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Epilogue: *Bush v. Gore* and the Constitutional Right to Vote

Samuel Issacharoff & Richard H. Pildes

Abstract: This essay provides a look at the legal landscape regarding the right to vote that has emerged in the wake of the 2012 elections. Courts have begun using *Bush v. Gore* to craft an intermediate form of equal protection scrutiny to address barriers to voting or the manipulation of voting requirements when the state’s justifications for these constraints are thin or unconvincing. The essay also focuses on the emergence of Early Voting as a central feature of current democratic participation and the ways in which courts have begun to understand Early Voting as a legal category. The essay serves as an epilogue to a social science volume on voting reform edited by Michael Alvarez and Bernard Grofman, *Election Administration in the United States: The State of Reform After Bush v. Gore*. The essay ends with a tentative assessment of the emerging new equal protection jurisprudence.

The purely partisan perspective on *Bush v. Gore* focuses on the ongoing, contested dimensions of a close election and the controversial role of the Supreme Court in declaring game over. On this telling, *Bush v. Gore* was a denial of the right of every vote to be counted amid an institutional power grab for the Republican Party. From this point of view, the main legacy of that dramatic moment in constitutional and political history is that everything possible should be done to allow post-election validation of all votes, including the expanding role for provisional ballots. The reform upshot was the Help America Vote Act (HAVA), a complicated legislative gambit that tried to rationalize state voter registration records at the state level, created a generally useless Electoral Assistance Commission, and enshrined a system of post-election challenges to provisional ballots that, while perhaps better than the other available options, is also litigation nightmare just waiting to happen.

Perhaps the passage of time will allow an alternative story, one in which the post-election partisan scramble was even more important as a window into the much more pervasive and structural dysfunctions of the American electoral system. This alternative account begins at the top with a

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winner-take-all Electoral College system that created the cliff effect necessary for Florida 2000 – the ability of a few hundred actual votes to determine whether Florida’s 25 Electoral College votes would be entirely captured by George Bush or Al Gore. From there, the story of electoral dysfunction would cast attention on how control of federal elections is still, more than 200 years since the Constitution’s creation, overwhelmingly left in the hands of the states and, ultimately, in those of local county administrators. Voting lists are kept in local polling books, volunteers (mostly female and mostly senior, even on a more probing reexamination) staff election administration generally with inadequate training and little more than episodic engagement with complicated election rules. This account would add in the local administrators who purchase voting machines from friendly vendors and devise ballots based on whimsical expectations of voter capabilities. And the list would run to partisan control of the machinery of elections. Here we would engage the devotion of major electoral resources to combat illusory claims of in-person fraud by constricting early voting, adding identification requirements, and generally clogging the machinery in ways that invite a take-over by Starbucks or Cheesecake Factory, or any competent market-tested firm able to satisfy basic consumer needs.

Under this alternative viewpoint, Bush v. Gore may have been partial, incomplete, hesitating, right on substance but wrong on remedy – the list is by no means exhausted. Yet, it may also have been the opening wedge in defining a broader claim of citizen expectation that voting should be accessible and fair. Any legal requirement of basic fairness would place a bull’s eye on the structural guarantees of dysfunctionality of the electoral system, starting with its partisan overseers and continuing right on through its localized administrators. On this more far-reaching reading, the Supreme Court’s efforts to find a guiding legal principle for constitutional oversight might provide a foothold for challenging some of the more bizarre excesses of our electoral system. A single case study of Ohio provides evidence whether this attempt to rescue a broader constitutional commitment to the right to vote is simply Panglossian, or whether the moment has finally come to integrate a conception of proper democratic functioning into the Constitution.

We look to Ohio because the last three presidential elections have either turned on the outcome in Ohio or, perhaps more significantly, because the last three presidential campaigns were waged on the presumption that Ohio could be the touchstone of the entire election.

I.

As the chapter by Paul Gronke and James Hicks nicely chronicles, perhaps the most significant change in voting law and practice in the decade after Bush v. Gore was the sudden emergence of early voting (EV) as a central feature of American elections. Although early voting existed in some places before 2000, it has exploded since then, with 32 states now adopting
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some form of pre-Election Day voting. As their work documents, the proportion of ballots cast early grew by around 50% in each presidential election from 2000 to 2008 (with some dips in midterm elections). For the 2008 presidential election, about 34% of the electorate (44 million voters) voted early. Preliminary indications are that the percentage was even higher in the 2012 election, despite the fact that some large states, such as Ohio and Florida, cut back on the number of early-voting days available. As Gronke and Hicks argue, this dramatic flourishing of early voting since 2000 is directly attributable to the combined forces of the 2000 election, *Bush v. Gore*, and the enactment of HAVA.

Yet while early voting has been among the most significant practical changes to the election system since 2000, the courts had not been required to grapple with this new category of voting in any significant way until the 2012 election cycle. The essential legal question is how to understand early voting as a legal matter, including for purposes of constitutional law. Indeed, the most significant election litigation in 2012 was about early voting, with cases in Ohio and Florida (including cases litigated the weekend of the election) leading to more than 106,000 people in Ohio alone making use of judicial decisions to vote the weekend before the election. The judicial decisions that resulted will be important for the future of election law for two reasons: first, because they indicate how courts are going to conceive of early voting as a legal category; and second, because these decisions continue the evolution of jurisprudence concerning the right to vote and show how courts are beginning doctrinally to integrate *Bush v. Gore* into that evolving jurisprudence.

On the first issue, one way to frame the question of how to treat EV as a legal category is to reason by analogy: should the courts treat EV more like traditional election-day voting or more like absentee voting? Is EV best understood, legally, as expanding election day back in time a bit, so that the legal and constitutional framework should be thought about much like the framework that applies to election day in general? Or is EV best understood as more like traditional absentee voting, in which States have long made decisions about which groups of voters have sufficiently good “excuses” for not being able to show up on election day to justify their access to an absentee ballot? Doctrinally, any lines that state draws on who can cast a vote at the ballot box are going to be subject to the most exacting scrutiny and upheld only for purposes of ensuring bona fide residency, eligibility and the like. Yet for absentee balloting, the doctrine is exactly the opposite: the Supreme Court had decided more than 40 years ago, in a fairly obscure case called *McDonald v. Board of Election Commissioners*, that the lines states drew in deciding which voters would have access to absentee ballots should be subject only to a minimal rational-basis standard. Although commentators have questioned that decision, courts of appeals continue to apply it in absentee-balloting cases.

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This question was the fundamental underlying the most consequential piece of election litigation in the 2012 cycle. Long lines and other problems in the 2004 election had led Ohio to create an expansive early voting system, which had helped the 2008 election process run more smoothly. Yet in the run-up to the 2012 election, the Ohio legislature cut back on the amount of early voting, including eliminating it on weekends. Yet through a crazy-quilt pattern of bills, repealed bills, the qualification of a voter referendum on voting issues, Ohio had ended up in a situation in which on the weekend before Election Day, some voters would have access to early voting – military and overseas voters, as defined by federal law – while all other voters would not. Indeed, Ohio might have simply stumbled into the situation it created: the state actually enacted two separate statutes, one that would have treated everyone equally for early voting, and one that permitted only military voters to vote the final weekend; election officials had resolved this conflict in favor of the latter result.

The Obama campaign then brought a constitutional challenge to this differential access to early voting. Invoking *Bush v. Gore* and many of the Court’s seminal right-to-vote cases, that challenge argued that Ohio could not open its polling doors to some voters but not others without at least some credible, compelling justification supported by a factual foundation. Thus, that challenge suggested EV should be seen as much like traditional election-day voting, just expanded backward in time. In turn, Ohio assumed that EV should be treated under Supreme Court precedents that apply to absentee voting, and the state should be only to draw lines on access as long as any conceivable rational basis existed for those distinctions.

Every federal judge to address the merits of these issues (in the District Court and a unanimous Sixth Circuit) rejected Ohio’s position. The Sixth Circuit held that the Constitution and the Court’s right-to-vote cases required Ohio to open its early-voting doors to all voters on an equal basis; the Supreme Court denied Ohio’s effort to stay that decision. As a result, more than 106,000 voters in Ohio voted early the weekend before the election.

These decisions are now the most important window into the way federal courts are beginning to understand EV as they work out its legal meaning. The Obama campaign did not challenge Ohio’s decision to eliminate EV for all voters on weekends; it challenged only Ohio’s decision to open those doors selectively to some voters and not others. As a matter of the actual practice on the ground, EV looks in virtually every way like election-day voting: voters line up in person, sometimes for hours, at state polling locations, go in, and cast their vote. Unlike with absentee voting, no state has ever tried to carve up its electorate during early voting and insist that some voters can vote early but others cannot. Since early voting has been developed, it has always been open in all states to all voters on equal terms, just as election-day voting is. Everything about the way early voting is covered in the media and treated by campaigns is the same as it is on election-day. And voters use early voting in massive numbers that dwarf the traditional absentee ballot process. In terms of the experience of voters with EV, the atmospherics of EV, and the emerging norms of EV, there is little
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In rejecting that policy on federal constitutional grounds, the federal courts cited not just *Bush v. Gore*, but many of the classic right-to-vote cases, such as *Kramer v. Union Free School District No. 15*, *Dunn v. Blumstein*, and *Harper v. Virginia State Board of Elections*. These are the cases that not only fleshed out the constitutional right to vote, but also asserted a muscular role for courts in policing the wrongful denial of the franchise. That citation list is itself a further, powerful signal that the courts viewed EV as much like election-day voting that was simply extended earlier in time. In these important first decisions, the courts rejected the position that EV should be viewed through the lens of absentee voting. That is why the courts invoked these foundational precedents that preclude states from opening their polls to some voters but not others. Thus, one of the most significant changes in election practice since 2000, the dramatic rise of EV, now has an accompanying legal response: in their initial confrontations, at least, with EV, courts are inclined to conceptualize EV as more similar to traditional election-day voting than to traditional absentee voting.

Could a state ever permit some voters to vote early and not others, if the state truly had some compelling reason for picking and choosing among early voters? That is unknown at this early stage of the development of the jurisprudence of early voting. Arguably, that issue was not squarely presented in the Ohio litigation, given the convoluted path through which Ohio had ended up opening its early-voting doors to some voters but not others. Given that path, the federal courts found it hard to credit any post-hoc claim that powerful and convincing reasons had justified Ohio in opening its polls for EV to some voters but not others. But the very fact that the federal courts examined the Ohio scheme in a rigorous way, and were unwilling to defer to the state’s post-hoc efforts in court to justify that scheme, leads to the second area of legal significance that emerged from the 2012 election cycle: the continuing evolution of the right-to-vote jurisprudence and the integration of *Bush v. Gore* into that jurisprudence.

II.

Ohio provides a window on a deeper and more general transformation of the election jurisprudence, the second major legal development in 2012. In *Baker v. Carr*, the Court rested the justiciability of constitutional challenges to the election system on these cases being integrated into what Justice Brennan termed the “well developed and

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8 369 U.S. 186 (1962).
familiar contours of equal protection law. That approach recognized claims that state conduct violated a fundamental right or that it drew distinctions along classifications that were deemed suspect because they reflected the historic subordination of racial or ethnic minorities.

The Ohio litigation posed challenges along both these dimensions. The initial cases in which the Court recognized voting to be a fundamental right mostly involved direct qualifications on political participation: failure to meet those qualifications (a poll tax, a durational residency requirement) meant complete exclusion. In the current generation of cases, however, the courts typically confront regulations on the processes by which voting is done, often without complete exclusion from participation. In Ohio, even following the restrictions imposed for 2012, EV was still widely available, anyone could vote absentee for any reason, and of course, general election day remained open to all. Should the courts then, nonetheless conceive Ohio’s differential access to EV the weekend before the election a severe burden on the fundamental right to vote? If the law was instead looked primarily in terms of whether it invidiously classified voters, Ohio’s attempt to distinguish overseas voters, particularly military overseas voters, from in-state voters for purposes of access to the EV sites on the weekend before the election may have been maladroit, but did not implicate any of the traditional categories of suspect classes. The overarching issue, then, was how the modern right to vote jurisprudence, which now spans almost 50 years, ought to be synthesized and applied in the context of emerging new forms of voting regulation.

In Obama for America v. Husted, the Sixth Circuit upheld a district court preliminary injunction against discriminatory restrictions on access to early voting the weekend before the election, a decision that allowed more than 100,000 Ohio voters to take advantage of enhanced opportunities to vote. As a formal matter, the Ohio law did not deny anyone the right to vote, since these other avenues remained open; hence, the Sixth Circuit concluded that the burden on the right could not be severe. But the Court also realistically noted that, for a significant number of Ohioans, weekend voting might in fact enhance their ability to vote, given job and family constraints when general election day takes place on a Tuesday.

As a result, the Court was not prepared to dismiss the burden on the right to vote as trivial or non-existent. Instead, the Court found that constitutional doctrine permitted recognition of a category between these extremes: burdens that were “real” and meaningful, even if not severe, would trigger a kind of intermediate judicial scrutiny. Moreover, major counties in Ohio filed briefs arguing that, despite the state law (and the state’s arguments), experience had shown that EV eased the burdens on election administrators and smoothed the election-day path for voters. For the Court, one critical fact was that the State of Ohio previously “had granted

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9 Id., 369 U.S. at 226.
10 697 F.3d 423 (6th Cir. 2012).
the right to in-person early voting to all Ohio voters” and that “[i]n 2008, thousands of Ohio voters cast their votes in person in the three days prior to Election Day. Then, the State retracted that right, imposing a 6 p.m. Friday deadline. Having established the significance of EV as part of the American electoral process, the Court could conclude that “thousands of voters who would have voted during those three days will not be able to exercise their right to cast a vote in person.”

Once the Court recognized that significant burdens on the right to vote, even if not severe, required serious judicial scrutiny, the Court turned to crafting the legal doctrine to offer relief. EV was a relatively new development and did not trigger the more classic outright denial of the franchise evident in the voting as fundamental right line of equal protection cases. Nor did the categories of privileged and non-privileged voters easily map on to the race-based distinctions that populate the constitutional right to vote cases. Instead of the classic forms of equal protection, courts (and the Sixth Circuit in particular in dealing with a series of cases from Ohio) began to formalize the elements of an intuitive sense of unjustified regulations of the electoral process or, put in other terms, illegitimate political behavior. This intuition turned on three elements: the creation of a real-world obstacle to voting, including the denial to some voters but not others of a previously granted ability to vote more easily; proximity of a change in voting procedures to election day, thereby creating an aura of partisan manipulation about the change; and an inability to articulate a reasonably credible account of why the change was necessary.

Together these three elements combined to defeat the normal deference granted to state administrative decisionmaking, even in the electoral arena. No one element seemed to stand alone. For example, no court in this line of cases ever intimated that early voting, once granted, could not be rescinded. The Obama campaign, as well, did not challenge the elimination in Ohio of EV altogether on weekends, but only the discriminatory access to it the week before the election. Thus, the courts did not subject administration of the franchise of a one-way ratchet, even with regard to EV, but if changes were to be made, they had to be even-handed. Similarly, no court imposed an elevated burden of justification on even bureaucratic decisionmaking unless struck by the likely impact on the realistic ability of voters to cast their ballot. At the same time, bureaucratic indifference proved to be insufficient to overcome a burden on the franchise. As the Sixth Circuit emphasized in Hunter v. Hamilton County Board of Elections in 2011, “unanticipated inequality is especially arbitrary.”

Much of the Sixth Circuit’s development of the right to vote has been built on the foundation of Bush v. Gore. The Sixth Circuit has

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12 Id.
13 635 F.3d 219, 238 n.16 (6th Cir. 2011).
elaborated this new equal protection jurisprudence across cases involving the use of inferior voting machines in some parts of the state, disparities in election administration across counties, and the inconsistent treatment of provisional ballots. In each case, the Sixth Circuit comes back to *Bush v. Gore* as standing for the proposition that the right to vote encompasses, in the language of *Bush v. Gore*, “more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.”

In *Hunter*, the most expansive of the Sixth Circuit cases prior to 2012, the Court’s focus was on the statement in *Bush* that there is a constitutional requirement under equal protection to “the nonarbitrary treatment of voters.” From this, the Sixth Circuit established the new equal protection of the franchise: “We are therefore guided in our analysis by the important requirement that state actions in election processes must not result in ‘arbitrary and disparate treatment’ of votes.” As a matter of doctrine, the new equal protection of the right to vote expanded judicial scrutiny beyond the constricted categories of outright denial of the franchise and the protection of vulnerable minorities against mistreatment on account of race of some other specified characteristic. As critically applied in *Hunter*, the contested treatment of provisional ballots was “not the result of a broader policy determination by the State of Ohio that such distinctions would be justifiable. Therefore, they are especially vulnerable to equal-protection challenges.”

Rather than carve out new categories of specific entitlements (e.g., all voters must have a certain number of EV opportunities), the new equal protection limited the prospects for strategic manipulation of access to the franchise by state officials, most notably the partisan aspirations of legislatures or elected secretaries of state. Constrained were the aims of state regulation, an “expressive” command that governmental conduct in the domain of elections not further improper purposes, including the arbitrary or unjustifiable conduct at issue repeatedly in Ohio. In practical terms, this meant that Ohio was free to alter the conduct of election, but that the combination of a suspected constriction of voting opportunities and lack of substantial reasons would be constitutionally fatal.

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14 *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007).
16 *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011).
19 *Id.*, 635 F.3d at 234 (quoting *Bush v. Gore*, 531 U.S. at 104).
20 *Id.*, 635 F.3d at 238.
In 2012, the new equal protection was tested – and strengthened – in two major cases challenging the restriction on early voting for non-military voters and on the disqualification of provisional ballots cast at the wrong precinct as a result of pollworker error. In each case, the appellate court upheld lower court injunctions against Ohio regulatory restrictions on the ability to cast a vote. And, in each case, the court ruled unanimously, with panels of Republican and Democratic appointees on the frequently fractious Sixth Circuit.

Rejecting the formalism of some constitutional law on the right to vote, the Sixth Circuit announced candidly that it needed to calibrate the level of equal protection scrutiny to “[t]he precise character of the state's action and the nature of the burden on voters.” In *Obama for America*, the district court had made the critical factual findings, again relying on *Bush v. Gore* as the ultimate legal authority for a constitutionally supple standard of review:

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

The Sixth Circuit elaborated the new model of equal protection:

If the State merely placed “nonsevere, nondiscriminatory restrictions” on all voters, the restrictions would survive if they could be sufficiently justified. … On the other hand, if the State merely classified voters disparately but placed no restrictions on their right to vote, the classification would survive if it had a rational basis. However, the State has done both; it has classified voters disparately and has burdened their right to vote. Therefore, both justifications proffered by the State must be examined

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24 *Obama for America v. Husted*, 697 F.3d at 428.
to determine whether the challenged statutory scheme violates equal protection.

Although states are permitted broad discretion in devising the election scheme that fits best with the perceived needs of the state, and there is no abstract constitutional right to vote by absentee ballot, eleventh-hour changes to remedial voting provisions that have been in effect since 2005 and have been relied on by substantial numbers of voters for the exercise of their franchise are properly considered as a burden ... To conclude otherwise is to ignore reality.26

This new equal protection helps insulate the right to vote from naked efforts at partisan manipulation. Though an election law is not unconstitutional merely because it might reflect partisan motivations in part, the Supreme Court in cases like Crawford v. Marion County Election Bd.27 had left open the possibility, or perhaps even suggested more strongly, that a restriction on voting whose only plausible justification was pure partisanship might well not survive constitutional scrutiny. As Justice Stevens wrote for the Crawford Court: "If [partisan] considerations had provided the only justification for a photo identification requirement, we may also assume that [such a law] would suffer the same fate as the poll tax at issue in Harper."28

This greater judicial sensitivity in recent years to partisan manipulation of the democratic process is also beginning to be reflected at the margins of redistricting cases; even though state redistricting was traditionally subject to a 10% "safe harbor" for populations deviations from perfect equality, one lower federal court (in a decision the Supreme Court summarily affirmed) has now held that it is unconstitutional for state legislatures to hide behind this safe harbor for partisan purposes.29

Thus, recent years, culminating in the 2012 presidential election, have seen a continuing evolution in the constitutional jurisprudence of the right to vote. Just as the 2000 election made all of us, including, unfortunately, partisan legislatures, far more aware of how micro-manipulations of electoral rules might change outcomes, so too with the courts. Major Supreme Court decisions that some have seen as nothing more than retrenchments in this jurisprudence -- Crawford, upholding photo identification laws, and Bush v. Gore, terminating the recounting of ballots -- have also become the building blocks for an initial new stage of constitutional scrutiny of the electoral process.

In this emerging approach, voting remains constitutionally unique and its protection continues to warrant a special, if modified, judicial role.

26 Obama for America v. Husted, 697 F.3d at 432, 442 (citations omitted).
28 Id., 553 U.S. at 203.
Even if burdens on the right to vote are not severe, and even if they do not involve complete exclusions from participation based on irrelevant criteria, the courts are starting to apply a kind of intermediate scrutiny that tests in a serious way a legislature’s actual justifications for new regulations of the voting process. In addition, courts are showing greater sensitivity to the risk that these regulations are based on purely partisan aims; even if the courts do not directly condemn laws in these terms, they are willing to examine electoral laws in a more intensive way and, if the public-regarding and neutral justifications for those laws cannot be credibly supported, to strike down those laws – while leaving unsaid the more bald-faced statement that the law is a purely partisan act.

Ohio has remained the most important crucible for constitutional challenges to voter exclusion from 2004 to 2012. And in the major series of cases that have emerged there, the courts turned once and again to *Bush* for an expansive view of equal protection, one that was nowhere else “well developed and familiar.”