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***WHAT TO EXPECT WHEN YOU'RE ELECTING:
FEDERAL COURTS AND THE POLITICAL THICKET
IN 2012***

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WHAT TO EXPECT WHEN YOU'RE ELECTING: FEDERAL COURTS AND THE POLITICAL THICKET IN 2012

RICHARD L. HASEN^{*}

Introduction: Once More Into the Political Thicket

It is not your imagination. Over the last decade, since the Supreme Court's decision in *Bush v. Gore* ending the 2000 Florida controversy over whether George W. Bush or Al Gore earned Florida's electoral votes and therefore the presidency, the amount of election law litigation has more than doubled, from about 94 cases nationally before 2000 to about 237 cases per year afterwards. Each election season since 2000 has seen its share of high profile election disputes, including the 2004 dispute over election challengers in Ohio polling places, culminating in an opinion issued by Justice Stevens of the U.S. Supreme Court early in the morning on Election Day; a 2006 dispute over 18,000 mysterious "undervotes" cast on electronic voting machines in a U.S. congressional race in Sarasota County Florida; the 2008 Coleman-Franken election dispute over who won the U.S. Senate seat in Minnesota; and 2010 litigation over the proper counting of misspelled write-in ballots cast for Lisa Murkowski in Murkowski's fight to retain her Alaska U.S. Senate seat against Tea Party insurgent Joe Miller, who wrested the Republican Party nomination from her. These suits raise difficult constitutional and statutory questions.¹

The 2012 election should be no different: already we have seen lawsuits over whether Rick Perry, Newt Gingrich, and Rick Santorum were entitled to a position on the Virginia Republican presidential primary ballot despite failing to turn in enough petition signatures;

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whether the U.S. Department of Justice erred in objecting under section 5 of the Voting Rights Act to South Carolina's new voter identification law which the state wants to use for its fall elections; and dozens of redistricting controversies, one of which already reached the Supreme Court.²

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

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

report-videos/77891/november-06-2006/what-to-expect-when-you-re-electing. The title gives new meaning to the term “pregnant chad.”

In this brief Article, I aim to do three things. First I canvass the nature of election law disputes which are likely to come to federal courts in the 2012 election season, focusing on constitutional questions arising from the interaction of state and federal courts in this area. Second, I discuss timing strategies which federal courts can and should use to avoid conflicts with state courts and to avoid becoming further enmeshed in the political thicket. Third, and most controversially, I suggest that federal courts be aware in evaluating election law disputes of the potential for subconscious bias on the part of election administrators, state courts, and federal judges themselves. I use examples from two important election law cases: *Roe v. Alabama* and *Ohio Republican Party v. Brunner*. I conclude with steps federal courts can take to minimize the potential for subconscious judicial bias and threats to the legitimacy of both the judiciary and the electoral process.

Bringing Federal Courts into the Thicket

Federal Statutes

Perhaps surprisingly, there is relatively little federal statutory law governing elections, at least as compared to state and local election law. The United States has what has been described as having a “hyperfederalized” approach to election administration, leaving many decisions about ballot machinery, voter registration rules, and other technical minutiae to counties or smaller units of government. No federal agency, for example, mandates standards for the accuracy and reliability of voting machines, the rules for ballot access, or the forms of ballot design.⁴

Despite this localism, major federal statutes govern certain aspects of the election process. The 1965 Voting Rights Act protects minority voting rights through a number of provisions, including a ban on literacy tests and the requirement that jurisdictions with a history

of racial discrimination in voting obtain approval (or “preclearance”) from the United States Department of Justice or a three-judge court in Washington D.C. before making any changes in their voting practices or procedures. Two federal statutes, the Federal Election Campaign Act and the Bipartisan Campaign Reform Act govern the rules for campaign financing in federal elections. The National Voter Registration Act, the Help America Vote Act, and various amendments to acts protecting military and other overseas voters impose certain standard requirements for the administration of elections, such as a requirement that absentee ballots be mailed to overseas voters at least 45 days before an election.⁵

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

Federal Constitutional Claims Against State Election Laws and Procedures

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

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

As *Hunter* illustrates, constitutional claims in these federal election cases often involve allegations of Fourteenth Amendment equal protection or due process violations. For another example, consider Joe Miller's lawsuits in the 2010 Alaska U.S. Senate election arguing against the counting of misspelled write-in votes potentially cast for Lisa Murkowski. In state court, Miller argued that the counting of misspelled ballots violated state law. In parallel federal court litigation, Miller argued that allowing election officials to decide which misspelled ballots to accept for counting deprived him of his right to equal protection of the laws by treating similar ballots differently. He also argued that the counting violated his federal due process rights, because the state was changing the rules for counting in the midst of the election dispute. Finally, he argued that such a change in the rules by Alaska election officials, rather than by the state

Legislature, violated the constitutional provision guaranteeing state *legislatures* the power to choose the rules governing federal elections.⁷

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

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

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

The Republican candidates for Chief Justice and state treasurer, along with other plaintiffs, then filed suit in *federal* court seeking a preliminary injunction barring Alabama election officials from complying with the state court order. The federal district court judge granted the injunction, citing the fact that the past practice of Alabama election officials was not to count such ballots. A three judge panel of the United States Court of Appeals for the Eleventh Circuit voted 2-1 to affirm the grant of the preliminary injunction, holding that the counting of such ballots could violate the constitutional due process rights of the plaintiffs. A "post-election departure from previous practice in Alabama" will "dilute the votes of those voters who met [the affidavit requirement] as well as those voters who actually went to the polls on election day. Second, the change in the rules after the election would have the effect of disenfranchising those who have voted but for the inconvenience imposed by the notarization/witness requirement." It

then certified to the Alabama Supreme Court the question whether absentee ballots lacking the notary or two witness requirement counted as legal ballots.

The Alabama Supreme Court accepted the case for certification after protesting the federal courts' intrusion into its case. "For over 70 years, decisions of this court have consistently construed Alabama's election laws liberally, where possible, to permit Alabama's citizens to express their will at the polls." The court cited some of the history of use of this "Democracy Canon" of statutory construction in Alabama, including in cases involving non-complying absentee ballots. Noting that a majority of jurisdictions apply a substantial compliance standard to similar voting laws, and noting that the case contained no allegations of "fraud, gross negligence, or intentional wrongdoing," the state supreme court concluded that the ballots should be considered legal so long as they contained the place of residence of the person casting the ballot, the reason for voting by absentee ballot, and the signature of the voter."

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

Timing is Everything

Encouraging Early Suits

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

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

Consider two examples. First, in the 2000 election, it became apparent on Election Day that the design of the ballot used in Palm Beach County, Florida to choose a presidential candidate confused many county voters. The so-called "Butterfly Ballot" listed candidate choices over two facing pages, and many voters asked to punch out a cardboard chad corresponding to the candidate of their choice mistakenly chose the wrong candidate or punched the choice of two

candidates (for a president and vice presidential choice). Imagine if someone had sued before the election claiming that the ballot was likely to confuse voters, and had credible proof to that effect. Courts should hear such a challenge and, if convinced that the ballot is confusing and violates the law, should enjoin its use. The alternative to acting early is the loss of any remedy. As a Florida court later determined, after the presidential election, a do-over for confused Palm Beach County voters would have been unconstitutional.

Second, in 2003 California held a gubernatorial recall election. The California Secretary of State had agreed to phase out unreliable punch card voting machines by the 2004 elections to settle a case arguing that the use of the machines in some parts of the state violated equal protection principles. The Secretary nonetheless authorized the machines' final use in the unexpected special recall election. The punch card plaintiffs sued to block use of the machine for the recall. A federal court first refused to block the machine's use. A Ninth Circuit panel then reversed, barring their use. Then an en banc panel of the Ninth Circuit reversed the panel and restored the district court's ruling. The en banc court said that the harm which plaintiffs alleged was too speculative; if the machines turned out to be problematic, there could be a suit after the election.

It is a good thing that the election was not close. Despite the fact that there were only four questions on the recall ballot, and the yes/no recall question was by far the most prominent of the four questions, almost 9% of Los Angeles voters—voting on those awful punch card machines—did not record a valid vote on the first question of the recall. This statistic compares to an undervote rate of 0.75% in Alameda County on this same question; Alameda used electronic voting machines. The Ninth Circuit erred in not briefly delaying the election until another voting system—such as paper ballots with pen and paper—could be put into place. Had the election

been close, there was nothing which could have been done, short of a do-over election, to remedy any constitutional problem with using the machines.

Discouraging Late Suits

The last part showed that courts should not avoid deciding meritorious election litigation when delay can cause irreparable harm to plaintiffs. Allowing early suits in election cases also helps preserve judicial legitimacy by keeping courts out of the most controversial election lawsuits, where courts must determine the winner of a close election.

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

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

Although Virginia's ballot access rules were unduly strict, they were no surprise. Candidates know they fight hard to get on the ballot in Virginia—it takes hard work, good organization, and determination. Rick Perry's campaign (along with the Newt Gingrich and Rick Santorum campaigns, which eventually joined the lawsuit) knew full well the hurdles they would face for ballot access. But Perry did not sue early on in the process to try to get Virginia to change its rules to allow for the use of non-resident circulators or to lower the threshold number

of signatures. Instead, he collected less than the number of signatures required to get on the ballot. He then sued only after Virginia officials declared him ineligible to appear on the ballot.

The federal district court held that Perry could likely show that Virginia's ban on non-resident circulators violated the First Amendment rights of Perry and his supporters. But the Court held Perry's suit barred by laches: this was an emergency of his own making. As the Fourth Circuit, affirming the district court, stated it: "[Perry] had every opportunity to challenge the various Virginia ballot requirements at a time when the challenge would not have created the disruption that this last-minute lawsuit has. [Perry's] request contravenes repeated Supreme Court admonitions that federal judicial bodies not upend the orderly progression of state electoral processes at the eleventh hour. [Perry] knew long before now the requirements of Virginia's election laws. There was no failure of notice. The requirements have been on the books for years. If we were to grant the requested relief, we would encourage candidates for President who knew the requirements and failed to satisfy them to seek at a tardy and belated hour to change the rules of the game. This would not be fair to the states or to other candidates who did comply with the prescribed processes in a timely manner and it would throw the presidential nominating process into added turmoil."¹²

Election law litigants need not be clairvoyant, anticipating any possible election law problem which might go wrong and suing about it early. Rather, for the limited class of election law issues which are both likely to arise and about which a prudent campaign would have notice in advance (such as state ballot access rules), the rule should be: sue early or do not sue at all.

Fighting (Subconscious) Bias in Election Cases

The United States is virtually alone among mature democracies in using partisan election officials to administer elections. In 33 states, the chief election officer of the state (usually called the “Secretary of State”) runs in an election as a Democrat or a Republican. Many local election officials are elected in partisan elections or chosen by partisan elected officials. The “counting teams” which recounted ballots in the Florida 2000 dispute were partisan. Unsurprisingly, Democratic election officials were more likely than Republican election officials to count disputed ballots for Gore and less likely to count disputed ballots for Bush.¹³

It is tempting for the public to believe that partisan election officials make decisions about election administration and election challenge issues in order to benefit candidates from their political party. But whether deliberate bias is common or rare, there seems ample evidence that at least *subconscious* bias is at work in making such decisions. Consider what happened after the Florida controversy ended and a consortium of media organizations had the University of Chicago’s National Opinion Research Center (NORC) hire people to count the uncounted ballots in Florida. Counters were to determine whether an uncounted ballot had a legal vote, and if so, for which candidate. Each ballot was judged by multiple counters.

The counters agreed 96 percent of the time, but the 4 percent on which they differed covered thousands of ballots, many times the number of votes separating Bush and Gore. Professor Einer Elhauge, who served as counsel for the Florida legislature during the crisis, later wrote of the role of subconscious bias in the NORC counting:

On ballots where at least one counter saw a potential vote for Bush or Gore, the counters disagreed 34 percent of the time, 37 percent for punch card ballots. Most worrisome, even with elaborate efforts to screen for political bias, the political

affiliation of the counters affected the results. Republican counters were 4 percent more likely than Democratic counters to deny a mark was for Gore. Even more striking, Democratic counters were 25 percent more likely to deny a mark was for Bush.

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

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

Unfortunately, the potential for subconscious partisan bias exists even within the federal judiciary. In recent years, on contested election law issues, first judges have often lined up on the side favored by their political party. Consider two examples.

First, consider *Roe v. Alabama*, described earlier. The judges' decisions about how to handle the election dispute broke along party lines. A Democratic trial judge and Democratic state supreme court judges voted to allow the counting of ballots which helped the Democratic candidates. Republican federal judges voted to block the counting of the ballots. To the federal court and supporters of the federal lawsuit, the state courts were engaged in politicized judging, a

Democratic court helping out Democratic candidates by changing the counting rules after the fact. To opponents of state court intervention, a Republican district court judge and Republican panel on the Eleventh Circuit was sticking its nose into state court business, and was itself engaged in politicized judging. The correlation is probably not a coincidence, but can be explained more by subconscious psychological forces.¹⁶

Second, consider a 2008 dispute, *Ohio Republican Party v. Brunner*. The case concerned a technical provision in the Help America Vote Act stating that the “chief state election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.” Despite this requirement, Democrat Secretary of State Jennifer Brunner resisted sharing mismatch information with county officials, because she trusted neither the information nor the officials. She said applying the database matching requirement would disenfranchise legitimate voters because of errors in the database.¹⁷

The Ohio Republican Party sued to require Brunner to make the mismatch list available to county election officials. The Party said that her interpretation violated HAVA. A federal district court judge appointed by President Reagan, issued a temporary restraining order requiring Brunner to reprogram her department’s computers to provide the mismatch lists to the counties. Sweeping away her objections that Congress did not give entities such as the Ohio Republican Party a right to sue for violation of the mismatch provision of the act, the court wrote that it was “clear” that Brunner was in violation of the HAVA requirement. Further, relying on two

newspaper articles from Ohio focusing on alleged voter registration fraud by ACORN, the court said that the potential for voter fraud made reprogramming an urgent need.

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

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

The debate on the Sixth Circuit mirrored the public debate on these issues. The Republican judges were worried about voter fraud and ruled in a way that would minimize that

danger even if it meant disenfranchising some voters. The Democratic judges were skeptical of the voter fraud claims and voted against ordering Brunner to take steps that could disenfranchise voters, even if it raised the potential for fraud by new voters.

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

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

What can courts do to avoid subconscious bias which may arise in suits such as this one? First, judges need to engage in soul searching for subconscious bias. A judge needs to ask: would the result in the case be the same if we have a *Gore v. Bush* rather than a *Bush v. Gore* lawsuit?

Second, are there established principles of law to draw upon from before the dispute arose which may be used to resolve the case? These could include precedent from other circuits, law review articles and treatises, and (soon to come) treatment of issues from the American Law Institute's new Election Law project, which is endeavoring to craft election rules. Rules established in advance of a current dispute are a neutral source for decisionmaking to avoid charges of lawlessness. Third, courts should take whatever steps they can to craft narrow, unanimous opinions resolving such disputes; judicial compromise and unity is a virtue in such cases.¹⁸

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

¹ Bush v. Gore, 531 U.S. 98 (2000). On the election litigation statistics, see Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 90 (2009). I detail each of the disputes described in this paragraph in RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* chs. 5,6 (forthcoming 2012).

² Perry v. Judd, ___ F.3d ___, 2012 WL 120076 (4th Cir. Jan. 17, 2012); Eric Conner, *S.C. Sues Feds for Blocked Voter ID Law*, USA TODAY, Feb. 8, 2012, <http://www.usatoday.com/news/washington/story/2012-02-07/south-carolina-voter-id/53001466/1>. On redistricting litigation, see Justin Levitt's comprehensive collection of redistricting litigation documents at All About Redistricting, <http://redistricting.lla.edu>.

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

⁴ On the hyperfederalized system, see ALEC EWALD: THE WAY WE VOTE: THE LOCAL DIMENSION OF ELECTION SUFFRAGE 3 (2009). The United States Election Assistance Commission plays an advisory role on such issues, but its power is very limited. See Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004).

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

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

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

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

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

¹⁰ Flanders, *supra* note 7.

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

¹² Perry v. Judd, 2012 WL 120076, *1 (4th Cir. Jan. 17, 2012).

¹³ HASEN, *supra* note 1, ch. 1. The next few paragraphs come from *id.* at 33–34. The quotation comes from Einer Elhauge, *Florida 2000: Bush Wins Again*, WEEKLY STANDARD, Nov. 26, 2001.

¹⁴ Cass Sunstein, *Of Law and Politics*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT 6–7 (Cass Sunstein & Richard A. Epstein eds., 2001).

¹⁵ For an extended argument along these lines, see Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125 (2009).

¹⁶ Hasen, *supra* note 1, at 121.

¹⁷ On the disputes over the *Brunner* case, see HASEN, *supra* note 1, at 112–16, from which I draw this account. The district court's opinion is at 582 F.Supp.2d 957 (S.D. Ohio 2008). The original opinion of a panel of Sixth Circuit judges is not good law, because the en banc court vacated it. It can be read at: <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ORPvBrunnerOct10.pdf>. The order of the entire Sixth Circuit sitting en banc and reversing the panel decision is at 544 F.3d 711 (6th Cir. 2008) (en banc).

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