

## JUDICIAL REVIEW OF ELECTION ADMINISTRATION

DANIEL P. TOKAJI<sup>†</sup>

In response to Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313 (2008).

Professor Christopher Elmendorf's article<sup>1</sup> is an admirable effort to find some order in what has often seemed an incoherent area of law.<sup>2</sup> Although he characterizes this article as mainly "diagnostic and descriptive,"<sup>3</sup> it clearly has normative implications. Given the increased litigation over the administration of elections in recent years,<sup>4</sup> there is an obvious need to refine the constitutional standard governing such claims. Professor Elmendorf and I are largely in agreement on the analysis that courts should take in constitutional cases involving the administration of elections—so much so that we co-authored a brief to the United States Supreme Court in *Crawford v. Marion County Election Board*, the Indiana voter identification case, which articulates a legal test we urge the Court to apply generally in these cases.<sup>5</sup> But

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<sup>†</sup> Associate Professor of Law, Moritz College of Law at The Ohio State University; Associate Director, Election Law @ Moritz.

<sup>1</sup> Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313 (2008). I thank Professor Elmendorf for his comments on this Response.

<sup>2</sup> For a summary of recent commentary lamenting the incoherence of the Supreme Court's election law jurisprudence, see Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1065-66 & nn.1-6 (2007). That commentary was part of a symposium entitled "Election Law and the Roberts Court," which appears in the same volume of the *Ohio State Law Journal*. See Edward B. Foley, *Election Law and the Roberts Court: An Introduction*, 68 OHIO ST. L.J. 733 (2007).

<sup>3</sup> Elmendorf, *supra* note 1, at 327.

<sup>4</sup> See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration To Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958 & fig.3 (2005) (displaying graphically the marked increase in election litigation).

<sup>5</sup> See Brief of Amici Curiae Christopher S. Elmendorf & Daniel P. Tokaji in Support of Petitioners at 2-4, *Crawford v. Marion County Election Bd.*, No. 07-21 (Nov. 13, 2007), available at [http://www.brennancenter.org/dynamic/subpages/download\\_file\\_50876.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_50876.pdf) [hereinafter, Elmendorf & Tokaji Amicus Brief] (arguing that all "direct barriers to the casting of a valid, properly counted ballot must at least be *reasonably necessary* to important state interests," and setting forth three factors to determine whether a barrier imposes a "severe" burden warranting strict scrutiny).

while Professor Elmendorf and I arrive at a similar destination, we take somewhat different routes in getting there.

This Response focuses on three points on which I take a different approach—or at least place a different emphasis—than does Professor Elmendorf. First, I would more clearly distinguish two categories of cases that his article at times seems to conflate under the rubric of “election mechanics”: election administration and ballot access.<sup>6</sup> The underlying democratic values implicated by these two areas are sufficiently different that they warrant individual constitutional analyses. Second, when setting the level of scrutiny in constitutional election administration cases, I would place special emphasis on whether a particular electoral practice can be expected to burden participation by groups that remain underrepresented in the electorate, including those defined by racial or economic status. I thus see *Harper v. Virginia Board of Elections*,<sup>7</sup> which struck down a poll tax that differentially burdened poor voters, as more germane to election administration litigation than *Burdick v. Takushi*<sup>8</sup> and other ballot access cases. Third, while I commend Professor Elmendorf’s “danger signs” approach in ascertaining the level of scrutiny,<sup>9</sup> I urge greater respect for trial court findings than Professor Elmendorf suggests.<sup>10</sup> There is undoubtedly a need for clarification of the constitutional standard—something that must be done by appellate courts. At the same time, election administration cases tend to turn on subtle factual differences that trial courts are generally in the best position to evaluate.

#### I. DISTINGUISHING ELECTION ADMINISTRATION AND BALLOT ACCESS

Professor Elmendorf characterizes his article as an effort to provide an account of the Supreme Court’s methods for “setting scrutiny levels in electoral mechanics cases.”<sup>11</sup> In so doing he places special

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<sup>6</sup> See Elmendorf, *supra* note 1, at 345-56 (analyzing the Supreme Court’s decisions in *Storer v. Brown*, 415 U.S. 724 (1974) (ballot access), and *Kusper v. Pontikes*, 414 U.S. 51 (1973) (enrollment rules)).

<sup>7</sup> 383 U.S. 663, 666 (1966).

<sup>8</sup> 504 U.S. 428, 430 (1992) (concluding that states that prohibit write-in voting do not “impermissibly burden the right to vote”).

<sup>9</sup> See Elmendorf, *supra* note 1, at 390-91 (internal quotation marks omitted) (extracting the principle from Justice Breyer’s language in *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006)).

<sup>10</sup> *Id.* at 391.

<sup>11</sup> *Id.* at 394.

emphasis on the line of constitutional cases that emerged from *Burdick*, which concerned Hawaii's ban on write-in voting and related regulations of ballot access.<sup>12</sup> This is understandable, given the substantial weight that courts have given to *Burdick* in cases involving such matters as voting equipment and voter identification. It does, however, risk confusing two sub-fields of election law—ballot access and election administration—that tend to implicate different democratic values and thus warrant different constitutional treatment.

Some clarification of terminology is first warranted. Following the Supreme Court, Professor Elmendorf defines his topic of “election mechanics” to include “the registration and qualification of voters, the selection and eligibility of candidates, [and] the voting process.”<sup>13</sup> So defined, his subject would extend beyond the “nuts and bolts”<sup>14</sup> of election administration—issues such as voting machines, registration rules, provisional ballots, voter identification, polling place operations, recounts, and contests, all of which implicate the question whether voters will be allowed to vote and have their votes counted accurately.<sup>15</sup> It would also include the rules governing access to the ballot and, therefore, the *choice* of candidates available to voters. I would avoid lumping together these two areas. Instead, I suggest that the terms “election administration” and “election mechanics” be used interchangeably to describe the set of nuts-and-bolts issues governing how voters are registered, voting is conducted, and votes are counted, but *not* to include the rules regarding access to ballots.

This is more than just a semantic point. The areas of election administration and ballot access warrant separate consideration, for purposes of determining the appropriate constitutional test, because the values implicated by these two areas are not the identical. It is certainly true that in both areas legislators or administrators may adopt rules that result in the “[f]encing out” of certain groups of voters, a term that Professor Elmendorf helpfully borrows from *Carrington v.*

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<sup>12</sup> See *id.* at 333 (“[T]he Court itself understands *Burdick* to have marked a doctrinal transition . . .”).

<sup>13</sup> *Id.* at 317 (alteration in original) (internal quotation marks omitted) (quoting *Burdick*, 504 U.S. at 433).

<sup>14</sup> See Daniel H. Lowenstein, *Election Law as a Subject—A Subjective Account*, 32 LOY. L.A. L. REV. 1199, 1202 (1999) (noting the prevailing disinterest in “nuts and bolts” questions among legal academics at the time).

<sup>15</sup> For an account of litigation surrounding these and other election administration issues in the 2004 election, see generally Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1220-39 (2005).

*Rush*.<sup>16</sup> In a state whose legislature is dominated by the Democratic Party, for example, the state might impose rules that make it relatively difficult for military and overseas voters to register and vote, out of a belief that those voters may swing toward the other party. Ballot access rules may be used to a similar effect. The two major parties, for example, might try to fence out minor parties by passing legislation that makes it more difficult for them to qualify for the ballot.

The difference is that election administration regulations tend to affect voters' ability to *participate* in elections, and not simply the candidates among whom they may choose. Historical examples of election administration practices that had the effect of curtailing participation include poll taxes and literacy tests. In its early years, the main focus of the voting rights movement was on eradicating such practices. After these barriers to participation were dismantled in the 1960s and 1970s, attention shifted from vote denial to vote dilution.<sup>17</sup> Advocates turned their attention to practices—such as at-large elections and gerrymandered districts—that tended to diminish the representation of certain groups in elected office.

As Professor Elmendorf observes, we have now come full circle, in the sense that barriers to participation have again assumed “center stage”<sup>18</sup> in the years since Florida's 2000 election and its resolution in *Bush v. Gore*.<sup>19</sup> The two most fertile topics of litigation have been voting equipment and voter identification.<sup>20</sup> Relying on the Court's decision in *Bush v. Gore*, advocates in several states mounted challenges to the paper-based voting systems used in most states, which allegedly resulted in more lost votes in comparison with other available technology.<sup>21</sup> More recently, a number of states with Republican-dominated legislatures have enacted rules imposing stricter identification requirements on those seeking to vote at the polls. These laws have led to equal protection litigation as well, most prominently the *Crawford*

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<sup>16</sup> Elmendorf, *supra* note 1, at 366 (internal quotation marks omitted) (quoting *Carrington v. Rush*, 380 U.S. 89, 94 (1965)).

<sup>17</sup> For a more complete discussion of the vote denial/vote dilution distinction, see generally Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 718-26 (2006).

<sup>18</sup> Elmendorf, *supra* note 1, at 314-15.

<sup>19</sup> 531 U.S. 98, 110 (2000) (per curiam) (holding that the Florida Supreme Court's vote recount procedure in the 2000 presidential election violated the Equal Protection Clause).

<sup>20</sup> See Tokaji, *supra* note 2, at 1072-86 (surveying lower court litigation in these areas).

<sup>21</sup> See *id.* at 1073-78 (citing cases).

case, which challenges Indiana's requirement that voters show government-issued photo identification in order to have their votes counted.<sup>22</sup>

What makes equal protection claims on such election administration issues analytically distinct is that they more directly implicate an individual voter's right to participate in elections. To be sure, ballot access rules can affect an individual voter's ability to participate in elections by limiting the candidates among whom they may choose. At their outer limits—say, when a national government dominated by one party prohibits any other party's candidates from appearing on the ballot—it can plausibly be argued that voters' rights to participate have effectively been nullified. But in general, election administration cases much more directly implicate participation rights. Put another way, they implicate individual interests (ensuring that each eligible citizen may vote in elections without undue impediments) as well as systemic ones (having a fair political structure that is not skewed to the advantage or disadvantage of certain groups). As I have elsewhere argued, equal protection analysis does and should take into consideration both types of interests.<sup>23</sup>

## II. TOO MUCH *BURDICK*, NOT ENOUGH *HARPER*

It would be unfair to lay blame for blurring the distinction between election administration and ballot access at Professor Elmendorf's feet.<sup>24</sup> The problem instead arises from judicial decisions, particularly those of the Supreme Court, which too often conflate these distinct areas.

This problem can be traced back to *Burdick v. Takushi*.<sup>25</sup> As noted above, this case involved a state's rules prohibiting write-in ballots, which allegedly limited voters' *choice* of candidates rather than their ability to participate. It is therefore properly classified as a ballot access case rather than an election administration case. Yet, as Professor Elmendorf notes, courts in election administration cases have repeat-

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<sup>22</sup> Crawford v. Marion County Election Bd., No. 07-21 (argued Jan. 9, 2008).

<sup>23</sup> See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2428, 2502-07 (2003) (describing atomistic and systemic theories of political equality and the shortcomings of each).

<sup>24</sup> In fact, he and I both think that election administration claims tend to implicate democratic participation much more directly than do ballot access claims, and thus, in general, warrant more searching review. See Elmendorf & Tokaji Amicus Brief, *supra* note 5, at 12-15 (discussing the difference between participatory and representational interests).

<sup>25</sup> 504 U.S. 428 (1992).

edly relied on the following passage from *Burdick* in determining the appropriate level of scrutiny:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.<sup>26</sup>

Although the facts of *Burdick* are far afield from the election administration controversies that have emerged since 2000, it is easy to understand why courts have fixated on this language. *Bush v. Gore* provides precedent for the application of the Equal Protection Clause to election administration practices, thereby constitutionalizing what had mostly been left to state law in preceding years.<sup>27</sup> Yet *Bush v. Gore* is uncomfortably silent on the level of scrutiny that should be applied in such cases.

To fill the void left by *Bush*, lower courts have understandably looked to *Burdick*. Even though it was not cited in *Bush* and has nothing to do with election administration, *Burdick* did at least attempt to explain why some election practices warrant strict scrutiny, while others receive more deferential review.<sup>28</sup>

An example of a practice that would clearly warrant strict scrutiny is a poll tax, like that struck down in *Harper v. Virginia Board of Elec-*

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<sup>26</sup> *Id.* at 434 (emphasis added) (citations omitted) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), *Norman v. Reed*, 502 U.S. 279, 289 (1992), and *Anderson*, 460 U.S. at 788).

<sup>27</sup> See Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 48-50 (2004) (noting that the decision in *Bush v. Gore*, in part, expressed a constitutional concern for guaranteeing an “individual right to an equally weighted vote”).

<sup>28</sup> See *Burdick*, 504 U.S. at 434 (discussing the appropriate legal standards to be used in state election law cases).

tions.<sup>29</sup> In fact, *Harper* might be considered the prototypical case in which an impediment to voter participation necessitates strict scrutiny. Decided in an era when African Americans were still disenfranchised throughout the South, *Harper* is associated with the eradication of race discrimination in voting. In a sense this is appropriate, inasmuch as southern states' use of poll taxes to fence out blacks was undoubtedly part of the Court's motivation for deciding the case as it did. The Court's stated rationale, however, does not expressly rest on the racially discriminatory intent of Virginia's poll tax law or even on its disproportionate impact on black would-be voters. In a footnote, the Court expressly disclaims this rationale.<sup>30</sup> Instead, *Harper* rests on the impermissibility of the state's conditioning participation on payment of a fee, a condition that could not but have the effect of excluding less affluent voters.<sup>31</sup> Quoting from the Court's then-recent exposition on the Equal Protection Clause as applied to voting in *Reynolds v. Sims*, the *Harper* Court identified "the opportunity for equal participation by all voters" as the central value at stake.<sup>32</sup> Accordingly, the Court concluded that the poll tax should be "closely scrutinized and carefully confined,"<sup>33</sup> an analysis that we would today characterize as strict scrutiny.

While I think the lower courts have generally done a respectable job of handling the election administration litigation that has emerged in the years since *Bush v. Gore*, they may be fairly criticized for devoting too much attention to *Burdick* and not enough to *Harper*. This is not to deny that *Burdick* is of some help in providing a rough basis for determining the appropriate level of scrutiny. For an electoral practice to warrant strict scrutiny, *Burdick* tells us, it must impose "severe" as opposed to "reasonable, nondiscriminatory" restrictions.<sup>34</sup>

The juxtaposition of these terms warrants some attention. For one thing, the contrast between "severe" and "reasonable, nondiscriminatory restrictions" suggests that a discriminatory restriction—like the one at issue in *Harper*—is necessarily severe. On this point, I quibble with Professor Elmendorf. He suggests that there may be "discriminatory but nonsevere burdens" under the *Burdick* frame-

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<sup>29</sup> 383 U.S. 663, 666 (1966).

<sup>30</sup> See *id.* at 666 n.3.

<sup>31</sup> See *id.* at 666-68.

<sup>32</sup> *Id.* at 670 (internal quotation marks omitted) (quoting *Reynolds v. Sims*, 377 U.S. 533, 566 (1964)).

<sup>33</sup> *Id.*

<sup>34</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks omitted).

work.<sup>35</sup> By contrast, I read the above-quoted passage from *Burdick* to mean that a “discriminatory” restriction is *by definition* severe.

*Burdick* is of precious little help, however, in answering a question that repeatedly arises in election administration litigation: what is required to demonstrate that a particular burden is severe, and thus deserving of strict scrutiny? As I have just noted, *Burdick* indicates that a burden is by definition severe if it discriminates, but it offers little guidance on what sort of discrimination warrants strict scrutiny. Is this limited to discrimination based on race or some other suspect classification? And must there be an *intent* to discriminate, as there must be for ordinary Equal Protection claims alleging discrimination?

If we take *Harper* as the prototype of a severe restriction that warrants strict scrutiny, the answer to both these questions must be no. The primary focus instead should be on electoral practices that tend to deny equal participation in the voting process by skewing the electorate. Here again, it is worth remembering that election administration cases tend to have both an atomistic and systemic component, implicating both the individual’s participatory interest and the broader democratic interest in preventing insiders from skewing the process to the disadvantage of certain groups. Both of these interests were at stake in *Harper*. Poorer individuals were prevented from voting by the poll tax; in the aggregate, this had a disproportionate impact on the political power of certain groups, particularly poor people and racial minorities. The lack of any reasonable and nondiscriminatory justification for the poll tax accented the poll tax’s suspect character, providing an additional reason for applying heightened scrutiny.

In invoking *Harper*, I do not mean to overstate its utility in defining the level of scrutiny that should apply in election administration cases. My argument is simply that *Harper* is of some value in giving content to the sort of discriminatory burdens that should be deemed severe, and thus subjected to strict scrutiny. *Harper* should be considered the prototype, though the boundaries of this category remain nebulous.

### III. CONSTITUTIONAL STANDARDS AND JUDICIAL PROCESS

I will not here attempt to define with any precision the constitutional standard that should apply to election administration cases.

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<sup>35</sup> Elmendorf, *supra* note 1, at 330 n.65.



The pending *Crawford* case may shed some additional light on this question—though I tend to doubt whether we can expect a great deal of clarity from the current Supreme Court, which, as many scholars have noted, seems hopelessly splintered on the proper judicial role with respect to democratic politics generally.<sup>36</sup> Instead, I close with some thoughts on the various interests that courts should take into account and the process that should govern the resolution of election administration claims.

Building on Professor Elmendorf's article, there are three interests that are likely to arise in most election administration litigation. The first interest, which sets election administration cases apart from those involving ballot access, is voter participation. Professor Elmendorf and I agree that courts should attend not merely to the number of voters affected by a particular practice and the degree to which those voters' participation is burdened, but also to their *skewing effect*—that is, the extent to which they are likely to impose a differential burden on certain classes of voters.<sup>37</sup> In keeping with *Harper*, I urge special attention to practices that impede the participation of those who are already least likely to vote, a class that might include poor voters, people with disabilities, and some racial or ethnic minorities. To the extent that a particular practice imposes a differential burden on such a group, there is reason to worry that the “ins” are using their power to exclude the “outs.”<sup>38</sup>

The second interest is the state's asserted justification for maintaining a particular electoral practice. In the cases challenging punch-card voting equipment, for example, states asserted the financial burden of purchasing new equipment as part of their reason for failing to replace their existing systems with ones that would reduce the number of lost votes.<sup>39</sup> In debates over more stringent voter identification laws, the state's ostensible interest is in preserving the integrity of elections by preventing voter impersonation fraud.<sup>40</sup> Where there is a severe burden on voters, particularly one that threatens to skew participa-

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<sup>36</sup> For a discussion of this division in the Court, see the authorities cited in Tokaji, *supra* note 2, at 1065-66.

<sup>37</sup> See Elmendorf & Tokaji Amicus Brief, *supra* note 5, at 22-23 (criticizing the Seventh Circuit's decision in *Crawford* for not accounting for a skewing effect).

<sup>38</sup> See Elmendorf, *supra* note 1, at 328 & n.61 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980)).

<sup>39</sup> See, e.g., *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 808-09 (N.D. Ohio 2004), *rev'd en banc*, 473 F.3d 692 (6th Cir. 2007) (noting the state's argument that punch-card ballots are “cost-effective”).

<sup>40</sup> See, e.g., Brief of State Respondents in Opposition to the Petitions at 18, *Crawford v. Marion County Election Bd.*, No. 07-21 (Aug. 6, 2007).

tion, heightened scrutiny provides a means by which to look behind the state's proffered interest and evaluate whether it is real or pretextual.

The third interest that tends to arise in election administration litigation is the cabining of judicial discretion, which can create the appearance (if not the reality) of unfairness in judicial decision making. As Professor Elmendorf aptly puts it, there is a great danger of courts intervening in election administration cases based on "hunch and anecdote."<sup>41</sup> That is particularly true in cases like *Crawford*, in which there is relatively little evidence documenting either the burden on voters or the need for the challenged practice.<sup>42</sup> Where there is such an evidentiary vacuum, it is tempting for judges to indulge their own presumptions about how elections work, as did Judge Posner in the Seventh Circuit's decision in *Crawford*<sup>43</sup> and as did the Supreme Court in the *Purcell v. Gonzalez*<sup>44</sup> opinion regarding Arizona's voter ID law.<sup>45</sup>

This leads me to the most significant contribution of Professor Elmendorf's article: his suggestion of a "danger signs" approach that courts should adopt in cases where hard evidence on the effect of the challenged practice is lacking.<sup>46</sup> Critical among these "danger signs" is the extent to which a practice can be expected to have a skewing effect on the electorate. As he and I have jointly argued in our *Crawford* brief, this would include the extent to which a particular practice can be expected to have a skewing effect on the composition of the electorate, to the disadvantage of groups defined by common political interests.<sup>47</sup> To the extent that a certain group of voters, already underrepresented in the electorate, are less likely to have the required ID, we can expect their participation to be more heavily burdened. Especially when the affected group tends to vote *against* the party that

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<sup>41</sup> Elmendorf, *supra* note 1, at 379.

<sup>42</sup> See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951-52 (7th Cir. 2007) ("There is not a single plaintiff who intends not to vote because of the new law . . .").

<sup>43</sup> See *id.* at 951 (attempting to explain why even some eligible voters do not cast a ballot).

<sup>44</sup> See 127 S. Ct. 5, 7 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to stay away from the polls.").

<sup>45</sup> My criticism of the Seventh Circuit's opinion in *Crawford* and the Supreme Court's opinion in *Purcell* may be found in Tokaji, *supra* note 2, at 1086-93.

<sup>46</sup> See *supra* note 9.

<sup>47</sup> See *supra* note 37.

adopted the challenged regulation, there is particular reason for suspicion and thus a stronger argument for strict scrutiny.

While Professor Elmendorf's "danger signs" approach is a major contribution to the development of a constitutional standard for election administration disputes, I am somewhat less sanguine than he on the extent to which this will stop judges from deciding cases based on hunch and anecdote. This leads me to regard with some skepticism his suggestion that trial courts' assessments of burden severity should be reviewed *de novo*.<sup>48</sup> Election administration cases are by their nature fact intensive, particularly when it comes to measuring the burdens on voters. Appellate judges are far afield from the day-to-day realities of election administration, as compared with trial judges who may at least hear such evidence, and thus must rely more on their own gut-level or ideological presumptions. This is not to deny that there should be some appellate review of trial court factual determinations. But I doubt whether vesting factfinding authority in appellate rather than district judges will do anything to diminish the appearance or reality of partisanship in judicial decision making; if anything, I would expect such a reallocation of authority to increase it.

In the long run, I suspect that improving judicial review of election administration will turn less on the constitutional standards set by appellate courts than on the processes that are in place for achieving such review. It is always a temptation for lawyers to retreat to process when substantive problems seem intractable. Still, there are some improvements in the process for adjudicating disputes over the administration of elections that should find agreement across the ideological spectrum. One is to encourage pre-election litigation rather than post-election litigation. Resolving disputes well in advance of elections can clarify the rules of the game and reduce the risks of another protracted post-election fight like that which occurred in 2000.<sup>49</sup>

Another procedural improvement would involve the creation of specialized election courts, as my colleague Professor Ned Foley has urged.<sup>50</sup> It is conceivable that courts of limited subject matter jurisdiction might be created, either at the state or the federal level, to reduce

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<sup>48</sup> Elmendorf, *supra* note 1, at 392.

<sup>49</sup> For more on the relative advantages of pre-election litigation, see Tokaji, *supra* note 15, at 1243-44; see also Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 3 (2007) (arguing that *Purcell* is "exceedingly troublesome" to the extent that it discourages pre-election litigation).

<sup>50</sup> See Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 376-79 (2007) (suggesting a blueprint for how special election courts might be constituted).

the likelihood of partisanship and thus increase the neutrality of decision making in this area. Finally, we should look further down the food chain, to the state and local institutions that actually have street-level responsibility for running elections. As Professor Steve Huefner, Professor Foley, and I argue in our recent book on the election systems of five midwestern states, these institutions play a critical role in our elections; yet there is good reason to worry whether they are discharging their responsibilities in the evenhanded manner that we all would like.<sup>51</sup> These institutions might be restructured to promote nonpartisan decision making, possibly with a model of judicial review borrowed from administrative law to ensure compliance with constitutional and statutory norms.

All these ideas need much greater elaboration. They certainly do not obviate the need, which Professor Elmendorf's article properly recognizes, to clarify the constitutional standard applicable to election administration cases. In the long run, however, improving the administration of American elections probably depends less on honing the standards governing judicial review than on reforming the institutions that actually run elections and the processes through which election disputes are resolved.

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<sup>51</sup> See STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 165-66 (2007) (noting that states with weak "election ecosystems" often have "individualist political culture[s]" that are "less attentive to procedural fairness, and may sometimes lose sight of the public interest in matters of election administration").