

## TEACHING ELECTION ADMINISTRATION

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### INTRODUCTION

When law students hear “election law,” many of them think of the set of administrative issues—including voting technology, voter registration, voter identification, and the conduct of recounts—that have come to the fore since Florida’s 2000 election. It isn’t hard to understand why students without a lot of exposure to the field would associate election law with such issues. Relatively few students have any direct experience in drawing district lines, financing political campaigns, getting their names on the ballot, or most of the other topics on which the typical Election Law course focuses. They do, however, have experience with election administration.

Most Election Law students have voted. Most have filled out a registration form and found their names on the rolls (or not) when they showed up to vote. They have used some type of voting technology, most likely an electronic voting machine or an electronically counted paper ballot, to cast their votes. Many have been required to produce some form of identifying information, in some states a photo ID, when they voted. Some will have cast absentee ballots or used early voting. Some may have been required to use a provisional ballot, because they lacked required ID when they went to the polls or their address had changed. Some may have volunteered to work as poll workers. And even those students who were children in November 2000<sup>1</sup> will have heard the phrase, “I demand a recount” if not “every vote should count.”

Because students have firsthand experience as voters, they tend to have an intuitive familiarity with the basics, if not the details, of election administration that doesn’t generally exist for other election law topics. For this reason, election administration problems tend to be easier for many students to get their heads around. They also provide an excellent jumping-off point for introducing the conceptual framework of election law, before getting to

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1. Like Professor Hasen, I have noticed a diminishing familiarity with circumstances surrounding the Florida 2000 controversy over the last decade. See Richard L. Hasen, *Teaching Bush v. Gore As History*, 56 ST. LOUIS U. L.J. 665, 667 (2012). In another decade, those of us still teaching Election Law will have students who were not even born yet in November 2000.

complex subjects like redistricting, campaign finance, and ballot access. Election Law teachers would therefore do well not only to include election administration in the survey course, but also to feature election administration issues near the beginning of the term.<sup>2</sup>

This Article offers some suggestions for teaching election administration. It is meant for those teaching a course on Election Law, The Law of Democracy, or The Law of the Political Process, as well as for those teaching a seminar or other smaller course focusing specifically on election administration.<sup>3</sup> I draw mainly on my own experience, having done both. The discussion that follows is organized in accordance with my preferred sequencing of material, though preferences will obviously vary among teachers. I start, as discussions of election administration so often do, with the dispute over Florida's 2000 presidential election—including the litigation (*Bush v. Gore*<sup>4</sup>) and legislation (the Help America Vote Act of 2002<sup>5</sup>) that it spawned. I then discuss how one might go about teaching some of the areas of controversy to emerge since then, specifically voter technology, voter identification, and voter registration. I close with some suggestions on teaching some of the institutional issues at play in election administration, including the exceptionally decentralized and partisan character of American election administration, a useful point of departure for those interested in introducing a comparative perspective on the field.

## I. FROM FLORIDA TO HAVA

A logical starting point for teaching election administration is the dispute over the 2000 election. As a practical matter, the modern history of election administration begins there. For the most part, election administration wasn't given much attention in preceding decades by members of the public or even most legal scholars. About the only ones who paid serious attention to the subject before that time were the local and state officials charged with running our elections, as well as the occasional candidates—and their lawyers—who found themselves in a post-election contest or recount.

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2. All of the casebooks in the field, including the one of which I am a co-author, DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* (4th ed. 2008), now include at least one chapter on election administration. The suggestions below can be used to augment the materials in the casebooks.

3. Spencer Overton has designed an excellent syllabus for a standalone class on election administration, which may be found at <http://publiclawseminar.pbworks.com/w/page/44341428/Fall%202011%20S>. Some of the suggestions contained here are derived from Professor Overton's syllabus or from conversations with him, and are borrowed with his gracious permission.

4. 531 U.S. 98 (2000) (per curiam).

5. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301–15545 (2006)).

The result was a long period during which the infrastructure of our democracy was neglected. For the most part, it was left to state and local officials to run elections with very little oversight or federal law to govern them.<sup>6</sup> The administration of elections was mainly a matter of state law and local practice.<sup>7</sup> Moreover, almost all state election officials and most local election officials were (and still are) affiliated with one of the major parties. A brief discussion of the circa-2000 landscape thus affords the opportunity to introduce students to the two dominant characteristics of elections generally: decentralization and partisanship.<sup>8</sup> Understanding these basic features of U.S. elections is essential to understanding election administration, as well as the various other subjects that comprise a typical survey course in election law.

These distinctive characteristics of American elections provide a helpful frame through which to view the recurring question of when it is appropriate for federal courts to intervene in the electoral process. They also provide the necessary context for understanding *Bush v. Gore*, the case I use to kick off the election administration unit or course. As Rick Hasen's article in this issue helpfully notes, contemporary law students must be given some context for this case.<sup>9</sup> Because his article so helpfully explains different ways of teaching this case, I won't go into great detail here. I do, however, recommend that those beginning a discussion of election administration with *Bush v. Gore* explore a couple of specific areas.

First, it is valuable to ask students to identify the problems with Florida's recount process that led the Court to hold it unconstitutional. Was it the lack of a clear standard? The fact that different counties were treating similar punch-card ballots differently? The fact that voters within a particular county were being treated differently? The differential treatment of overvotes and undervotes? The lack of an adequate process for resolving discrepancies in a consistent manner across the state? The sheer messiness of the recount process? The arguably partisan way in which the case was handled by the Florida Supreme Court?<sup>10</sup> All of these are defensible answers, for which support may be found either in the text of the opinion or the larger context of the case.

The second question worth exploring is what exactly the Court held. This is a question that has, of course, divided scholars almost from the day the case was decided. Dan Lowenstein has made the most thoughtful and sustained

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6. I've discussed this period of neglect in Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 122 (2007) (book review).

7. *Id.*

8. See Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 82 (2004).

9. See Hasen, *supra* note 1, at 667.

10. See *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

argument for a narrow interpretation of the case.<sup>11</sup> I have previously offered two alternative interpretations, both more expansive—namely, that it can be understood either as prohibiting inter-jurisdictional inequalities or proscribing standardless discretion in the counting of votes.<sup>12</sup> My colleague, Ned Foley, has offered a detailed explication of the case, both assessing multiple ways of understanding it and providing a taxonomy of post-*Bush v. Gore* claims.<sup>13</sup> These are just a few of the many articles on the subject that instructors might consider providing, especially in a stand-alone seminar on election administration.<sup>14</sup> My main point here is to emphasize that *Bush v. Gore* is a great case for teaching something that is the bread and butter of lawyers' work: stating and then defending one's statement of the holding of a case. For those, like me, who tend to emphasize both legal doctrine and lawyering skills, it provides a great teaching vehicle. For those who teach with a more scholarly bent, one's statement of the holding determines the extent to which it constitutionalizes the specific topics that I describe in Part II.

*Bush v. Gore* also makes a great springboard for discussing the legislation that followed the 2000 election, most notably the Help America Vote Act of 2002 ("HAVA").<sup>15</sup> I transition to post-Florida developments by highlighting the per curiam opinion's statement that: "[a]fter the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting."<sup>16</sup> Whatever else one might say in criticism of the case, this prediction turned out to be true.

In fact, legislative bodies like Congress were not the only ones to look carefully at how our elections were conducted in the wake of the 2000 election. A raft of reports were issued that took a close look at every aspect of American election administration, including not only voting technology but also voter registration, ballot security, polling place operations, absentee voting, and the process for conducting recounts.<sup>17</sup> Many law teachers, myself included, are within our comfort zone teaching cases but less so when discussing other materials. On the topic of election administration, however, it is worth getting out of our case law comfort zone to discuss the public reaction to the problems that Florida brought to the fore.

11. Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007 (2007).

12. Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1069–70 (2007).

13. Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925 (2007).

14. For an expanded list of articles, see Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297, 311–13 (2004).

15. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301–15545 (2006)).

16. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

17. Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1210–12 & n.31 (2005).

Three of the most important post-2000 reports were issued by Caltech/MIT Voting Technology Project,<sup>18</sup> the U.S. Commission on Civil Rights,<sup>19</sup> and the National Commission on Election Reform (also known as the Carter-Ford Commission).<sup>20</sup> All three found that the antiquated punch card machines, then used in Florida and every other state, were only the tip of the iceberg.<sup>21</sup> I usually call students' attention to the Caltech/MIT Project's finding that, despite the public focus on voting equipment, voter registration was probably the largest source of lost votes in 2000—accounting, by their estimate, for some one and a half to three million of the four to six million lost votes.<sup>22</sup> (As a teacher at Ohio State, I find it helpful to show a slide with forty photos of our filled-up football stadium to illustrate the number of lost votes to our students.) The USCCR report is notable for its focus on voter registration issues, including the “purging” of eligible voters, a disproportionate number of them African American, from Florida's registration list.<sup>23</sup> The Carter-Ford Commission is important because its recommendations provided a template for the federal legislation that ultimately emerged, which included the creation of a federal agency with some responsibility for facilitating election reform, the Election Assistance Commission (“EAC”).<sup>24</sup> Although it probably isn't feasible to include all these materials in a course surveying election law, portions of them might be incorporated into a seminar focused on election administration.

Even if these background materials can't be included, some discussion of HAVA is vital to any discussion of election administration. While I don't recommend going through the entire statute section by section—a good way of putting students to sleep—it is worth focusing on four major substantive changes HAVA made: (1) providing money for the replacement of punch card equipment and imposing minimum standards for voting technology;<sup>25</sup> (2) requiring that every state with voter registration implement a statewide

18. CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE (2001) [hereinafter CALTECH/MIT PROJECT].

19. U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001) [hereinafter USCCR REPORT].

20. NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2001) [hereinafter CARTER-FORD COMM'N].

21. See CALTECH/MIT PROJECT, *supra* note 18, at 8–10 (giving several reasons besides faulty equipment for lost votes); CARTER-FORD COMM'N, *supra* note 20, at 1 (listing several aspects of the election process that were scrutinized following the 2000 election); USCCR REPORT, *supra* note 19, at 23 (describing the purging of eligible voters from the voter rolls in the 2000 election).

22. CALTECH/MIT PROJECT, *supra* note 18, at 9.

23. USCCR REPORT, *supra* note 19, at 23.

24. CARTER-FORD COMM'N, *supra* note 20, at 13.

25. 42 U.S.C. §§ 15302(a), 15481(a) (2006).

registration database;<sup>26</sup> (3) requiring that first-time voters who registered by mail provide identifying information;<sup>27</sup> and (4) requiring that provisional ballots be made available to those whose names don't appear on the registration list or who lack required ID.<sup>28</sup> Finally, it should be mentioned that HAVA created a bipartisan commission, the EAC, with responsibility for implementing its requirements—although, as one commentator has put it, “[t]he EAC was designed to have as little regulatory power as possible.”<sup>29</sup>

Why do I think it's important to spend some time on HAVA? First, although many of us who teach Election Law tend to gravitate toward constitutional issues, it is worth reminding students that most of the law in this area is statutory. And second, HAVA represents the most significant federal intervention in election administration in U.S. history.<sup>30</sup> It also provides a way of introducing the many of pre- and post-election disputes that have emerged in the years since then. Some of these disputes arise from vague or ambiguous language in the statute itself, like its provisional voting and statewide registration database requirements.<sup>31</sup> Others arise from areas where Congress decided to leave things to the states, such as whether to impose ID requirements that go beyond federal law.<sup>32</sup> HAVA therefore provides a nice segue to the many election administration issues that have since emerged, often resulting in lawsuits.

## II. THE ELECTION ECOSYSTEM

Despite the enactment and administration of HAVA, election administration in the U.S. remains mostly a matter of state law and local practice. My Moritz colleagues and I have used the metaphor of an “ecosystem” to describe election administration.<sup>33</sup> The basic idea is that the various components of the system work together, in a way that is distinctive to each of the states, and that changes to one aspect of the system tend to affect others in ways that aren't always understood by legislators.<sup>34</sup> Changes to how voter registration is conducted, for example, tend to affect how states use

26. *Id.* § 15483(a).

27. *Id.* § 15483(b).

28. *Id.* § 15482(a). For more detail on these changes, see Tokaji, *supra* note 17, at 1214–18.

29. Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004).

30. Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 116 (2010).

31. *See id.* at 159.

32. *Id.* at 117–18.

33. STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES* (2007).

34. *Id.* at v.

provisional ballots.<sup>35</sup> It is therefore important to understand the various components of the election system as an interconnected whole.

I have found this ecosystem model to be a useful way of introducing the various pieces of election administration. Our 2007 report on five Midwestern states identified and examined nine components of state election ecosystems: (1) institutional arrangements, (2) voter registration, (3) challenges to voter eligibility, (4) voting technology, (5) early and absentee voting, (6) polling place operations, (7) voter identification and other ballot security measures, (8) provisional voting, and (9) recounts, contests, and other post-election disputes.<sup>36</sup>

Any of these topics can be useful teaching vehicles, but I focus on three of them below: voting technology, voter identification, and voter registration. I suggest these topics because they have been prominent subjects of controversy in recent years, leading to judicial decisions that provide great teaching vehicles. For each topic, I note the cases and other materials that I find especially worthy of consideration.

#### A. *Voting Technology*

In the immediate aftermath of the 2000 election, much of the public and legislative attention was focused on the equipment used for voting. Many Americans, like those in Florida, used punch-card voting equipment that was found to result in many more “residual votes”—that is ballots registering no valid vote for a particular contest—than other available technologies.<sup>37</sup> In light of this evidence, HAVA provided funding for the replacement of antiquated voting machines, which has effectively rendered them extinct.<sup>38</sup>

In the meantime, lawsuits were filed in several states challenging punch card voting equipment. Two of them led to appellate court opinions upholding the equal protection claim against the use of punch card voting in some but not all counties.<sup>39</sup> In both cases, however, the panel opinions were reversed en banc on procedural grounds, without a full-fledged opinion on the merits.<sup>40</sup> For this reason—and because punch card were effectively made extinct by HAVA—I don’t recommend teaching the appellate opinions on punch cards,

35. *Id.* at 17.

36. *Id.* at 11.

37. Charles Stewart III, *Residual Vote in the 2004 Election*, 5 ELECTION L.J. 158, 162–68 (2006).

38. *Id.* at 162.

39. *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated*, 473 F.3d 692 (6th Cir. 2007) (en banc); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *vacated*, 344 F.3d 914 (9th Cir. 2003) (en banc). I was one of the attorneys for the plaintiffs in both of these cases.

40. *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007) (en banc); *Sw. Voter Reg. Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2004) (en banc).

fascinating though they were in their analyses of the *Bush v. Gore* equal protection issue.

Instead, I suggest focusing on the more recent controversies to have emerged surrounding the implementation of electronic voting technology. As punch cards were phased out, many jurisdictions opted to adopt touchscreen voting machines, commonly known as DRE (direct record electronic) systems.<sup>41</sup> Many advocates raised security concerns about the new technology, leading to several constitutional challenges.<sup>42</sup> Of the lower court decisions on this topic, the one I most prefer to teach is *Wexler v. Anderson*, in which the Eleventh Circuit rejected an equal protection challenge to Florida's paperless touchscreen voting machines.<sup>43</sup> The challenge to touchscreen voting provides a useful vehicle for exploring the limits of the *Bush v. Gore* equal protection holding, as well as the larger issue of whether and when it's a good idea for federal courts to intervene in election administration.

Although the challenge to Florida's paperless touchscreen machines failed, several states have enacted laws requiring that all voting systems produce a voter verified paper audit trail ("VVPAT").<sup>44</sup> Florida ultimately wound up getting rid of its touchscreen voting machines, and going back to a paper-based system, after a 2006 election in which there were a large number of electronic ballots registering no vote for the U.S. House race between Vern Buchanan and Christine Jennings.<sup>45</sup> Including materials on this dispute and its aftermath is a helpful reminder that going to court isn't the only way, and sometimes isn't the best way, of resolving election administration problems.

### B. Voter Identification

Whether to require voters to present a government-issued photo ID is probably the most contentious election administration issue to have emerged in the years since HAVA's enactment. Photo ID has been the focal point in the larger access-versus-integrity debate, which has tended to dominate public discussions of election reform.<sup>46</sup> In general, conservatives argue that photo ID should be required in order to prevent voting fraud, while progressives argue that photo ID laws are likely to impede participation, particularly among poor and minority voters.<sup>47</sup>

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41. Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1730–31 (2005).

42. *Id.* at 1734–37.

43. *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006).

44. See Tokaji, *supra* note 41, at 1739.

45. See LOWENSTEIN, HASEN & TOKAJI, *supra* note 2, at 314.

46. Tokaji, *supra* note 12, at 1078.

47. See *id.* at 1079.



The most obvious case for teaching voter ID is the Supreme Court's decision in *Crawford v. Marion County Board of Elections*,<sup>48</sup> in which the Court upheld Indiana's photo ID requirement, without a majority opinion. I approach the case as a lesson in how different judges handle a factual void, given that neither side had much in the way of evidence to support its position for or against the Indiana photo ID requirement.<sup>49</sup> The lead opinion by Justice Stevens applies a kind of balancing test, finding Indiana's stated interests sufficient to sustain the law against a facial challenge, given plaintiffs' failure to show much of a burden on participation.<sup>50</sup> The concurring opinion of Justice Scalia sweeps more broadly and would make it much more difficult to challenge any alleged impediments to voting.<sup>51</sup> The dissenting justices apply a test that is similar to that of Justice Stevens, though they reach the opposite conclusion.<sup>52</sup> Doctrinally, it's worth asking what sort of evidentiary showing would be required, after *Crawford*, for heightened scrutiny to apply to a particular election administration practice. Is there any hope of winning a facial constitutional challenge, however burdensome the law? What about an as-applied challenge? Can we imagine a plaintiff who might be able to win an as-applied challenge to such a law? You might throw out the nuns turned away in 2008 or homeless voters without ID as an example.<sup>53</sup> *Crawford* is also a useful vehicle for focusing on some practical lawyering questions. In particular, you might consider asking students whether it was strategically wise for the plaintiffs to take the case up to the Supreme Court, after losing below. Given the composition of the current court, some of us believe this to have been a poor decision.<sup>54</sup>

Those teaching a stand-alone course of Election Administration should consider supplementing *Crawford* with additional materials. The leading law review article on the subject is Spencer Overton's *Voter Identification*,<sup>55</sup> which embraces an empirical, cost-benefit type approach to the problem. More recent perspectives may be found in opposing commentaries by Hans von Spakovsky<sup>56</sup> (a leading proponent of such laws) and Justin Levitt<sup>57</sup> (a leading

48. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

49. *Id.* at 200–02.

50. *Id.* at 202–03.

51. *Id.* at 208 (Scalia, J., concurring).

52. *Id.* at 209 (Souter, J., dissenting).

53. *See Crawford*, 553 U.S. at 201–02.

54. *See* Dan Tokaji, *Crawford: It Could Have Been Worse*, ELECTION LAW @ MORITZ (Apr. 29, 2008, 6:53 AM), [http://moritzlaw.osu.edu/blogs/tokaji/2008\\_04\\_01\\_equalvote\\_archive.html](http://moritzlaw.osu.edu/blogs/tokaji/2008_04_01_equalvote_archive.html).

55. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

56. Hans A. von Spakovsky, *Protecting the Integrity of the Election Process*, 11 ELECTION L.J. 90 (2012).

57. Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97 (2012).

opponent), which appeared in *Election Law Journal*. Another source to consider is Chapter Two of Rick Hasen's forthcoming book *The Voting Wars*, entitled "The Fraudulent Fraud Squad."<sup>58</sup> The chapter provides a skeptical view of the arguments made by voter ID proponents, suggesting that the real agenda is to make it more difficult for some eligible citizens to vote and have their votes counted.<sup>59</sup> Turning back to legal doctrine, one might ask whether courts should focus on the intent of the legislature or the effect of a particular law, in assessing its constitutionality. This again gets back to the proper role of courts in policing the electoral process.

### C. Voter Registration

Although voting technology and voter identification tend to get more attention, no election administration topic is of greater practical importance than voter registration. As noted above, registration problems were probably the largest source of lost votes in the 2000 election.<sup>60</sup> There is also a substantial federal footprint in the area, which includes the National Voter Registration Act of 1993 (commonly known as "Motor Voter")<sup>61</sup> as well as HAVA's statewide voter registration database requirement.<sup>62</sup> Voter registration was the big issue of the 2008 election season, with a lot of attention devoted to ACORN's submitting registration forms for nonexistent voters<sup>63</sup>—and Republican candidate John McCain going so far as to claim that the group was on the verge of "maybe destroying the fabric of democracy."<sup>64</sup> Hyperbolic as this claim was, it demonstrates the public spotlight on registration practices, something that always helps make a topic of greater interest to students.

Like voter identification, voter registration has been a focal point for the access-versus-integrity debate in recent years. In my article *Voter Registration and Election Reform*, I identified four big questions that have arisen in connection with the American system of voter registration: (1) the maintenance of registration lists, (2) the responsibility of state agencies to register votes, (3) the regulation of registration drives by non-governmental entities, and (4)

58. RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (forthcoming 2012). In fact, those teaching a stand-alone course on election administration might consider assigning the entire book, which offers plenty of anecdotes that could help students understand the partisan battles of the past decade.

59. *Id.*

60. See *supra* notes 22–23 and accompanying text.

61. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. §§ 1973gg to 1973gg-10 (2006)); Overton, *supra* note 55, at 638 n.24.

62. 42 U.S.C. §§ 15483(a) (2006).

63. Jess Henig, *ACORN Accusations*, FACTCHECK.ORG (Oct. 18, 2008, 3:35 PM), <http://factcheck.org/2008/10/acorn-accusations/>.

64. *Id.*

requirements that voters prove their eligibility at the time of registration.<sup>65</sup> That article discusses several voter registration cases that might be worth including.<sup>66</sup>

There is no big case in voter registration, comparable to *Crawford* in voter identification. Teachers interested in devoting attention to a particular registration controversy might, however, consider the litigation over the registration databases that ultimately led to the Supreme Court's one-paragraph reversal in *Brunner v. Ohio Republican Party*.<sup>67</sup> That case concerned an ambiguous provision of HAVA, requiring states to "match" information on registration lists against other government databases.<sup>68</sup> Unfortunately, the statute provided little guidance on how the matching was to be done, or what to do with records that didn't match.<sup>69</sup> Concerned about the possibility of election fraud, Republicans wanted election officials to be aggressive in investigating non-matches; concerned about the possibility of impeding access, Democrats wanted to avoid any action that might remove eligible voters.<sup>70</sup>

The Sixth Circuit upheld the relief sought by the Ohio Republican Party,<sup>71</sup> but the Supreme Court reversed for lack of a private right of action.<sup>72</sup> The Sixth Circuit opinion is useful for those interested in getting students to focus on some difficult statutory language, which addresses a complicated but important problem. While the Supreme Court's opinion does not reach the merits, it does raise the question of what role courts should play in overseeing election administration.<sup>73</sup> I have argued that courts should be generous in implying rights of action, given the absence of any entity in the United States capable of checking partisanship by election officials.<sup>74</sup> On the other hand, one might view the Sixth Circuit's decision—in which conservative judges sided with the Ohio Republican Party, while progressive judges sided with Democratic Secretary of State Brunner—as showing that federal judges are no

65. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY L. REV. 453, 478 (2008).

66. *Id.* at 477–94. Professor Overton's syllabus, *supra* note 3, provides some other great suggestions on voter registration materials to include.

67. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008) (per curiam). I discuss this litigation at greater length in Daniel P. Tokaji, *Voter Registration and Institutional Reform: Lessons from a Historic Election*, 3 HARV. L. & POL'Y REV. ONLINE 1, 8–11 (Jan. 22, 2009), [http://www.hlpronline.com/Tokaji\\_HLPR\\_012209.pdf](http://www.hlpronline.com/Tokaji_HLPR_012209.pdf).

68. *Brunner*, 129 S. Ct. at 6 (citing 42 U.S.C. § 15483(a)(5)(B)(i) (2000 & Supp. V 2005)).

69. *Ohio Republican Party v. Brunner*, 544 F.3d 711, 715–16 (6th Cir. 2008), *vacated*, 129 S. Ct. 5 (2008).

70. Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 147 (2009).

71. *Ohio Republican Party*, 544 F.3d at 712.

72. *Brunner*, 129 S. Ct. at 6.

73. Tokaji, *supra* note 30, at 113–14.

74. *Id.* at 119.

more capable of acting as nonpartisan arbiters than election officials. Either way, this case helps bring to the fore the proper role of courts in overseeing election administration.

### III. ELECTORAL INSTITUTIONS

The final topic that I recommend including in a unit or course on election administration provides a useful point of comparison between the United States and other democracies. As discussed in Part II, the United States is distinctive in the prevalence of party-affiliated officials running our elections.<sup>75</sup> This has been most conspicuous at the state level, most notably through the examples of Florida Secretary of State Katherine Harris in 2000<sup>76</sup> and Ohio Secretary of State Ken Blackwell in 2004.<sup>77</sup> Though less visible, partisan election administration is the norm in many local jurisdictions as well.<sup>78</sup>

My general sense is that American Election Law teachers tend to focus overwhelmingly—if not exclusively—on U.S. cases and materials. Questions of election management, however, are especially well-suited to comparative study. The pronounced partisanship of U.S. election administration, especially at the state level where many of the most important decisions are made, makes us an outlier. Most other democratic countries have some type of independent election management body.<sup>79</sup> It is worth exploring with students why the United States does not, whether we should move to a more independent institutional structure, and how such a change might be implemented.

I therefore recommend including some comparative materials at the end of a course or unit on election administration. By that point, students will undoubtedly have developed a clear sense of the strong partisan valence that most election administration disputes have. This makes it possible to get into the problem without having a specific case to focus on.

For secondary materials, I recommend Chris Elmendorf's *Representation Reinforcement Through Advisory Commissions*<sup>80</sup> and my own *The Future of Election Reform*.<sup>81</sup> Both discuss the institutional problems with American elections in the context of other countries that have alternative structures.<sup>82</sup> Those interested in delving into other countries' structures might consider

75. Tokaji, *supra* note 70, at 127.

76. *Id.*

77. *See Developments in the Law – Voting and Democracy*, 119 HARV. L. REV. 1127, 1193–95 (2006).

78. Tokaji, *supra* note 70, at 132.

79. Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953, 968 (2007).

80. Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1385–90 (2005).

81. Tokaji, *supra* note 70, at 137–42.

82. Elmendorf, *supra* note 80, at 1385–1405; Tokaji, *supra* note 70, at 137–42.

Canada, Australia, and India, all of them English-speaking countries with a national independent electoral authority.<sup>83</sup> Such examples are helpful in challenging the assumptions, which some students bring, that American democracy is superior to that of other countries and that we have nothing to learn from other countries' experience. In the increasingly global legal environment in which our students will soon find themselves practicing, it is essential for American lawyers to have some familiarity with other countries' legal and governmental systems. In another decade, I hope that there is a lot more comparative election law scholarship to recommend to both teachers and students.

### CONCLUSION

Election administration is an exciting subject to teach. It tends to be more accessible to students than most other areas of election law. It has been an especially dynamic part of the field in recent years, in terms of both litigation and scholarship. It also affords the opportunity to introduce current disputes, which have a way of piquing student interest. Especially when teaching this course during an election year, I have found that there is almost always a hot issue being litigated, which I try to incorporate in my syllabus. Finally, election administration provides a great way of introducing students to some of the peculiarities of the U.S. election system, most notably its partisanship and decentralization, and comparing other countries' structures. For all these reasons, I recommend featuring election administration prominently in the survey course, and even consider a standalone course or seminar on election administration. If you choose to do so, please let me know if I can offer any further tips in your course planning!

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83. See, e.g., Elmendorf, *supra* note 80, at 1386–87 (discussing advisory districting commissions in Australia and Canada among others).

