

## **Statement of Professor Daniel P. Tokaji**

### **U.S. Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Human Rights**

Field Hearing - Cleveland Ohio

“New State Voting Laws III: Protecting the Right to Vote in America’s Heartland”

May 7, 2012

Thank you for the opportunity to testify before you today. By way of introduction, I am the Robert M. Duncan/Jones Day Designated Professor of Law at The Ohio State University’s Moritz College of Law and a Senior Fellow at the nonpartisan *Election Law @ Moritz* project, a group of scholars that provides information, analysis, and commentary on election law and policy. I am co-author of the casebook *Election Law: Cases and Materials* (4th ed. 2008), and co-editor of *Election Law Journal*, the only peer-reviewed publication in the field. I also sit on the board of Common Cause Ohio. For the last eight years, my primary area of research and scholarship has been election law and administration, in Ohio and throughout the country.<sup>1</sup>

As this subcommittee is aware, the rules governing voting have precipitated a great deal of legislation and litigation in the years since the tumultuous 2000 election. The State of Ohio, in particular, has seen more than its share of voting-related controversies during this period. The United States Supreme Court has long declared that the right to vote is fundamental because it is preservative of all other rights. Here in Ohio, we have learned that the right to vote is not something that can be taken for granted. We have learned that it is not merely a right, but also a responsibility. We have learned that we as citizens have a responsibility not simply to exercise our right to vote but, just as importantly, to protect it so that everyone has equal access to the ballot.

Unfortunately, here in Ohio as in many other parts of the country, we have seen rules adopted—in the past decade and especially in the past year – that make it more difficult for eligible citizens to vote and have their votes counted. It is for this reason that I am so pleased that this subcommittee has chosen to make new state voting laws a high priority, and I am especially gratified by your attention to Ohio, a state that is almost certain to be pivotal in the 2012 presidential election and probably many more to come. We must never forget that democracy exists, not for the benefit of elected officials or election officials, but for the people of this country. And we must take care to ensure that the equality of all citizens prevails when it comes to our fundamental right to vote.

The remainder of my statement is divided into three parts. First, I provide an overview of the last decade of election changes across the country. Second, I will discuss Ohio’s eventful history in recent election cycles. Third, I will address recent developments in Ohio, focusing especially of Amended House Bill 194 (HB 194), which made significant changes to Ohio’s voting laws and is subject to a referendum in November 2012.

---

<sup>1</sup>This statement is offered solely on my own behalf, not on behalf of any other individuals or entities with which I am associated.

## I. The National Backdrop

Since 2000, we have seen unprecedented public, scholarly, and legislative attention devoted to the “nuts and bolts” of elections in the United States. Before then, election administration – including voting technology, voter registration, provisional ballots, voter identification, and polling place operations – was a subject to which few election law scholars paid much attention.

More important, election administration was an area that public policymakers mostly neglected. We as a country failed to recognize that the infrastructure of our democracy had decayed, a reality brought painfully to light during the recount and litigation surrounding Florida’s 2000 presidential election. However one feels about the resolution of that disputed election, it cannot seriously be questioned that it exposed serious underlying problems with how American elections are conducted. In the wake of these events, it became clear that the problems in our election system resulted in millions of votes being lost – somewhere between four to six million in 2000, according to the respected Caltech/MIT Voting Technology Project report.<sup>2</sup>

In the years that followed, the United States experienced major changes to its election system. At the federal level, the most significant changes were prompted by enactment of the Help America Vote Act of 2002 (“HAVA”), which in turn triggered a number of changes at the state level.

There were unquestionably some improvements that emerged from HAVA, including the replacement of antiquated voting technology. According to one estimate, approximately 1,000,000 votes were saved nationwide in 2004, due to the transition to better technology and better procedures. At the same time, there have been some unintended consequences of voting changes. They include the administrative difficulties arising from the introduction of practices, like provisional voting, that were new in many states, as well as the unexpected challenges arising from the introduction of statewide voter registration lists in places that previously kept their lists at the local level.<sup>3</sup> There have also been laws enacted in a number of states which have imposed new burdens on voting without countervailing benefits, as discussed below.

What’s the big lesson to be learned from this recent history? Changes in election law, however well-intentioned, invariably have unanticipated consequences. My colleagues and I have used the metaphor of an “ecosystem” to describe how elections work. The idea is that there is a delicate balance among the various component parts of our election system, which major legal changes tend to disrupt. The tendency of such changes is to destabilize the system in the years that follow. The ultimate lesson is that we should be cautious in making major changes to our election system.

In the last year, we have seen a number of states adopt changes to their voting laws. The most significant changes have been concentrated in three areas: (1) laws imposing stricter identification requirements on voters, (2) laws limiting early and absentee voting; and (3) laws

---

<sup>2</sup>Caltech/MIT Voting Technology Project, *What Is, What Could Be* (July 2001).

<sup>3</sup>For an extensive discussion and assessment of HAVA and related voting changes, see Martha Kropf & David C. Kimball, *HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM* (2012).

restricting opportunities for voter registration. This new round of legal changes is in one sense surprising, given that the United States did not experience unusual problems in last year's elections. No election is free from glitches. But on the whole, the 2010 election cycle was much less eventful than those of past years, from the perspective of election administration problems.

What then explains the recent rise in state legislative activity? The most obvious and important change has been a change in the composition state legislatures and Governor's offices. In my opinion, it is partisan politics rather than any genuine problems with our election system that have driven the latest round of changes to state voting laws.

Unfortunately, most of the changes adopted this year have made it more difficult for ordinary citizens to vote and have their votes counted. This is ironic, given that the main problem with American elections is not that too many people are voting; it is that not enough eligible citizens are turning out to vote. In the 2008 presidential election, 62% of the voting eligible population turned out to vote.<sup>4</sup> That is actually higher than in the immediately preceding election cycles, but lower than at some other periods of U.S. history and lower than most other industrialized democratic countries. Turnout in mid-term elections is much lower, and for state and local elections lower still. We should be pursuing changes that will encourage people to register and to vote, not ones that will make participation more of a challenge.

The most prominent example of a law that falls into the latter category is the voter identification laws that have been adopted in several states. In their strictest form, these state laws require voters to produce specified forms of government-issued photo identification in order to vote and have their votes counted. Kansas, Mississippi, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin have passed such laws in the past year or so, and Virginia's governor is considering a bill that would impose similar restrictions now.<sup>5</sup>

The best available evidence indicates that approximately 11% of the voting age population does not have the ID that these state laws require.<sup>6</sup> Recent evidence further suggests that stricter voter ID laws have a negative effect on turnout.<sup>7</sup> They are likely to strike hardest against those groups who are already underrepresented in the electorate – specifically, minority voters, people with disabilities, those who are elderly, and poorer citizens.<sup>8</sup> According to one study, African

---

<sup>4</sup>Harold W. Stanley & Richard G. Niemi, VITAL STATISTICS ON AMERICAN POLITICS 2011-2012, at 5.

<sup>5</sup>A list of state voter ID laws may be found at <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx>.

<sup>6</sup>Brennan Center for Justice at NYU School of Law, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, Nov. 28, 2006; see also Norman Robbins, *On Estimating the Number of Voting Age Citizens Who Lack a Drivers License or State ID*, May 24, 2011, available at <http://www.nova-ohio.org/Estimating%20number%20of%20voters%20without%20state%20ID.pdf>.

<sup>7</sup>Shelley de Alth, ID at the Polls: *Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARVARD LAW & POLICY REVIEW 185 (2009).

<sup>8</sup>M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute*, 36 AMERICAN POLITICS RESEARCH 555 (2008); Matt

American voters are over twice as likely *not* to have ID.<sup>9</sup> Another found that African Americans in Wisconsin were half as likely as whites to have photo ID, and that 78% of black men aged 18-24 did *not* have photo ID.<sup>10</sup> Seniors and people of low income are also much less likely to have photo ID.<sup>11</sup> In addition, there is evidence that voter ID laws are *applied* in a discriminatory manner, with minorities more likely to be asked to show ID.<sup>12</sup>

There are legal questions surrounding these laws. While the U.S. Supreme Court upheld Indiana's voter ID bill against a facial challenge in *Crawford v. Marion County Board of Elections*,<sup>13</sup> there was no majority opinion, and the lead opinion by Justice Stevens was extremely narrow. The decision only involved a facial challenge, leaving open the possibility that the law might be struck down as applied to specific voters or groups – like the nuns who were later turned away for having outdated IDs.<sup>14</sup> In addition, there are questions about whether these bills have an impermissible discriminatory effect on minority voters under Section 2 and Section 5 of the Voting Rights Act. The U.S. Department of Justice has denied preclearance of two states' recent ID laws (South Carolina and Texas) under Section 5. Finally, there are questions about voter ID laws under state constitutional laws. In two states (Missouri and Wisconsin), state courts have concluded that photo ID requirements violate the right to vote under the state constitution.

Ohio is not yet among the states that have chosen to implement the most stringent voter identification requirements. This is partly attributable to Secretary of State Jon Husted, who deserves credit for standing up to the more extreme voices in his own party by opposing a voter ID bill (HB 159) proposed last year. His statement on that bill is worth quoting directly:

---

Barreto, Stephen Nuno & Gabriel Sanchez, *Voter ID Requirements and the Disenfranchisement of Latino, Black, and Asian Voters*, Sept. 1, 2007, available at [http://faculty.washington.edu/mbarreto/research/Voter\\_ID\\_APSA.pdf](http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf); John Pawasarat, *The Driver's License Status of the Voting Age Population in Wisconsin*, available at <http://www.inclusionist.org/files/wistatusdrivers.pdf>.

<sup>9</sup>Brennan Center for Justice at NYU School of Law, *Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, Nov. 28, 2006.

<sup>10</sup>Pawasarat, *supra*.

<sup>11</sup>Brennan Center for Justice at NYU School of Law, *Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, Nov. 28, 2006.

<sup>12</sup>Rachael V. Cobb, D. James Greiner & Kevin M. Quinn, *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Boston in 2008*, 7 QUARTERLY JOURNAL OF POLITICAL SCIENCE 33 (2012)(finding “strong evidence that Hispanic and black voters were asked for IDs at higher rates than similarly situated white voters”); see also Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICHIGAN JOURNAL OF RACE & LAW 1 (2009).

<sup>13</sup>553 U.S. 181 (2008).

<sup>14</sup>*Nuns with Dated ID Turned Away at Ind. Polls*, AP, May 6, 2008, available at [http://www.msnbc.msn.com/id/24490932/ns/politics-decision\\_08/](http://www.msnbc.msn.com/id/24490932/ns/politics-decision_08/).

I want to be perfectly clear, when I began working with the General Assembly to improve Ohio's elections system it was never my intent to reject valid votes. I would rather have no bill than one with a rigid photo identification provision that does little to protect against fraud and excludes legally registered voters' ballots from counting.<sup>15</sup>

The proposed Ohio voter ID bill was not supported by any evidence of voter impersonation fraud at the polling place. I have closely studied Ohio's election system for the past eight years, and am not aware of a proven case of in-person voter impersonation fraud – that is, a voter going to the polls pretending to be someone he or she is not. If there are any incidents of in-person voter impersonation in Ohio, they are extremely rare. Yet that is the *only* type of fraud that a government-issued photo ID requirement can even hope to address.<sup>16</sup> This is not surprising. The few people who attempt voter impersonation aren't likely to risk criminal prosecution by showing up at the polling place; they are much more likely to vote by mail. This is consistent with evidence at the national level, which shows that voter impersonation fraud is extremely rare.<sup>17</sup>

Because I know this subcommittee has heard testimony on the subject previously, I will not dwell on other states' voter ID laws here. It is nevertheless important as a part of the backdrop against which Ohio's recent voting law changes have occurred. The recent round of state election laws will make it more difficult for eligible citizens to vote in the 2012 election, particularly some of the demographic groups that are already underrepresented in the electorate.<sup>18</sup>

## II. Ohio's Experience

Here in Ohio, we have had more than our share of voting controversies in recent years. The most noteworthy were in 2004, in which the outcome of the presidential race turned on Ohio's vote. Among the areas of controversy were voting machines, voter registration, voter identification, provisional ballots, absentee ballots, challenges to voter eligibility, and long lines at some polling places. All of these areas were the subject of litigation during the 2004 election season.

On the morning after Election Day, 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 presidential race ultimately turned. This margin was sufficient to overcome any legal challenges that might have arisen from uncounted provisional votes, ambiguously marked punch card ballots, and lengthy lines that may have discouraged many citizens from voting. That lead

---

<sup>15</sup> Secretary of State Husted Statement on Proposed Photo ID Legislation, June 24, 2011, available at <http://www.sos.state.oh.us/mediaCenter/2011/2011-06-24.aspx>.

<sup>16</sup>At the time this bill was being debated, the only documented case of impersonation I could find in recent Ohio elections involved *absentee voting* by a mother pretending to be her daughter. Dean Narciso, *2 Ballots Coast Woman \$1,000 Plus Probation*, COLUMBUS DISPATCH, Mar. 29, 2009.

<sup>17</sup>See generally Lorraine C. Minnite, THE MYTH OF VOTER FRAUD (2010).

<sup>18</sup>For a more thorough discussion of the national picture, see Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION LAW JOURNAL 97 (2012).

shrunk by several thousand votes by the time the final tally was in. Had President Bush's morning-after lead been a quarter or perhaps even half what it was, a replay of the legal battles that culminated in *Bush v. Gore*<sup>19</sup> – with the Buckeye State rather than the Sunshine State as the backdrop, Ken Blackwell playing the role of Katherine Harris, and provisional ballots replacing punch-card ballots as the dominant props – would probably have ensued.<sup>20</sup>

One of the most controversial issues concerned Secretary of State Ken 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). Under this directive, forms on lesser paper weight were to be considered mere *applications* for a registration form, rather than a valid voter registration. Voting rights advocates argued that the directive violated the federal law, which requires that "[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."<sup>21</sup> In the face of these objections, Secretary Blackwell backed down and announced that registration forms on ordinary-weight paper should still be processed.

Ohio saw significant controversy over provisional voting in 2004. Title III of HAVA requires provisional ballots to for those eligible voters who, due to administrative error or for some other reason, appear at the polls on election day to find their names not on the official registration list. The issue that garnered the most attention is whether provisional ballots may be cast or counted if the voter appears in the "wrong precinct." In Ohio, Secretary of State Blackwell issued a directive in September 2004, providing that voters would not be issued a provisional ballot, unless the pollworkers were able to confirm that the voter was eligible to vote at the precinct at which he or she appeared. A federal district court issued an injunction against this order, on the ground that Secretary of State Blackwell's directive failed to comply with the requirements of HAVA. This injunction was affirmed in part and reversed in part on appeal. The Sixth Circuit upheld the district court's order, insofar as it found that the Secretary of State had not fully complied with HAVA by requiring pollworkers to determine "on the spot" whether a voter resided within the precinct and by denying those not determined to reside within the precinct a provisional ballot altogether. But the Sixth Circuit concluded that HAVA did not require provisional ballots to be counted if cast in the wrong precinct.<sup>22</sup>

In January 2006, then-Governor Bob Taft signed a lengthy bill (Am. Sub. HB 3) enacted by the Ohio legislature, making a variety of legal changes in provisional voting, challenges to voter eligibility, absentee voting, recounts and contests, voter identification, and other subjects. There were some constructive changes in this legislation but, on the whole, it too had a destabilizing effect on our election system, resulting in multiple lawsuits and court orders – not to mention confusion for election officials, poll workers, and voters alike. Among the changes was to extend HAVA's ID requirement to all voters. Fortunately, the vast majority of citizens have one

---

<sup>19</sup>531 U.S. 98 (2000).

<sup>20</sup>I discuss these controversies in much greater detail in *Early Returns on Election Law: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEORGE WASHINGTON LAW REVIEW 1206 (2005).

<sup>21</sup>42 U.S.C. § 1971(a)(2).

<sup>22</sup>*Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004).

of the permitted forms of ID, which include utility bills, bank statements, and government documents with the voter's name and current address. Any negative impact was further mitigated by the fact that it accommodated the few who do not have one of the permitted forms of identification. Still, this change precipitated years of litigation. It took years to sort out this confusion and restore some stability to our system.<sup>23</sup>

In 2007, my colleagues at the Ohio State election law project and I released a comprehensive study of the election systems of five Midwestern states.<sup>24</sup> We ranked Ohio last among these states in terms of the health of its election system. There can be no question, however, that in the years that followed, Ohio made significant improvements in the functioning of its election system.<sup>25</sup> Former Secretary of State Jennifer Brunner deserves credit for engaging in an extensive review of the state's election practices, including elections summits her office hosted, which brought together election officials, legislators, community group leaders, and academics to discuss existing problems.<sup>26</sup> In addition, some of the most serious problems with Ohio's system were resolved through litigation, including court orders in multiple cases. Just as important, the various actors in our election system have become familiar with the election law changes, most notably HAVA and HB 3. All this helped bring a greater level of stability.

That is not to say that Ohio has been without its share of controversies in recent years. Two that occurred in 2008 are especially worthy of mention. The first concerned the five-day window, sometimes referred to as "Golden Week," for simultaneous registration and early voting. This window was made possible by HB 234, signed by Governor Taft in 2005, which allowed no-excuse absentee voting – including in-person absentee voting, or early voting – starting 35 days before the election. Under pre-existing Ohio law, the registration period extends until 30 days before the election, the earliest possible deadline consistent with federal law. That opened up a five day window, between 35 and 30 days before the election, in which any eligible voter could simultaneously register and vote. The Ohio Supreme Court and a U.S. District Court both upheld then-Secretary Brunner's order requiring this window for early voting, holding that it was consistent with Ohio law and required by federal law respectively.<sup>27</sup>

---

<sup>23</sup>The lawsuits relating to HB 3 include *NEOCH v. Blackwell* (later *NEOCH v. Brunner*), discussed further below; *League of Women Voters of Ohio v. Blackwell* (later *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008)); and *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006). By way of disclosure, I was one of the attorneys for plaintiffs in the *Boustani* case, which resulted in a court order permanently enjoining a provision of HB 3 requiring naturalized citizens to produce their certificates of naturalization if challenged at the polls.

<sup>24</sup>STEVEN F. HUEFNER, DANIEL P. TOKAJI, & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2007).

<sup>25</sup>We discuss these changes in a follow-up book, STEVEN F. HUEFNER, NATHAN A. CEMENSKA, DANIEL P. TOKAJI, & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS REVISITED: DEVELOPMENTS IN THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2011).

<sup>26</sup>*Id.* at 22-23.

<sup>27</sup>*State ex rel. Colvin v. Brunner*, 896 N.E.2d 979 (Ohio 2008); *Project Vote v. Madison Co. Board of Elections*, 2008 WL 4445176 (N.D. Ohio 2008). By way of disclosure, I was part of the legal team in *Project Vote*, representing plaintiffs who successfully brought suit to keep this window open during the 2008 election season

The other significant issue involved the procedures used for “matching” voter registration lists against other information. In *Ohio Republican Party v. Brunner*,<sup>28</sup> a federal district court granted the state Republican Party’s request for an injunction against Secretary of Brunner, concluding that HAVA “requires matching for the purpose of verifying the identity and eligibility of the voter before counting that person’s vote.”<sup>29</sup> Ultimately, however, the U.S. Supreme Court rejected the Republican Party’s claims without reaching the merits, concluding that there was no private right of action to enforce HAVA’s matching requirement.<sup>30</sup>

While Ohio’s 2008 election was not without controversy, the general consensus is that it was a significant improvement over 2004. This is partly the consequence of better administration, from the Secretary of State’s office down. It is also a consequence of the fact that the rules were stable. The significant changes that had occurred as a result of changes to federal and state law had, for the most part, been absorbed by election officials, poll workers, and voters. This created a much greater level of stability.

The 2010 election was the most uneventful election – from the perspective of election administration problems – that Ohio has seen in years.<sup>31</sup> While no election is trouble-free, we seem to have had attained a relative level of stability. Again, this is largely a consequence of the fact that the changes of past years have now been absorbed into our election ecosystem.

### **III. Recent Ohio Voting Changes**

Notwithstanding this period of relative stability, the Ohio legislature adopted and Governor Kasich signed Amended Substitute House Bill 194 (HB 194). Like HB 3 in 2005, this is a lengthy bill which yet again overhauls the state’s election laws. If it is implemented, this new statute will make it more difficult for eligible citizens to vote, and can be expected to result in many more years of controversy, confusion, and court involvement in our elections. Below is a summary of some of the key changes in this new law and the problems they create.

*Reducing opportunities for early voting.* Early voting (known as “in person absentee voting” under Ohio law) allows people to vote in person at designated locations prior to election day. This has the advantage of reducing pressure on polling places on election day, including the risk of long lines, without presenting the ballot security concerns that accompany mail voting. One of the best features of Ohio’s system has been that it provides people with the opportunity simultaneously to register and vote, in the window between 35 and 30 days before election day. Allowing new voters to register and vote on the same day is the only election reform that

---

<sup>28</sup> Documents from this case may be found at <http://moritzlaw.osu.edu/electionlaw/litigation/ohiorepublicanpartyv.brunner.php>.

<sup>29</sup> *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913, Opinion and Order at 8–9, (S.D. Ohio Oct. 9, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/R52Order.pdf>.

<sup>30</sup> *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008).

<sup>31</sup> The major exception is the issue surrounding provisional ballots in a Hamilton County judicial race, at issue in *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219 (6th Cir. 2011). I discuss this case below.



empirical research has consistently shown to increase turnout in a variety of elections.<sup>32</sup> Unfortunately, HB 194 closes this window. ORC § 3509.01. The statute also eliminates early voting on Saturday afternoon and Sunday. This is especially troubling, given the evidence that minority voters are more likely to exercise their right to vote on Sundays.<sup>33</sup> Worse still, the bill eliminates early voting on the three days immediately prior to Election Day (Saturday, Sunday, and Monday), during which approximately 105,000 voters statewide would otherwise vote.<sup>34</sup> Taken together, these provisions reduce the period for early voting from 35 days to 12 days (between 17 days and 4 days before the election, with Sundays excluded).

*Eliminating the requirement that poll workers direct voters to the correct precinct.* Under past and present Ohio law, ballots cast in the wrong precinct are not counted. Unfortunately, HB 194 eliminates the requirement that poll workers direct voters to the *correct* precinct. Specifically, it deletes language from ORC § 3505.181(C)(1) that, if a voter appears at the wrong polling place,<sup>35</sup> the poll worker “shall direct” the voter to the correct one, replacing “shall” with “may.” This is especially problematic in cases where there are many precincts at the same location and voters may appear – or even be directed by a poll worker – to the wrong table. This is a problem so common, it has a name: the “right church, wrong pew” problem. We already have a big problem in Ohio with voters having their votes rejected for casting them in the wrong precinct. There were over 14,000 such votes lost in 2008, many of which were cast in the correct building.<sup>36</sup> HB 194 makes this problem worse. It can be expected to result in more voters voting in the wrong precinct, with a concomitant increase in the provisional ballots. It raises serious due process problems for an eligible citizen to be denied his or her vote, because a poll worker directs a voter to the wrong precinct or refuses to direct the voter to the right one. It also raises an equal protection problem, as poll workers in different counties, at different precincts in the same county, or even at the same precinct may now treat voters differently. In fact, state law gives *the same poll worker* the discretion to treat voters unequally, directing some to the right precinct while failing to do so for others. By opening the door to arbitrary and disparate treatment of voters, HB 194 is inviting litigation, particularly in the event of a close election.

*Changing the rules for determining election official error.* HB 194 adds ORC § 3501.40, which alters the rules for both administrative review and legal actions. It prohibits any presumption that election officials have made errors, even where that election official “has been found to have committed an error with respect to a particular person or set of circumstances.” Thus, even if a

---

<sup>32</sup>See, e.g., Craig L. Brians & Bernard Grofman, *Election Day Registration’s Effect on U.S. Voter Turnout*, 82 SOCIAL SCIENCE QUARTERLY 170, 176-77 (2001); James White, *Election-Day Registration and Turnout Inequality*, 22 POLITICAL BEHAVIOR 29 (2000); Benjamin Highton, *Easy Registration and Voter Turnout*, 59 JOURNAL OF POLITICS. 565 (1997); Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992*, 22 AMERICAN POLITICS RESEARCH 74, 80, 84 (1994).

<sup>33</sup>Daniel Smith & Michael Herron, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION LAW JOURNAL – (forthcoming 2012).

<sup>34</sup>Norman Robbins, *Documentation of How HB 194 Restricts Voting or Makes It More Difficult*, May 1, 2012.

<sup>35</sup>“Polling place” is defined to mean “that place provided for each precinct at which the electors having a voting residence in such precinct may vote.” ORC § 3501.01(R).

<sup>36</sup>Robbins, *supra*.

poll worker is proven to have repeatedly made the same mistake – for example, instructing voters to go to the wrong precinct – that official cannot be presumed to have made the same error again. At some point, probably in the context of a disputed election, this provision is likely to be challenged in federal court on the ground that it improperly supplants the fact-finding and adjudicatory role of courts and violates the due process rights of voters.

*Eliminating the period for voters to document their eligibility.* HB 194 eliminates the provision allowing voters who have to cast provisional ballots to bring in documentation of their eligibility within 10 days of election day as currently provided by ORC §§ 3505.181(B)(8) and 3505.183(B)(2). This would prevent provisional voters without required identification from later bringing in proof that they are in fact eligible and registered, so their votes may be counted. This provision also threatens to deny due process and equal protection, because it will effectively prevent some voters from producing evidence of their eligibility and election officials from considering that evidence. Again, this is a change that could make a critical difference in a close race, precluding eligible citizens from having their votes counted, and can be expected to result in further litigation.

With one exception, the changes made by HB 194 will not be in effect for the 2012 election. That is because opponents of this law collected sufficient signatures to subject the statute to a referendum. Thus, Ohio voters will be voting in November on whether to approve the changes effected by HB 194. The one exception is the provision of HB 194 that moved up the last day for early voting to the Friday before the election day. This provision will take effect, because of a subsequent bill (HB 224), which added a provision requiring that applications for an absentee ballot (including in-person absentee or early voting ballots) be made by 6:00 pm the Friday before election day. § 3509.03(I). Because of this provision, the Secretary of State has ruled the last day for early voting will be Friday, November 2, four days before Election Day, notwithstanding the referendum on HB 3.

There is one final issue of which this subcommittee should be aware. As noted above, provisional ballots have been a major issue in Ohio elections in recent years. Many voters are denied their right to vote in every election because their provisional ballots are not counted. In the 2008 election, almost 40,000 provisional ballots were rejected. To put this in perspective, our State Attorney General race in 2010 was decided by 48,686 votes (with the winning candidate prevailing by a 47.54% to 46.26% margin).<sup>37</sup>

According to data from the Ohio Secretary of State's office, over one-third of these provisional ballots were rejected because election officials determined that they were cast in the wrong precinct.<sup>38</sup> That includes ballots cast in the correct polling location. As noted above, provisional ballots cast in the wrong precinct are not counted under Ohio law. In Cuyahoga County, 3423 provisional ballots were rejected for this reason in 2008. But the problem is not

---

<sup>37</sup>Ohio Secretary of State, Amended Official Results, Attorney General: November 2, 2010, *available at* <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2010results/20101102ag.aspx>.

<sup>38</sup>Ohio Secretary of State, Provisional Ballot Statistics for the November 4, 2008 General Election, *available at* <http://www.sos.state.oh.us/sos/upload/elections/2008/gen/provisionals.pdf>.

limited to urban counties. In Hardin and Miami counties, for example, more than half the rejected provisional ballots were rejected for this reason.<sup>39</sup>

Under current Ohio law, these provisional ballots are not to be counted. There have, however, been two significant federal lawsuits challenging the refusal to count provisional ballots cast in the correct polling location but wrong precinct, in circumstances where it appears that poll worker error is responsible for the mistake.

In one case, the failure to count provisional ballots cast in the wrong precinct due to poll worker error was challenged as a violation of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. After years of litigation, a U.S. District Court issued a consent decree in that case which requires that provisional ballots be counted if the provisional voter provided the last four digits of his or her Social Security Number and (1) the provisional ballot was cast in the correct polling location but in the wrong precinct due to pollworker error, (2) the provisional ballot application was filled out incorrectly due to pollworker error, or (3) the provisional ballot application was not signed by the pollworker.<sup>40</sup>

In effect, the federal court order in *NEOCH* protects voters from being penalized due to a poll worker's mistake. Yet the President of the Ohio Senate and the Speaker Pro Tem of the Ohio House have recently sought to challenge this federal court order – not through the appropriate means of going back to the federal court, but instead through a collateral attack brought in the Ohio Supreme Court. This is a remarkable subversion of the U.S. Constitution's structure of federal-state authority, which provides that federal law is supreme over state law. If one disagrees with a federal district court order, the proper course is not to ask a state court to undermine that order; it is to go back to the federal district court and then the appropriate federal appellate court (in this case the Sixth Circuit). Put simply, the state legislators' lawsuit is nothing less than an invitation to flout a federal court order. This is comparable to the disgraceful tactics to which southern officials resorted decades ago, in an effort to avoid federal court orders in civil rights cases.

I have already mentioned the other case involving the failure to count provisional ballots cast in the right polling place but wrong precinct. That case, *Hunter v. Hamilton County Board of Elections*, involves a disputed judicial election in which candidates were separated by a small number of votes. Some provisional ballots cast in the wrong precinct were counted based on a presumption of poll worker error, while others were not. The Sixth Circuit upheld a district court injunction, based on the Equal Protection Clause of the U.S. Constitution, relying in part on the U.S. Supreme Court's decision in *Bush v. Gore*:

Constitutional concerns regarding the review of provisional ballots by local boards of elections are especially great. As in a recount, the review of provisional ballots occurs after the initial count of regular ballots is known. This particular post-election feature makes “specific standards to ensure ... equal application,” *Bush [v. Gore]*, particularly “necessary to protect the fundamental right of each voter” to have his or her vote count

---

<sup>39</sup>*Id.*

<sup>40</sup>*NEOCH v. Brunner*, Consent Decree (S.D. Ohio Apr. 19, 2010), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCH-Decree-4-19-10.pdf>.

on equal terms.... [D]isparate treatment of voters here resulted, not from a “narrowly drawn state interest of compelling importance,” but instead from local misapplication of state law. This discriminatory disenfranchisement was applied to voters who may bear no responsibility for the rejection of their ballots, and the Board has not asserted “precise interests” that justified the unequal treatment.<sup>41</sup>

The lesson from these cases is that Ohio is at risk of continuing to violate the U.S. Constitution, as long as it denies voters equal treatment and fails to direct voters to the right precinct, especially when they go to the correct building on election day. Unfortunately, some of Ohio’s leaders seem to have taken the opposite lesson, enacting legislation and bringing litigation that will make it more difficult for eligible voters to vote and have their votes counted. It is difficult to understand these actions as anything other than an attempt to gain partisan advantage by making it more difficult for some of our fellow citizens to vote. If this is not vote suppression, I don’t know what it is.

## **Conclusion**

For the most part, the recent round of state election laws have the effect and apparent intent of making it more difficult for eligible citizens to vote. Ohio’s recent law is a prime example. If it is allowed to take effect, this statute will sow confusion for voters and poll workers alike, many of whom have just gotten used to current rules. It can be expected to increase the number of provisional ballots cast, including by voters who go to the correct polling location. Ultimately, it will increase the likelihood of voters being denied their fundamental right to vote – and therefore of lawsuits that could potentially throw future elections into doubt. Worse still are the efforts by the leaders of the Ohio legislature to undermine a federal consent order requiring the fair and equal treatment of voters.

For all the complexity of our voting laws, the bottom line is simple: We should be making it easier, not more difficult, for eligible citizens to vote.

---

<sup>41</sup>635 F.3d 219 (6th Cir. 2011). The case went back to the district court which, after a trial, concluded that the Equal Protection Clause had indeed been violated by the disparate treatment of provisional ballots.