden, however, by a temporary restraining order issued in \textit{Miller v. Blackwell}, a case brought by the Ohio Democratic Party and voters who had been challenged.\textsuperscript{260} On October 27, 2004, U.S. District Judge Susan Dlott,

\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{253} Dao & Fessenden, \textit{supra} note 252.
\textsuperscript{255} Directive No. 2004-44 from J. Kenneth Blackwell, Ohio Sec'y of State, to All County Boards of Elections Members, Directors, and Deputy Directors 1 (Oct. 6, 2004).
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
\textsuperscript{259} Id. at 2.
citing the hasty and inadequate notice provided to challenged voters, issued a temporary restraining order enjoining the pre-election challenges from going forward.\textsuperscript{261} As Judge Diott noted, sending notices of a hearing to an address that had already proven faulty was very unlikely to result in the challenged voter actually receiving notice.\textsuperscript{262} Two days later, the Sixth Circuit denied a motion for a stay, effectively stopping any of the pre-election challenges from proceeding.\textsuperscript{263}

2. **Election Day Challenges**

Litigation over the election day challenges was more complicated. Under Ohio law, challenges to voter eligibility may also be made on election day by party representatives.\textsuperscript{264} "[A]ny political party supporting candidates . . . and any group of five or more candidates" are entitled to appoint challengers, who are allowed to be inside the polling places on election day.\textsuperscript{265} The Republican Party's alleged plan to make aggressive use of these challenges resulted in four different legal actions—and ultimately in four different court orders, all of which were subsequently stayed or reversed by appellate courts. Two of those actions (Spencer v. Blackwell and Summit County Democratic Cent & Executive Committee v. Blackwell) challenged the constitutionality of the election day challenges going forward at all.\textsuperscript{266} A third lawsuit, brought in state court, alleged that each party should be limited to one challenger per precinct, rather than one challenger per polling place.\textsuperscript{267} The final action was initiated in a New Jersey federal court to enforce a 1987 consent decree between the Democratic National Committee and the Republican National Committee limiting the parties' ability to challenge voter qualifications.\textsuperscript{268}

These four actions produced a dizzying series of court orders and appellate proceedings, leading up to, and even extending into, election day. The first order limiting the election day challenges was issued in the state court litigation filed in Cuyahoga County.\textsuperscript{269} That case challenged Secretary Blackwell's directive allowing each challenging entity (such as a party) to have one challenger per precinct.\textsuperscript{270} Because some polling places have more

\textsuperscript{261} \textit{Id} at 921–22.
\textsuperscript{262} \textit{Id} at 921.
\textsuperscript{263} Miller v. Blackwell, 388 F.3d 546, 547 (6th Cir. 2004).
\textsuperscript{265} \textit{Id} § 3505.21.
\textsuperscript{270} \textit{Id} at 1–2.
than one precinct, the effect of Blackwell's directive was to allow more than one challenger from each party at those polling places.\footnote{271}

Judge John P. O'Donnell of the Cuyahoga County Court of Common Pleas found Blackwell's order to be inconsistent with the Ohio statute authorizing one challenger per entity per "polling place."\footnote{272} On Saturday, October 30, 2004, he granted plaintiffs' motion for an injunction limiting challenging entities to one challenger per polling place, rather than one per precinct.\footnote{273} But on the day before the election, the Ohio Supreme Court granted a writ of mandamus, effectively reinstating Blackwell's prior directive and allowing one challenger per precinct, "no matter how many precincts vote at a single location."\footnote{274}

Court orders were also issued in the two lawsuits alleging that the election day challenges violated federal law. On Sunday, October 31, U.S. District Judge John Adams in Akron issued a temporary restraining order in \textit{Summit County Democratic Central & Executive Committee,} preventing challengers from being "present in the polling place for the sole purpose of challenging the qualifications of other voters,"\footnote{275} A few hours later, early in the morning on Monday, November 1, U.S. District Judge Susan Drott in Cincinnati issued an even broader order.\footnote{276} Judge Drott's order in \textit{Spencer} prevented challengers from being present at all in the polling places on election day.\footnote{277} These orders did not last long. The Sixth Circuit consolidated the two cases and, early in the morning of election day, issued an opinion that stayed both Judge Drott's and Judge Adams's orders.\footnote{278} A few hours later, Justice Stevens (acting in his capacity as Circuit Justice) declined to vacate the stay.\footnote{279}

Although each of these cases was resolved prior to the poll opening, the proceedings surrounding the New Jersey consent decree did not conclude until the day of the election. U.S. District Judge Dickinson Deboevoise found that the Republican plan to challenge voters at the polling place, based on the list of some 35,000 names, violated the 1987 consent decree.\footnote{280} On the day before the election, he issued an order prohibiting the Republican Na-
tional Committee and its agents from using this list for the purpose of challenging Ohio voters on election day. A three-judge panel of the Third Circuit denied a motion to stay Judge Debevoise's order, but on election day, the Third Circuit, en banc, issued a stay of Judge Debevoise's order. It seems very unlikely that word of the Third Circuit's en banc stay reached most poll workers, given its late issuance. Nevertheless, by the time the polls closed on election day, none of the court orders limiting the election day challenge process remained in effect.

F. Long Lines at the Polls

The final major issue to emerge in Ohio's 2004 presidential election was the long lines at some polling places—in some places estimated to be up to five hours long. Although HAVA did not directly address the problem of long lines at the polling place, its authorization of $325 million for the replacement of outdated voting equipment and an additional $3 billion for other voting system improvements might be seen as addressing this concern. In any event, the failure to move forward with the planned voting system upgrade in time for the 2004 election was likely a contributing factor in the long lines that some Ohio voters experienced on election day, which resulted in the Ohio Democratic Party filing a lawsuit on the day of the election.

That lawsuit, Ohio Democratic Party v. Blackwell, was brought on behalf of voters in Franklin County (where Columbus is located) and Knox County (where Kenyon College is located). Both counties use electronic voting machines, which were tied up for hours due to the large number of voters at some polling places. With their complaint, the plaintiffs filed affidavits from election officials, challengers, and voters. These affidavits attested to waiting in line up to four or five hours in some Franklin County precincts. Plaintiffs sought a temporary restraining order, compelling both county boards of elections to provide paper ballots to voters as an option instead of waiting for the voting machines to become available.

Sometime during the evening on election day, U.S. District Judge Alge- non Marbley issued a temporary restraining order requiring that voters waiting in line be provided with “paper ballots or another mechanism to provide

281 Id.
285 See supra notes 67–68 and accompanying text.
286 Complaint at 1, Ohio Democratic Party, No. C2 04 1055.
287 Id. at 2.
288 Id. at 4–21.
289 Id.
290 Id. at 3.
an adequate opportunity to vote.”

The district court’s order also contained an additional handwritten requirement (one that went beyond the order plaintiffs had sought), stating: “The Court directs that the defendants shall keep the polls open for voters waiting in line at 7:30 pm.” This requirement really did nothing more than restate Ohio law, which requires that voters in line at the time the polls close be permitted to vote. Despite the requirement to provide paper ballots to voters waiting in line, some voters in these counties waited in line for several hours after the polls closed before casting their vote.

III. Five Lessons from Election 2004

In the early morning hours of Wednesday, November 3, 2004, it appeared that the United States might be facing another contested election that would leave the country uncertain of its next president for weeks. With 100% of precincts reporting, President Bush led Senator Kerry by a margin of approximately 136,000 votes in Ohio. Although this lead seemed commanding, the wild card was the unknown number of provisional ballots still outstanding and uncounted. John Kerry’s campaign speculated that there might be as many as 250,000 provisional ballots still to be counted. Later that morning, the Ohio secretary of state announced that there were only approximately 155,000 provisional ballots to be counted. Senator Kerry thereafter conceded the election, apparently concluding that this margin was too great to be overcome. He was right to do so because, even with the most aggressive litigation strategy, the over 136,000-vote margin was too large to eliminate through any combination of provisional ballots, recounts, and any other litigation efforts that might have been undertaken.

Still, the near miss that Ohio and the country experienced in Election 2004 should give us little comfort. Above all, Ohio’s experience reveals that the mammoth task of improving the administration of elections is far from complete.

It is, of course, precarious to draw any general lessons from the experience of a single state, particularly given the need for a more comprehensive analysis of several of the issues identified in Part II. Nevertheless, some definite themes are discernible in Ohio’s Election 2004 experience. In conjunction with what was already known before election day, this experience

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292 Id.
294 Cauchon, supra note 1 (reporting 136,483-vote margin for Bush).
295 Steven Thomma, Voters Surge to Polls; Bush and Kerry Grapple over Ohio, PHILA. DAILY NEWS, Nov. 3, 2004, http://www.broward.com/mlb/philly/news/special_packages/election2004/thomma/10084494.htm (quoting Kerry campaign spokesperson as claiming that there were 250,000 votes left to be counted).
297 Liptak, supra note 2, at P10.
298 See Hasen, supra note 4; Wishful Thinking, or a Real Conspiracy?, http://equalvote.blogspot.com/ (Nov. 8, 2004, 6:42 PM); Liptak, supra note 2, at P10.
provides some clear directions for the future, not only for election officials but also for courts, legislators, and the parties. The controversies set forth above are helpful in assessing what components of HAVA succeeded in accomplishing their intended objective, and which areas are in need of further refinement. What follows are the top five lessons drawn from the election and its attendant lawsuits.

Lesson #1: Voting Equipment (Still) Matters

One area in which HAVA’s changes have had a salutary effect is voting equipment. Here, there is both good news and bad news to report. Although Ohio is behind the curve when it comes to voting technology, other states that made the switch to better voting equipment saw significant improvements.

First, the bad news: There can be no serious question that tens of thousands of votes were lost in Ohio alone as a result of the continuing use of punch card voting equipment. Overall, 1.8% of the punch card ballots cast did not register a vote for president.299 Although a small percentage of the 76,000 or so residual votes cast with punch cards were the ballots of voters who intentionally abstained from the presidential race, it can safely be said that a substantial majority were not.300 Given that President Bush’s ultimate margin of victory in Ohio was 118,601 votes,301 Kerry supporters cannot plausibly attribute their candidate’s loss to the voting equipment used. Nevertheless, it is clear that tens of thousands of votes were lost due to Ohio’s continuing use of punch cards.

Ohio provides an extreme example, but its experience is not unique. Rather, the high rate of residual votes with punch cards is similar to what other jurisdictions have experienced in elections stretching back to 1980.302 Although the Ohio litigation challenging this equipment did not proceed to trial in time for a court order to be issued requiring the equipment’s replacement by the 2004 election,303 it has become abundantly apparent that punch cards are an unreliable system that should be eliminated entirely.304

The good news is that Election 2004 should be the last federal election in which punch card voting equipment is used in most, if not all, of these juris-

299 Tokaji, supra note 137.
300 See id. (noting that historically between 0.3% and 0.7% of voters intentionally do not vote for president).
303 The ACLU of Ohio’s litigation challenging the punch card was not filed until 2002. See supra notes 142–47 and accompanying text. By contrast, the ACLU brought suit in 2001 to challenge punch cards in four other states (Florida, Georgia, Illinois, and California). In each of these states, relief was negotiated prior to the 2004 election, although in the case of Illinois, the effective date was not until after that election. See supra notes 25–30 and accompanying text.
304 I address problems with punch card technology and the ongoing debate regarding electronic voting in greater detail in Tokaji, The Paperless Chase, supra note 25, at 1719–41.
dictions. Although HAVA did not mandate the replacement of punch cards, it did provide an incentive for states to replace this type of equipment. Under Title I, states that accept monies for the buyout of punch card and lever voting equipment must replace this equipment by November 2004, unless they receive a waiver extending that deadline until January 1, 2006. Should Ohio and the other states that received buyout funds fail to replace their punch card or lever equipment by this date, they are required to repay the amount received, in proportion to the "noncompliant precinct percentage of the amount of the funds provided." For example, the State of Ohio received over $30 million in buyout funds (more than any other state except California, New York, and Illinois). It if fails to meet the 2006 deadline in half of the precincts that had used punch card and lever equipment in November 2000, then the state would be obligated to pay back half of this amount (roughly $15 million) to the federal government.

The extent to which this repayment requirement will be enforced is uncertain, and it cannot be said conclusively whether the threat of repayment will provide an adequate incentive for states and counties to comply with their obligations. There is nevertheless reason to be optimistic that most, if not all, of the punch card ballots still in use during Election 2004 will find their way to the trash bin (or perhaps to an eBay auction block) by 2006.

What has complicated the transition to new voting technology is the intense debate over the security and transparency of electronic voting technology. Critics have argued that touchscreens and other forms of electronic voting technology are unacceptably susceptible to fraud and error. Some skeptics have demanded a "voter-verifiable paper audit trail" ("VVPAT"), which would require electronic voting machines to generate a contemporaneous paper record of the ballot that the voter could see before his or her vote is cast. Events in a handful of jurisdictions, including a precinct in Franklin County, Ohio, have fueled the call for this device. Gahanna Precinct 1-B outside Columbus mistakenly reported 3,893 extra votes for President Bush. The error was traced to a mistake in reading the cartridge, one of the five places in which votes are stored within the machine. Although Franklin County was able to isolate the problem and quickly detect the error,

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305 See supra notes 74–81 and accompanying text.
307 Id. § 15302(d).
310 These criticisms are discussed in greater detail in Tokaji, The Paperless Chase, supra note 25, at 1774–80.
311 See id. at 1780–91.
313 Id.
this experience had the effect of pouring gasoline on the already-raging controversy over electronic voting.

The concerns regarding electronic voting, and the legislative steps that have been taken with the goal of making it more secure, have prolonged the life of the punch card. In 2004, even before the Gahanna error, the Ohio legislature had passed a law requiring a VVPAT. Although the requirement does not go into effect until 2006, its effect was to cause counties to hold off on purchasing new voting equipment. The problem is that, as of November 2004, there were no voting machines certified in the state that could perform this function. Furthermore, the higher costs associated with an electronic voting machine capable of generating a contemporaneous paper record led Secretary of State Blackwell to issue an administrative directive requiring counties to choose a precinct-count optical scan voting system. The state attorney general, however, concluded that the secretary of state lacked the power to issue this directive. Blackwell subsequently reversed himself and issued a directive allowing counties to choose either a precinct-count optical scan or electronic voting system with VVPAT. It remains uncertain (as this Article goes to press) whether Ohio will comply with HAVA's 2006 deadlines for the replacement of punch cards and the provision of at least one disability-accessible voting machine at each polling place.

In this respect, Ohio's experience is somewhat anomalous. Overall, the percentage of voters in counties using the punch card declined substantially between 2000 and 2004, from over thirty-one percent of all registered voters to just over thirteen percent. The percentage of voters in counties using electronic voting machines showed a corresponding increase, going from just over twelve percent in 2000 to almost thirty percent in 2004. Along with this shift in voting technology came a significant decrease in the number of residual votes. Charles Stewart III of the Caltech/MIT Voting Technology Project estimates that one million votes were saved in 2004 due to technological and administrative improvements. The biggest improvements oc-

315 See supra Part II A.
322 CHARLES STEWART III, RESIDUAL VOTE IN THE 2004 ELECTION 1 (version no. 2.3 2005), http://www.vote.caltech.edu/media/documents/vtp_wp21v2.3.pdf.
curred in counties that abandoned their punch card ballots in favor of electronic voting technology. 323

Whatever clouds over the election system HAVA may have created, the silver lining is that those jurisdictions that moved from punch cards to other forms of voting technology in 2004 saw substantial improvements in the number of votes counted. Though Ohio and a handful of other states still lag behind, the shift in voting technology resulting from litigation and legislation over the past four years has had a positive effect, at least in this respect. Although not yet completed, the improvement in voting technology is one aspect of HAVA that has worked well.

Lesson #2: Sue Early, Sue Often

As I have detailed in Part II, Ohio witnessed an avalanche of litigation in the weeks leading up to the election, which continued into and after election day. Some of these cases undoubtedly served a constructive purpose, while others may have obfuscated more than they clarified.

The lawsuits surrounding out-of-precinct provisional voting provide one example of the constructive use of litigation. The district court's order in Sandusky County Democratic Party required the secretary of state to provide guidance to the counties on fulfilling HAVA's provisional voting mandate that had previously been lacking. 324 Although the Sixth Circuit ultimately reversed the district court's order requiring that out-of-precinct provisional ballots be counted for the presidential and U.S. Senate race, it was far better to have resolved this dispute in advance of the election. By doing so, the courts performed a vital function: clarifying the rules of the game for election officials, poll workers, the parties, and of course, voters. The alternative, in a closer race, might well have been a postelection fight to the death over whether provisional ballots should be counted.

Moreover, even though the "wrong precinct" provisional voting litigation was ultimately unsuccessful, it may well have had a useful pedagogical effect. The publicity attending the judicial decisions, including the Sixth Circuit's ruling that provisional ballots would not be counted if cast in the wrong precinct, likely educated some voters that they had better find out their correct precinct ahead of time—and show up at the right precinct—if they wanted their votes to count. Even if few voters were paying attention, the parties and third-party advocacy groups surely were, allowing them the opportunity to educate their constituents.

So too, the litigation over pre-election challenges and the ID requirement was essential in clarifying the rules of the game in advance of the election. The Miller case saved the counties from having to hold tens of thousands of emergency hearings within days of the election. 325 That decision should also have the effect of causing Ohio and other states to reexam-

323 Id. at 17 tbl. 2.
325 See supra Part II.E.1.
ine their challenge laws to evaluate whether they can survive constitutional scrutiny. The League of Women Voters’ lawsuit over the ID requirement also served a constructive purpose, despite the fact that the court denied the injunctive relief sought. As noted above, the effect of the complaint in *League of Women Voters v. Blackwell* was to compel the secretary of state’s office to alter (or at least clarify) the conditions under which provisional ballots would be counted if cast by voters who were subject to HAVA’s ID requirement but failed to present that identification at the time of voting.\(^{326}\)

Specifically, in response to the court’s order asking for an explanation of his policy,\(^{327}\) Blackwell clarified that voters would be given a regular ballot if at the time of voting they (a) orally provided the last four digits of their Social Security number; (b) orally provided their driver’s license number; or (c) provided a copy of their driver’s license, utility bill, or one of the other forms of identification specified by HAVA.\(^{328}\) Voters who did not comply would still be allowed to cast a provisional ballot, which, according to the secretary of state, would be counted if this information was presented by the time the polls closed.\(^{329}\) The district court’s subsequent order relied on this clarification of policy in upholding the state’s implementation of HAVA’s ID requirement.\(^{330}\)

These examples suggest that pre-election litigation can play a valuable role in promoting the fair and transparent administration of elections. When lawsuits are brought sufficiently in advance of an election to allow both the presentation of evidence and time for appeal, they can force election administrators to clarify the rules according to which elections will be administered. Even when the litigation is not ultimately successful—as was true in the cases involving “wrong precinct” provisional voting and the ID requirement—pre-election litigation serves an important public education function.

Complaints that there were “too many lawsuits” therefore miss the mark. Whenever possible, it is much better to resolve issues well before an election than to clean up the mess afterwards. If such lawsuits are brought, it is imperative that they be filed at the earliest possible date to ensure adequate time for judicial resolution. There is substantial value in having court rulings that clarify the rules of the game in advance, giving officials some time to conform their behavior to those orders.

**Lesson #3: Injunctions Should Issue Swiftly or Not at All**

Just as aggrieved parties should file lawsuits promptly (if they file at all), it is critical that courts act on those lawsuits expeditiously. When it comes to pre-election litigation, justice delayed may actually be worse than justice denied. A court that fails to rule until immediately before the election—or,

\(^{326}\) See *supra* Part II.D.


\(^{329}\) See *supra* note 242 and accompanying text.

\(^{330}\) See *supra* note 245 and accompanying text.
worse still, the day of the election—is almost certain to cause more problems than it solves.

A case in point is the litigation surrounding election day challenges to voter eligibility. As noted above, four different trial courts issued orders limiting or stopping election day challenges in the days leading up to November 2, 2004. All of these court orders were reversed on appeal. One can only speculate as to the reasons why the district courts were more troubled by the prospect of challenges to voter eligibility than the appellate courts. It may have stemmed from the ideological composition of the judges. Alternatively, it may arise from the fact that the district courts heard evidence of the problems—including potential racial discrimination—that could arise from a highly discretionary system of challenging voters, while the appellate courts were more concerned with the need for judicial restraint or considerations of comity and were thus more reluctant to intrude.

Whatever the reason, it is very likely that the sequence of these orders, the last of which came on the afternoon of election day, could only have caused confusion among some election officials, poll workers, and partisan challengers. In Summit County Democratic Central & Executive Committee, the district court granted plaintiffs a temporary restraining order just two days before the election and denied a stay the day before the election. In Spencer, the district court granted a temporary restraining order and denied a stay the day before the election. The Sixth Circuit’s consolidated opinion staying these two orders was not released until the early morning hours on election day, and news of Justice Stevens’s decision not to disturb that opinion became public around the time the polls were opening. The litigation growing out of enforcement of the Democratic National Committee v. Republican National Committee consent decree followed an even more compressed and confusing course. The district court issued its order limiting challenges on the day before the election. That order was affirmed that day, only to be reversed on the afternoon of election day by the en banc court.

The late issuance of these judicial rulings made it impossible for election officials, poll workers, voters, and other affected parties to have notice of the courts’ rulings at the time they left their homes on election day. That was

331 See supra Part II.E.2
334 Summit County Democratic Cent & Exec. Comm v. Blackwell, 388 F.3d 547 (6th Cir. 2004); see supra notes 278–79 and accompanying text.
particularly true because multiple cases were pending at the same time. It is hard to fault the courts for not ruling more quickly, given that these cases were not filed until within a week of the election. At the same time, the litigants cannot fairly be faulted for failing to file more quickly, as the likelihood of the long-dormant challenge process being used on election day was not apparent until shortly before election day. Still, when litigation is commenced just hours before an election, it may sometimes be better for courts to hold off on issuing injunctive relief, particularly when there is little, if any, opportunity for appellate review.

Instead, a court might choose to deny a temporary restraining order while making clear the type of conduct that would likely contravene voting rights. For example, the district court in *Spencer* might have indicated that racial disparities in the exercise of voter challenges would give rise to a postelection claim. This would allow the party or candidate whose voters are subject to improper challenges to contest the results, should the election turn out to be close. In other words, the court might issue what is, in effect, preliminary declaratory relief, rather than the “strong medicine” of an injunction, where there is inadequate time to allow the appellate process to run its course, even on an expedited basis. Such a declaration would have the effect of clarifying the rules of the game, without the confusion that is virtually certain to attend court orders issued within hours of the opening of polls.

Lesson #4: States Should Prescribe Clear Rules Well in Advance of Elections

Litigation is not an unqualified evil. To the contrary, it can be very useful in clarifying the rules of the game before an election, especially where there are legitimate disputes over the meaning of ambiguous statutory language. A prime example is the dispute over the casting and counting of provisional ballots cast in the wrong precinct, which turned on the meaning of the term “jurisdiction” as used in HAVA.

The controversy surrounding provisional voting illustrates both the advantages of a clear rule prescribed in advance and the dangers of failing to articulate such a rule. On September 16, 2004, over six weeks before the election, the secretary of state issued a directive saying that out-of-precinct voters would not be allowed to cast a provisional ballot. This directive left much to be desired, and it would have been preferable to have issued it several months earlier—particularly given that provisional voting was supposed to have been in place by the time of the March 2004 primary election. Still, the existence of this directive, imperfect though it was, helped frame the issue for litigation. It would have been worse for the directive to have issued within a week of the election.

337 Steffel v. Thompson, 415 U.S. 452, 466 (1974) (“Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction and to be utilized to test the constitutionality of state criminal statutes in cases where injunctive relief would be unavailable . . . .”).
338 See supra Part II.C.1.
339 See supra notes 196–202 and accompanying text.
340 See supra note 117.
That is exactly what happened with the order prescribing the standard and procedure according to which provisional ballots would be counted.\textsuperscript{341} Because Blackwell's order on that subject was not issued until October 29, 2004 (the Friday before the election), it left no time for pre-election resolution. Because that rule turned out to be less than perfectly clear, it resulted in the \textit{Schering v. Blackwell} complaint being filed on the date of the election.\textsuperscript{342} Had the margin been closer, the \textit{Schering} litigation could have become critical in determining which provisional ballots would be counted, with the parties arguing for different rules for counting those ballots after each side's interests were clear. The Kerry campaign would certainly have argued for a more liberal rule governing the counting of provisional ballots if he had been narrowly behind on November 3 with many ballots still to be counted in Democratic strongholds like Cuyahoga County (Cleveland area) and Summit County (Akron area).

The secretary of state and Lucas County's de facto policy of not issuing provisional ballots to voters who had requested absentee ballots—even if those ballots had not been received prior to the election—did not become apparent until the Saturday preceding the election, when it was revealed through an e-mail.\textsuperscript{343} It was not possible for litigation challenging this practice to begin until just before voting started. The permissibility of challenges to voter eligibility also remained in flux until shortly before the election, with the secretary of state's office issuing guidance on the subject on October 26, 2004, just seven days before the election.\textsuperscript{344} This also left insufficient time for pre-election judicial resolution, leading to a court order on the day of the election, by which time it was likely that many voters had wrongly been denied provisional ballots.

The lack of transparency with which the secretary of state's office conducted its responsibilities was detrimental to public confidence. On some questions, such as whether voters who had requested absentee ballots should receive provisional ballots, the secretary of state's office provided no readily available public guidance at all. On others, his office had issued directives to the county election boards—but made little effort to make those directives known to advocates or the general public. In fact, as of the date of this writing, the Ohio secretary of state's administrative directives are not publicly available on the office's public website. Nor was the secretary of state's office especially prompt or forthcoming in providing this information when it was requested.\textsuperscript{345} In short, the Ohio secretary of state appears to have made

\textsuperscript{341} See supra Part II C.3.
\textsuperscript{343} See supra Part II C.2.
\textsuperscript{344} See supra Part II E.1.
\textsuperscript{345} I personally requested information from the Ohio secretary of state on August 13, 2004—specifically, any guidance that his office had provided to the counties on provisional voting and the ID requirement. E-mail from Daniel P. Tokaji, Assistant Professor of Law, The Ohio State University, Moritz College of Law, to Richard Coglianese, Ohio Assistant Attorney General (Aug. 13, 2004) (on file with author). The secretary of state's attorney initially interposed objections to the production of this public information, and did not actually provide the
very little effort to clarify the rules of the game to those who were affected by them.

When the rules according to which elections will be administered are publicly promulgated sufficiently in advance of the election, it diminishes the likelihood of confusion among election officials, poll workers, voters, parties, and candidates. Conversely, the conspicuous lack of transparency with which the State of Ohio conducted its 2004 election exacerbated public distrust, leading many citizens to question the legitimacy of the result.346

In cases where a state fails to set clear rules in advance of an election, the prospect of equal protection litigation under Bush v. Gore may provide a useful stick. The absence of clear rules prescribed in advance creates the possibility that election administrators at the local level will apply different rules—possibly to the benefit of their preferred candidates or to the detriment of those candidates whom they oppose. Any constitutionalization of election practices should proceed with caution.347 Nevertheless, Bush v. Gore's equal protection holding suggests a means by which courts may play a useful role in inducing states to adopt clear rules in advance of elections.

As I have elsewhere argued, Bush v. Gore is best read as a case about discretion.348 Silently borrowing from First Amendment cases, the Court's opinion exhibits a profound distrust of election officials making decisions—in that case, which ballots would be counted during a manual recount—in the absence of clear rules prescribed in advance. As the Court puts it, the problem with Florida's recount process was the absence of "specific rules designed to ensure uniform treatment" for all voters.349 What troubled the Court was the prospect that, in the absence of a clear rule, official decision makers would count votes in a manner designed to benefit their preferred candidate, while hiding behind the veil of discretion.350 In this respect, the real progenitors of Bush are not the equal protection cases, such as Reynolds v. Sims351 and Harper v. Virginia,352 that the Court cites; they are instead the

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346 The most conspicuous evidence of this distrust was the postelection lawsuit contesting the election results. See Moss v. Bush, 821 N.E.2d 152, 152–53 (Ohio 2004); Contesters’ Verified Election Contest Petition, Moss (No. 04-2055), http://moritzlaw.osu.edu/electionlaw/docs/ohio/MossBush/certification.pdf


350 See Tokaji, supra note 15, at 2489–90.

free speech cases, such as *Shuttlesworth v. Birmingham* and *City of Lakewood v. Plain Dealer Publishing Co.* in which the Court struck down licensing schemes that conferred excessive discretion on public officials to determine which speech would be subject to regulation. In this line of cases, which I have referred to collectively as “First Amendment Equal Protection,” the Court requires the articulation of clear rules to prevent government actors from favoring certain speakers behind the veil of discretion.

If this interpretation of *Bush v. Gore* is correct, then a case like *Schering v. Blackwell* presents a critical test of the doctrine. Despite the *Bush v. Gore* Court’s attempt to limit the scope of its holding, the failure to set clear standards for determining which provisional ballots are counted presents a problem that cannot be distinguished in any principled way. In both cases, the underlying problem is that without clear standards, official decision makers have unacceptably broad discretion to determine which votes will count. The attendant risk is that these officials will use that discretion to favor a preferred candidate without being detected. *Schering* thus fits neatly within the *Bush v. Gore* Court’s extension of the First Amendment Equal Protection precedent to the process of voting. Deciding this case in the plaintiffs’ favor would provide a strong incentive for states to articulate clear rules in advance of elections.

**Lesson #5: Courts Should Be Skeptical of Rules Unilaterally Announced by Partisan Election Officials**

Clear rules prescribed in advance are necessary to the proper functioning of the election system. But it is not sufficient that rules be clear; they must also be fair. It is especially important that election rules be enacted and administered in a manner that avoids any suggestion that they are being used to the advantage of one party.

These concerns were abundantly evident in the weeks leading up to the 2004 general election in Ohio. Democrats subjected Republican Secretary of State Ken Blackwell to intense and dogged criticism for decisions that they perceived to be advantaging President Bush and, more generally, conservative candidates and issues. Foremost among the secretary of state’s decisions that provoked criticism were: (1) forbidding individuals from even receiving a provisional ballot unless their eligibility to vote within the precinct could be confirmed; (2) the refusal to provide provisional ballots to voters who had requested but claimed not to have received absentee ballots; (3) declining

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356 See, e.g., Plain Dealer Publ’g Co., 486 U.S. at 757–59.
357 See supra notes 233–37 and accompanying text.
358 Bush v. Gore, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”)
359 See supra Part II.C.1.
360 See supra Part II.C.2.
to count provisional ballots by voters subject to HAVA’s ID requirement, unless they provided their identifying number or acceptable documentation by the time the polls closed;\textsuperscript{361} (4) the initial decision to allow both pre-election challenges and election day challenges;\textsuperscript{362} (5) the requirement that voter registration forms be rejected if certain information was omitted;\textsuperscript{363} and (6) the rejection of registration forms on less than eighty-pound paper weight.\textsuperscript{364}

Although at least some of the abovementioned decisions might be defended on the merits, Blackwell’s role as an elected Republican planning to run for higher office, with his close connection with the Bush campaign to boot, could only have fueled the perception that he was anything but a neutral arbiter. Secretary of State Blackwell’s role in Ohio politics exacerbated the perception that he was executing his duties in an unfair fashion. That he was an honorary co-chair of the Bush campaign did little to assuage the secretary of state’s Democratic critics.\textsuperscript{365} Nor did Blackwell’s well-known plans to run for governor in 2006,\textsuperscript{366} and therefore his presumed desire to curry favor with the Republican Party in order to improve his chances of receiving the nomination, instill confidence that the secretary of state was fulfilling his duties in a neutral fashion.

Unilateral rulemaking by partisan state officials arguably presents the most severe challenge facing our election system. Such decision making can only detract from public confidence in the integrity of the process. The more difficult questions are how election rules should be made and how to get to a better rulemaking system.

One possibility is for Congress to amend HAVA to give the EAC regulatory authority. Unfortunately, HAVA prescribes a very limited role for the EAC, which does not have the power to issue binding regulations on how the law’s requirements should be implemented.\textsuperscript{367} The EAC can still play a constructive role in prescribing “best practices,” but under current federal law, its power is sharply circumscribed. Giving the bipartisan EAC rulemaking authority—and the resources needed to do its job effectively—would be of great value in promoting the fair implementation of HAVA’s more ambiguous provisions. The fact that the EAC can only act with the support of three of its four commissioners guards against partisan decision making (though it may also result in paralysis). By contrast, when elected or appointed chief election officials act unilaterally, the appearance, if not the reality, of partisan motivation is highly likely.

Unfortunately, there seems to be little appetite for amending this Act among some key members of Congress.\textsuperscript{368} Assuming that HAVA is not

\textsuperscript{361} See supra Part II C.3
\textsuperscript{362} See supra Part II E.
\textsuperscript{363} See supra Part II B.2.
\textsuperscript{364} See supra Part II B.3.
\textsuperscript{365} Mark Naymik, Inside Politics. Blackwell’s Many Hats, Plain Dealer (Cleveland), Feb. 20, 2005, at H3
\textsuperscript{366} Conflicting Interests: Blackwell’s Politicking Risks Public’s Perception of Election Impartiality, Columbus Dispatch, Jan. 30, 2005, at C4
\textsuperscript{367} See supra Part I C.
\textsuperscript{368} HAVA’s principal Republican co-sponsor in the House, Representative Bob Ney (R-
amended, the responsibility of making most rules will continue to rest with state governments.\textsuperscript{369}

But which part of state government should make those rules? Ohio is far from unique in having a chief election official that is elected through a partisan process.\textsuperscript{370} Nor is it only Republican chief election officials, such as Blackwell and former Florida Secretary of State Katherine Harris, who have been criticized for real and perceived partisanship in the conduct of their duties. California’s former Democratic Secretary of State Kevin Shelley recently resigned in the face of multiple claims that he had abused his authority.\textsuperscript{371} One of the most serious allegations made against him was that he misused HAVA funds for partisan political purposes.\textsuperscript{372} In the long term, promoting the nonpartisan administration of elections is one of the most serious challenges facing our democracy.\textsuperscript{373}

In the short to medium term, however, chief election officials with partisan interests are likely to be the continuing reality. So long as this is the case, it is far better that the rules governing elections be dictated by the legislature than by chief election officials. For example, Ohio would have been better off had the legislature enacted post-HAVA legislation prescribing the situations in which voters would receive provisional ballots and in which those provisional ballots would be counted. When election rules take the form of legislation, the public can at least have some assurance that they are the product of a fair process. In Ohio, the establishment of such a rule through legislation would have avoided the charge that a partisan chief election official was making up the rules on an ad hoc basis to support his preferred candidate. There is no guarantee that the legislative process will be free from partisanship. To the contrary, both major parties can be expected to fight for rules that will benefit their side. There is, however, greater reason for public confidence where election rules emerge from the legislative process, as opposed to being dictated by administrative fiat shortly before a hotly contested election.

To the extent feasible, state legislative bodies should review their existing election administration laws and attempt to anticipate problems well in advance of election day. Allowing partisan election officials to make those decisions in the heat of a contested election is a recipe for disaster.

\textsuperscript{369} This is aside from any constitutional questions that might be raised about the authority of Congress, either by itself or through delegated authority, to dictate the rules that govern election administration to state and local election officials.

\textsuperscript{370} Hasen, supra note 4 (noting that thirty-three states choose their chief elections official through partisan elections).

\textsuperscript{371} Nancy Vogel, Allegations Lead to Rising Star’s Fall, L.A. TIMES, Feb. 5, 2005, at A11.


\textsuperscript{373} For one suggestion on how to deal with partisanship in election administration, see Chris Elmendorf, Representation Reinforcement Through Advisory Commissions 1 (Dec 4, 2004) (unpublished manuscript, on file with author). For another suggestion, see Hasen, supra note 4, who suggests that chief election officials be nominated by the governor but confirmed by a supermajority of the state legislature to ensure consensus of the major parties.
What is less clear is whether there is anything courts can do to promote this allocation of institutional responsibility. One possibility would be to strike down administrative directives that are not the product of a fair process, such as those issued by Secretary of State Blackwell in the days and weeks leading up to the November 2004 general election. A textual hook, suggested by Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*,374 is Article II, section 1, clause 2, which provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ."375 Following *McPherson v. Blacker*,376 the Chief Justice construed this provision to leave it "exclusively" to the state legislature to define the method in which presidential electors would be appointed.377 As Chief Justice Rehnquist stated, this is one of the "few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government."378 He thought that the Florida Supreme Court had exceeded its authority in prescribing the manner in which recounts ought to be conducted.379 This clause might also be read to forbid executive branch officials, like a secretary of state, from promulgating election rules.

A problem with a broad reading of Article II, section 1, clause 2 is that it proves too much. When new problems arise, ones not foreseen by Congress or the state legislature, it will be necessary for the executive or judicial branch to fill the gap, as happened in Ohio's 2004 election. Moreover, even Chief Justice Rehnquist appears to acknowledge that the Constitution allows state legislatures to "delegate" authority over the conduct of elections to state executive branch officials and courts.380

A more narrowly tailored means by which to encourage state legislative rulemaking would be to accord less judicial deference to election rules that are unilaterally promulgated by a chief election official, in both constitutional and statutory cases. For example, had Blackwell's eighty-pound-paperweight directive been challenged under either the Voting Rights Act or the Constitution, his asserted justifications might be treated with more skepticism than would be the case with a statute duly enacted by the state legislature or a rule promulgated by a bipartisan state agency structured like the EAC (with equal representation of both major parties). Where rules are unilaterally articulated by a partisan chief election official, the danger of "self-entrenching" rules—ones designed to promote the interests of his or her own party—is greatest. On the other hand, to the extent that election rules are the product of a truly nonpartisan or bipartisan process, the risk that one party is defining

375 U.S. CONST. art II, § 1, cl. 2 (emphasis added).
378 *Id.* at 112 (Rehnquist, C.J., concurring).
379 *Id.* at 115 (Rehnquist, C.J., concurring).
380 *Id.* at 113–14 (Rehnquist, C.J., concurring) ("Importantly, the [Florida] legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State, and to state circuit courts.").
381 See *Fildes*, supra note 347, at 41
those rules to advantage itself diminishes. Courts should therefore be more skeptical of unilateral directives, like those issued by Ohio Secretary of State Blackwell in the weeks preceding Election 2004, than would be the case with rules enacted through a fair process.

**Conclusion**

The litigation surrounding Election 2004 provides useful lessons not only for the courts but also for legislators, election officials, and election lawyers. While some might view litigation as a problem to be avoided at all costs, the 2004 election demonstrates that it can play a constructive function. Litigation not only may protect essential voting rights, but may also clarify the rules of the game in advance of the election. Even when pre-election lawsuits are unsuccessful, they can be of significant benefit, so long as relief is obtained sufficiently in advance of election day. Where injunctive relief is impracticable due to time constraints, courts should consider issuing declaratory relief setting forth election officials’ obligations. On the other hand, where lawsuits are filed too late or where courts are not timely in issuing or staying injunctive relief, those actions can actually exacerbate the confusion that inevitably accompanies hotly contested elections.

While there are many important lessons that might be drawn from Ohio’s experience, perhaps the most important are the need for clear rules prescribed in advance and the desirability of enacting those rules through a fair process. Federal courts may have a useful role to play in enforcing the legislative agenda. A problem in need of further examination is whether there are ways in which courts could induce state officials to set clear and fair rules in advance of presidential elections. This sort of judicial intervention ought not be looked on as an evil to be avoided, but as a lever by which to promote the functioning of those aspects of our election system still in need of attention. If Ohio’s 2004 experience should teach us anything, it is that the active yet careful participation of the judiciary is essential to the ongoing process of election reform.