

# **COLVIN V. BRUNNER: THE SHIFTING DEFINITION OF “QUALIFIED ELECTOR” AND VOTER FRAUD IN OHIO**

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## I. INTRODUCTION

Voter fraud and the threat of election theft is an ever-present concern in American politics.<sup>1</sup> Even though these issues go back to the foundation of our democracy,<sup>2</sup> the events in Florida surrounding the 2000 presidential election have brought arguments over election theft and voter fraud to the center of partisan battles for political power.<sup>3</sup>

Ohio, in particular, has been a crucial battleground in recent presidential elections. The conventional wisdom in the 2008 presidential election said that no Republican could win the White House without carrying Ohio,<sup>4</sup> and given the realities of the Electoral College, this turned out to be an accurate assessment.<sup>5</sup> Considering the importance of Ohio and the problems (both real and perceived) the state had in the 2004 presidential election,<sup>6</sup> it is not surprising that fear about voter fraud and a stolen election in Ohio was a highly publicized issue preceding the 2008 election.

These fears played out in a legal battle between Ohio Secretary of State, Jennifer Brunner,<sup>7</sup> and Ohio Republican legislators, led by Kevin

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<sup>1</sup> See TRACY CAMPBELL, *DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742-2004* 8 (2005); ANDREW GUMBEL, *STEAL THIS VOTE: DIRTY ELECTIONS AND THE ROTTEN HISTORY OF DEMOCRACY IN AMERICA* xvi (2005); see also Bob Ponting, *Election Fraud in 2008? History Abounds with Voting Scandals*, THEPITTSBURGHCHANNEL.COM, Oct. 28, 2008, <http://www.thepittsburghchannel.com/politics/17822661/detail.html> (a less lengthy but equally interesting discussion).

<sup>2</sup> Ponting, *supra* note 1.

<sup>3</sup> Richard L. Hasen, *Eight Years After Bush v. Gore, Why Is There Still So Much Election Litigation and What Does This Mean for Voter Confidence in the Electoral Process?*, FINDLAW, Oct. 20, 2008, [http://writ.news.findlaw.com/commentary/20081020\\_hasen.html](http://writ.news.findlaw.com/commentary/20081020_hasen.html); see *Bush v. Gore*, 531 U.S. 98, 100-01 (2000).

<sup>4</sup> Frank Luntz, Op-Ed., *A GOP Comeback Strategy*, L.A. TIMES, July 15, 2007, at M4.

<sup>5</sup> See *President Map*, N.Y. TIMES, Dec. 9, 2008, <http://elections.nytimes.com/2008/results/president/map.html>.

<sup>6</sup> Robert F. Kennedy, Jr., *Was the 2004 Election Stolen?*, ROLLING STONE, June 15, 2006, at 46; Mark Crispin Miller, *None Dare Call It Stolen: Ohio, the Election, and America's Servile Press*, HARPER'S MAGAZINE, Aug. 1, 2005, at 39.

<sup>7</sup> Jennifer Brunner, Ohio Secretary of State, <http://www.sos.state.oh.us/> (last visited Mar. 1, 2010).

DeWine, who at the time was the Speaker Pro Tempore of Ohio's House of Representatives and Deputy Chairman of the Ohio Republican Party.<sup>8</sup> When the Ohio General Assembly passed Substitute House Bill Number 234 on September 19, 2005, becoming effective on January 27, 2006, Ohio law changed so that any "qualified elector" could vote by absentee ballot.<sup>9</sup> This change did away with the previous law that required a valid excuse to vote by absentee ballot.<sup>10</sup> On its own, this was a relatively innocuous and uncontroversial change in Ohio's election law, but in combination with the voter registration deadline,<sup>11</sup> the mix became explosive.

For the 2008 presidential election, the deadline to register to vote in Ohio was thirty days before the election (October 6, 2008),<sup>12</sup> but absentee ballots had to be ready for voters thirty-five days before the election (by September 30, 2008).<sup>13</sup> This created an overlap period during which voters could register to vote, and when done in person at the board of elections, voters could also receive an absentee ballot at the same time.<sup>14</sup> In effect, same-day voter registration, which was otherwise impermissible,<sup>15</sup> became legal in Ohio. Even though this overlap period had existed for years,<sup>16</sup> the use only came to the forefront because of its combination with no-fault absentee voting, and a high-stakes presidential election where Ohio was a crucial swing state.<sup>17</sup>

Republicans argued that the Democratic Secretary of State, Jennifer

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<sup>8</sup> Ohio Republican Party, Party Leadership, [http://www.ohiogop.org/party\\_leadership](http://www.ohiogop.org/party_leadership) (last visited Mar. 1, 2010).

<sup>9</sup> Memorandum to Directive 2008-63 from Jennifer Brunner, Ohio Sec'y of State, to All Counties; BOE Contacts, (Aug. 13, 2008), *available at* <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-63.pdf> [hereinafter Memorandum to Directive 2008-63]; *see also* OHIO REV. CODE ANN. § 3509.02(A) (West 2007 & Supp. 2009).

<sup>10</sup> *See* OHIO REV. CODE ANN. § 3509.02(A) (2005) (amended 2006).

<sup>11</sup> OHIO REV. CODE ANN. § 3503.19(A) (2007 & Supp. 2009) (dealing with voter registration deadlines).

<sup>12</sup> Directive 2008-63 from Jennifer Brunner, Ohio Sec'y of State, to All County Boards of Elections (Aug. 13, 2008), *available at* <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-63.pdf> [hereinafter Directive 2008-63]; *see also* OHIO REV. CODE ANN. § 3503.19(A) (2007 & Supp. 2009).

<sup>13</sup> Directive 2008-63, *supra* note 12; *see also* OHIO REV. CODE ANN. § 3509.01 (2007).

When the voter registration deadline falls on a weekend or holiday and when a public office in which an act is to be performed is closed for the day, the deadline extends to the first business day the public office is open. In 2008, the voter registration deadline is Sunday, October 5, 2008, extending the deadline to Monday, October 6, 2008.

Directive 2008-91 from Jennifer Brunner, Ohio Sec'y of State, to All Country Boards of Elections, n.1 (Sept. 11, 2008), *available at* <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-91.pdf> [hereinafter Directive 2008-91].

<sup>14</sup> Directive 2008-63, *supra* note 12; Directive 2008-91, *supra* note 13.

<sup>15</sup> Ohio Republican Party, Brunner Advocates Violating State Election Law, <http://www.ohiogop.org/press/articles/2008/08/brunner-advocates-violating-state-election-law> (last visited Aug. 14, 2008); *see also* OHIO REV. CODE ANN. tit. XXXV.

<sup>16</sup> Directive 2008-91, *supra* note 13.

<sup>17</sup> Luntz, *supra* note 4, at M4.

Brunner, was breaking the law,<sup>18</sup> and Democrats claimed that Republicans were attempting to suppress legitimate voter turnout.<sup>19</sup> The courts, as they have in so many other political battles during recent election seasons, decided this political fight.<sup>20</sup> For this particular issue, the case of *Colvin v. Brunner* was brought directly before the Ohio Supreme Court.<sup>21</sup>

Despite the political pressure surrounding the issue, the Court made the correct decision in *Colvin v. Brunner*. This decision shifted the meaning of qualified elector under Ohio law, but the practical effects of this change were very limited, and Republican fears about the overlap period never materialized. It also highlighted the reality that the concern about voter fraud was a political issue rather than a legal one. Finally, the decision brought up the issue of whether new changes in Ohio's election laws are necessary, and the conclusion that Ohio would be better served by election law stability as opposed to more legislative changes.

Section II begins with a summary of the law on the overlap period prior to the ruling in *Colvin v. Brunner* and of the issue considered in that decision. Section II will then address the arguments made to the Court by the two parties and review the Court's decision. Section III focuses on how the meaning of qualified elector shifted in Ohio's election law, how the fears that drove Republicans to file the case in the first place never materialized, and how the purely political issue of voter fraud was used in the case. Section III ends with recommendations for relatively minor changes in Ohio's election law, but more importantly, with recommendations for stability.

## II. BACKGROUND

This background addresses two main issues. First, what was the state of the law prior to *Colvin v. Brunner*? Second, what were the arguments made by the parties in that case, and what was the Court's decision?

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<sup>18</sup> See Ohio Republican Party, *supra* note 15.

<sup>19</sup> Editorial, *Suppressing the Vote*, THE BLADE (Toledo), Aug. 21, 2008, <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20080821/OPINION02/808210310> [hereinafter Editorial, *Suppressing the Vote*].

<sup>20</sup> Amy Merrick, *Campaign '08: Ohio Republicans Use Lawsuit to Fight for State's Crucial Votes*, WALL ST. J., Sept. 13, 2008, at A6.

<sup>21</sup> See *State ex rel. Colvin v. Brunner*, 896 N.E.2d 979, 982 (Ohio 2008). There were two other court actions that peripherally dealt with this overlap issue, *Project Vote v. Madison County Board of Elections* and *Ohio Republican Party v. Brunner*. This comment focuses on *Colvin v. Brunner*, as it was decided by the Ohio Supreme Court and it dealt most directly and forcefully with the overlap issue. See *Project Vote v. Madison County Bd. of Elections*, No. 1:08-cv-2266-JG, 2008 WL 4445176, at \*1 (N.D. Ohio Sept. 29, 2008); *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957, 960 (S.D. Ohio 2008). See Election Law @ Moritz, <http://moritzlaw.osu.edu/electionlaw/litigation/projectvotev.madisoncty.php> (last visited Mar. 1, 2010), for complete information on *Project Vote*. See also Election Law @ Moritz, <http://moritzlaw.osu.edu/electionlaw/litigation/ohiorepublicanpartyv.brunner.php> (last visited Mar. 1, 2010), for complete information on *Brunner*.

A. *The Law Prior to Colvin v. Brunner*

The Ohio Supreme Court's decision in *Colvin v. Brunner* did not result in broad and wide-ranging changes in Ohio's election law, but the result was significant nonetheless.<sup>22</sup> Given the narrow change, Ohio's election law has remained largely the same.<sup>23</sup> It is therefore important to know the state of the law prior to *Colvin v. Brunner* to understand fully the decision's effects.

Two points of law were crucial to understanding the legal controversy regarding the overlap period: (1) the process of applying to receive an absentee ballot and (2) the language of who exactly is a qualified elector under Ohio law. Deciding precisely when one becomes a qualified elector, and therefore, when one is able to apply to receive an absentee ballot, was the determining factor in *Colvin v. Brunner*.

The Ohio Constitution states that to vote in Ohio one must be a qualified elector.<sup>24</sup> More specifically, it states:

Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections.<sup>25</sup>

Parsing this language and breaking it down into its constituent elements, four requirements of a qualified elector are identifiable.<sup>26</sup>

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<sup>22</sup> See *Colvin*, 896 N.E.2d at 992.

<sup>23</sup> See *id.*

<sup>24</sup> OHIO CONST. art. V, § 1.

<sup>25</sup> *Id.* This language is echoed in statute:

Every citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote for thirty days, has the qualifications of an elector and may vote at all elections in the precinct in which the citizen resides.

OHIO REV. CODE ANN. § 3503.01(A) (Supp. 2009). The Ohio Revised Code further states that an “[e]lector” or “qualified elector” means a person having the qualifications provided by law to be entitled to vote.” *Id.* § 3501.01(N). The Code also says, “[v]oter” means an elector who votes at an election.” *Id.* § 3501.01(O).

<sup>26</sup> OHIO CONST. art. V, § 1; see OHIO REV. CODE ANN. § 3503.01(A) (Supp. 2009). First, every Ohio voter must be a citizen of the United States; second, the voter must be eighteen years of age; third, the voter must be a resident (of the state, the county, and the precinct where she intends to vote) for thirty days prior to the election; and fourth, the voter must be “registered to vote for thirty days.” OHIO CONST. art. V, § 1; OHIO REV. CODE ANN. § 3503.01(A) (Supp. 2009). In addition to these requirements, but unimportantly for this comment's purposes, “[a]ny elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.” OHIO CONST. art. V, § 1. Moreover, one must not be “incarcerated (in prison or jail) for a felony conviction under the laws of this state, another state or the United States”; one must not have “been declared

However, the most important requirement for this discussion is that the voter must be “registered to vote for thirty days.”<sup>27</sup>

For absentee voting, “[a]ny qualified elector may vote by absent voter’s ballots at an election.”<sup>28</sup> This language comes from the “no-fault” absentee voting statute.<sup>29</sup> It simply allows anyone who is otherwise qualified to vote via absentee ballot.<sup>30</sup> In contrast, prior to January 27, 2006, when Substitute House Bill Number 234 went into effect, the previous statute had many restrictions about whom the law allowed to vote by absentee ballot.<sup>31</sup>

Absentee voting actually occurs in three phases.<sup>32</sup> The first phase is applying to receive an absentee ballot.<sup>33</sup> The second phase is when the voter marks and returns the absentee ballot.<sup>34</sup> The final phase is the receipt and processing of the absentee ballot.<sup>35</sup> It is the first phase, applying to receive

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incompetent for voting purposes by a probate court”; and one must not have “been permanently disenfranchised for violations of the election laws.” Ohio Secretary of State, Voter Registration, <http://www.sos.state.oh.us/SOS/elections/voterInformation/regToVote.aspx> (last visited Mar. 1, 2010); see also OHIO REV. CODE ANN. §§ 3503.18, 3503.21 (2007).

<sup>27</sup> OHIO CONST. art. V, § 1; OHIO REV. CODE ANN. § 3503.01(A).

<sup>28</sup> OHIO REV. CODE ANN. § 3509.02(A).

<sup>29</sup> Brief of Jennifer Brunner, Sec’y. of State at 1, State *ex rel.* Colvin v. Brunner, 896 N.E.2d 979 (Ohio 2008) (No. 08-1813); see also Directive 2008-82 from Jennifer Brunner, Sec’y of State, to All County Boards of Elections, Members, Directors, and Deputy Directors (Sept. 5, 2008), available at <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-82.pdf> [hereinafter Directive 2008-82]. It is called “no-fault” absentee voting because no excuse is required.

<sup>30</sup> Brief of Jennifer Brunner, *supra* note 29, at 1; see also Directive 2008-82, *supra* note 29.

<sup>31</sup> Memorandum to Directive 2008-63, *supra* note 9. The language of the previous version of the statute read as follows:

Any qualified elector who meets any of the following qualifications may vote by absent voter’s ballots at an election:

(1) The elector is sixty-two years of age or older. (2) The elector’s employment as a full-time fire fighter, full-time peace officer as defined in division (B) of section 2935.01 of the Revised Code, or full-time provider of emergency medical services may prevent the elector from voting at the elector’s polling place on the day of the election. (3) The elector is a member of the organized militia, serving on active duty within this state, and will be unable to vote on election day on account of that active duty. (4) The elector will be absent from the elector’s polling place on the day of an election because of the elector’s entry or the entry of a member of the elector’s family into a hospital for medical or surgical treatment. (5) The elector is confined in a jail or workhouse under sentence for a misdemeanor or is awaiting trial on a felony or misdemeanor charge. (6) The elector will be unable to vote on the day of an election on account of observance of the elector’s religious belief. (7) The elector will be absent from the county in which the elector’s voting residence is located on the day of an election. (8) The elector has a physical disability, illness, or infirmity.

OHIO REV. CODE ANN. § 3509.02(A) (Lexis 2005) (amended 2006).

<sup>32</sup> See Directive 2008-82, *supra* note 29.

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

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* In her brief, Secretary Brunner adds the step of “verification of the absentee ballot application,” between the first and second steps outlined here. Brief of Jennifer Brunner, *supra* note 29, at 4. Although this is noteworthy, it is not the focus of this comment.

an absentee ballot, which is most crucial to this comment.

To receive an absentee ballot, one must first apply for such a ballot.<sup>36</sup> Ohio law states, “any qualified elector desiring to vote absent voter's ballots at an election shall make written application for those ballots to the director of elections of the county in which the elector's voting residence is located.”<sup>37</sup> Anyone making an application to receive an absentee ballot must provide certain information.<sup>38</sup> Such information is nearly identical to the information that is required to register to vote, namely the voter's name, address, date of birth, and signature.<sup>39</sup>

The critical information required is a “statement that the person requesting the ballots is a qualified elector.”<sup>40</sup> It is this language, the language of who exactly is a qualified elector, which is at the heart of this issue. Article V, section 1 of the Ohio Constitution and section 3503.01 of the Ohio Revised Code both state that to be a qualified elector, one must be registered to vote for thirty days.<sup>41</sup> Does this also mean that one must be registered to vote for thirty days before one may receive or make an application to receive an absentee ballot under Ohio law?

If being a qualified elector for the purposes of receiving an absentee ballot includes being registered to vote for thirty days, then the overlap period where one may register *and* vote by absentee ballot at the same time is a violation of Ohio law.<sup>42</sup> Moreover, if this is a violation of law, then the voter attempting it, along with the Secretary of State and the boards of elections workers who allowed it to happen, are potentially guilty of a felony of the fifth degree.<sup>43</sup>

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<sup>36</sup> OHIO REV. CODE ANN. § 3509.03 (Supp. 2009).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; *id.* § 3503.14(A). Only the current date is omitted here from the otherwise identical requirements needed to register to vote. Also, as with the requirements needed to register, the voter must provide one of the following forms of identification: (1) the voter's driver's license number; (2) the last four digits of the voter's social security number; (3) a copy of the voter's current and valid photo identification; (4) a copy of a military identification; or (5) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. *Id.* § 3509.03. This is in addition to information identifying the election the voter wishes to vote in, and a return mailing address if the voter wishes to have the ballot mailed to his or her residence. *Id.* These identification requirements present a host of special complications, but such a discussion is beyond the scope of this comment.

<sup>40</sup> OHIO REV. CODE ANN. § 3509.03(G) (2007).

<sup>41</sup> “Every citizen . . . who . . . has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections.” OHIO CONST. art. V, § 1. “Every citizen . . . who . . . has been registered to vote for thirty days, has the qualifications of an elector . . . .” OHIO REV. CODE ANN. § 3503.01(A) (Supp. 2009).

<sup>42</sup> Merit Brief of Relators Rhonda L. Colvin and C. Douglas Moody at 6, *State ex rel. Colvin v. Brunner*, 896 N.E.2d 979 (Ohio 2008) (No. 08-1813) [hereinafter Merit Brief of Relators].

<sup>43</sup> *Id.* at 6, 17, 18; OHIO REV. CODE ANN. § 3599.11.

### B. *The Issues Addressed in Colvin v. Brunner*

On August 13, 2008, Jennifer Brunner, the Ohio Secretary of State, issued Directive 2008-63 and an accompanying memorandum.<sup>44</sup> This Directive, along with Directive 2008-91 of September 11, 2008, that qualified the necessary procedures, required Ohio's boards of elections to "immediately register the applicant and issue an absentee ballot to the newly registered elector of the county at the time of registration" during the overlap period.<sup>45</sup> These directives spurred the Ohio Republican Party ("ORP") into action.<sup>46</sup>

The crucial questions decided in *Colvin v. Brenner* were a determination of when a voter becomes a qualified elector and whether a voter must be registered for thirty days *before* he or she may submit an application to receive an absentee ballot.<sup>47</sup> The ORP's two main arguments related to statutory interpretation of Ohio law<sup>48</sup> and the likelihood that voter fraud would result from the overlap period.<sup>49</sup> Ohio Secretary of State Brunner's main argument also relied on statutory interpretation,<sup>50</sup> but she supplemented that with concern over violations of federal law.<sup>51</sup>

#### 1. The Republican Position

In its brief filed with the Ohio Supreme Court on September 22, 2008, the ORP laid out several arguments to the Court,<sup>52</sup> but only two are notable for the purposes of this comment. The most important proposition was based on the statutory interpretation of the term qualified elector,<sup>53</sup> as

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<sup>44</sup> Memorandum to Directive 2008-63, *supra* note 9; Directive 2008-63, *supra* note 12. The Ohio Secretary of State has the responsibility of issuing "instructions by directives and advisories . . . to members of the boards as to the proper methods of conducting elections," preparing "rules and instructions for the conduct of elections," prescribing "the form of registration cards, blanks, and records," and compelling "the observance by election officers in the several counties of the requirements of the election laws." OHIO REV. CODE ANN. § 3501.05(B), (C), (F), (M) (Supp. 2009); *see also id.* § 3501.053(A).

<sup>45</sup> Memorandum to Directive 2008-63, *supra* note 9; Directive 2008-63, *supra* note 12; Directive 2008-91, *supra* note 13.

<sup>46</sup> Merrick, *supra* note 20; *see Colvin*, 896 N.E.2d at 982-83.

<sup>47</sup> *Colvin*, 896 N.E.2d at 982.

<sup>48</sup> Merit Brief of Relators, *supra* note 42, at 5-6, 10-13.

<sup>49</sup> *Id.* at 14-15.

<sup>50</sup> Brief of Jennifer Brunner, *supra* note 29, at 3, 23-28.

<sup>51</sup> *Id.* at 2-3, 14-23.

<sup>52</sup> *See* Merit Brief of Relators, *supra* note 42, at 6; *see also* Reply Brief of Amicus Curiae Representative Larry Wolpert at 5-6, *State ex rel. Colvin v. Brunner*, 896 N.E.2d 979 (Ohio 2008) (No. 08-1813); Reply Brief of Relators at 1-2, *State ex rel. Colvin v. Brunner*, 896 N.E.2d 979 (Ohio 2008) (No. 08-1813). These sources also presented other arguments. First, an argument based on the legal opinions of county prosecuting attorneys that advise local county boards of elections was presented. Merit Brief of Relators, *supra* note 42, at 6-8, 19-22. Next, an argument based on the necessities of the voter verification process was presented. *Id.* at 13-14. Finally, an argument referring to the legislative history surrounding the passage of the bill that created the overlap was made. Reply Brief of Amicus Curiae Representative Larry Wolpert, *supra*, at 4-7.

<sup>53</sup> Merit Brief of Relators, *supra* note 42, at 5-6, 10-13.

introduced above.<sup>54</sup> The second proposition addressed concerns about voter fraud.<sup>55</sup>

a. Statutory Interpretation of Ohio Law

While the Secretary of State is Ohio's chief election officer, she is nonetheless obliged to follow the Ohio Constitution and state statutory provisions.<sup>56</sup> Following the language of Article V, section 1 of the Ohio Constitution and the language of section 3503.01 of the Ohio Revised Code, both of which state that a qualified elector must be registered to vote for thirty days, the ORP contended that "[u]nder Ohio's statutes and Constitution, in order to be a 'qualified elector' one must first be registered for 30 days."<sup>57</sup> Statutory language also states that while any qualified elector may vote by absentee ballot, in order to *request* an absentee ballot, one must first be a qualified elector.<sup>58</sup> It therefore follows that one may only vote by absentee ballot if that person has been registered for thirty days at the time the person applies to receive an absentee ballot.<sup>59</sup> Conversely, one who is newly registered may not vote by absentee ballot (at least until thirty days after the date of registration).<sup>60</sup>

Furthermore, on the absentee ballot form prescribed by the Secretary of State and used to request an absentee ballot, the voter must attest that he is a qualified voter.<sup>61</sup> The ORP contended that this qualification should be measured "at the time he requests an absent voter's ballot."<sup>62</sup> Because any person who "commits election falsification is guilty of a felony of the fifth degree," any "citizens who are not qualified electors or voters, but nevertheless request an absentee ballot by attesting to being a qualified voter, are potentially guilty of a felony."<sup>63</sup> In short, the ORP argued that "the Secretary ha[d] used Directive 2008-63 to order that boards of elections permit 'same day' registration and voting."<sup>64</sup> This order ignored the constitutional and statutory requirements that "a resident must be registered to vote for thirty days, i.e. be a qualified elector, before a board of

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<sup>54</sup> See *supra* Part II.A.

<sup>55</sup> Merit Brief of Relators, *supra* note 42, at 14-15.

<sup>56</sup> OHIO REV. CODE ANN. § 3501.04; Merit Brief of Relators, *supra* note 42, at 3, 10.

<sup>57</sup> Merit Brief of Relators, *supra* note 42, at 1; see also OHIO CONST. art. V, § 1; OHIO REV. CODE ANN. § 3503.01(A) (Supp. 2009)

<sup>58</sup> OHIO REV. CODE ANN. § 3509.02(A) (2007 & Supp. 2009); *id.* § 3509.03; Merit Brief of Relators, *supra* note 42, at 12.

<sup>59</sup> Merit Brief of Relators, *supra* note 42, at 13.

<sup>60</sup> *Id.*

<sup>61</sup> OHIO SECRETARY OF STATE, FORM NO. 11-A, APPLICATION FOR ABSENT VOTER'S BALLOT (Aug. 2008), available at <http://www.sos.state.oh.us/sos/upload/elections/forms/11-A.pdf>. While statutory law states that "[t]he application need not be in any particular form," the Secretary provides one for voters' convenience. OHIO REV. CODE ANN. § 3509.03; Directive 2008-82, *supra* note 29.

<sup>62</sup> Merit Brief of Relators, *supra* note 42, at 5-6;

<sup>63</sup> *Id.* at 6 (citing FORM NO. 11-A, *supra* note 61).

<sup>64</sup> *Id.* at 11.

elections can issue an absentee ballot to the person.”<sup>65</sup> Thus, the ORP argued the Secretary’s directives led to violations of Ohio election law in three respects.<sup>66</sup>

First, the Directive encourages a person to appear at the board of elections and simultaneously submit an application to register to vote and a request for an absent voter’s ballot, even though such person is not a qualified elector or voter. Second, in order to request an absent voter’s ballot, the Directive encourages a citizen to falsely attest that he is a qualified elector or voter. Third, contrary to Ohio election law, the Directive requires election officials to issue an absent voter’s ballot to applicants that officials know are not qualified electors.<sup>67</sup>

The key to the ORP’s argument was determining *when* to measure if a voter is a qualified elector. The question became whether qualification should be measured at each step of the electoral process or whether it should be measured based on the voter’s future status on Election Day. This sets up a choice. One can say either that a voter must be a qualified elector on Election Day or the voter must be a qualified elector at each step throughout the electoral process, such as when the voter applies to receive an absentee ballot.

#### b. Concern About Voter Fraud

The ORP based a second argument on the likelihood of voter fraud.<sup>68</sup> The relators, the individual Ohio voters who brought the case, had a legitimate concern about voter fraud in the form of having their own lawful votes “diluted by unlawful votes by unqualified electors.”<sup>69</sup> As evidence of this concern, the ORP submitted an Associated Press article that quoted Ohio Democratic Party Chairman Chris Redfern as asserting that “in Ohio ‘there are an additional 490,000 college students who can *register and vote on the same day*.’”<sup>70</sup> Additionally, the Wall Street Journal reported that “‘The Northeast Ohio Coalition for the Homeless, a Cleveland-based umbrella group for service providers, housing activists and others, is making plans to drive about 2,000 shelter residents to polling places during the

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 18.

<sup>67</sup> *Id.* at 18-19.

<sup>68</sup> Merit Brief of Relators, *supra* note, at 14. Recall that the ORP presented many other arguments, but they are not within the scope of this comment. *Supra* note 52.

<sup>69</sup> Merit Brief of Relators, *supra* note 42, at 14.

<sup>70</sup> *Id.* (emphasis in original) (quoting David Espo, *Democrats’ Advice for Obama: Tie McCain to Bush*, NEWSVINE, Sept. 10, 2008, [http://www.newsvine.com/\\_news/2008/09/10/1851026-democrats-advice-for-obama-tie-mccain-to-bush](http://www.newsvine.com/_news/2008/09/10/1851026-democrats-advice-for-obama-tie-mccain-to-bush)).

overlap period.”<sup>71</sup> According to the ORP, these comments showed intent to use the overlap period to encourage people to register “without regard to their actual residence and whether or not they are a qualified electors [sic] registered for at least 30 days prior to participating in the ballot process.”<sup>72</sup> The situation would therefore result in hundreds of thousands of unlawful votes being cast, “throwing the results of the general election into chaos.”<sup>73</sup>

## 2. Secretary of State Brunner’s Position

From Secretary Brunner’s point of view, the ORP was asking the Court to “judicially create a 30-day ‘waiting period’ before registered voters may receive an absentee ballot.”<sup>74</sup> Brunner argued that this was in direct opposition to state and federal law, which requires that “registered voters are immediately eligible to request and receive absentee ballots.”<sup>75</sup>

Secretary Brunner proposed two main arguments.<sup>76</sup> The Secretary’s first argument was simply that the ORP had misinterpreted the language of Ohio law and that misinterpretation would inevitably lead to absurd results.<sup>77</sup> The second argument was that even if the ORP had been correct, such an interpretation would have put “Ohio squarely in conflict with *federal law*,” which governed the 2008 election.<sup>78</sup> The result would have been violations of the Voting Rights Act of 1970, the National Voter Registration Act of 1993, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>79</sup>

### a. Statutory Interpretation of Ohio Law

Secretary Brunner’s position was that the ORP was simply incorrect in its interpretation of Ohio law,<sup>80</sup> and that absurd results would have

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<sup>71</sup> *Id.* at 15 (quoting Merrick, *supra* note 20).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Brief of Jennifer Brunner, *supra* note 29, at 6.

<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at 2-3.

<sup>77</sup> *Id.* at 3, 23-28.

<sup>78</sup> *Id.* at 2-3, 14-23 (emphasis in original).

<sup>79</sup> *Id.* In addition to these two main arguments, the Secretary also argued a lack of subject matter jurisdiction and that the equitable doctrine of laches should have been applied. *Id.* at 2, 6-14, 28-33. The court quickly dismissed both of these arguments, so they are not considered here. *Colvin*, 896 N.E.2d at 985, 987-88. The Secretary made a further argument that the ORP’s position violated the Uniformed and Overseas Citizens Absentee Voting Act; however, this largely mirrored points made in other arguments, and the court never addressed it, so it is not discussed here. Brief of Jennifer Brunner, *supra* note 29, at 2, 23; *see Colvin*, 896 N.E.2d at 979. The Secretary dealt with the ORP’s concerns about fraud by saying, “any unsupported claim that fraud might occur is not only completely unsupported by admissible evidence, it is also contradicted by Ohio’s statutory scheme which provides for checks and challenges against an absentee ballot in particular situations.” Brief of Jennifer Brunner, *supra* note 29, at 20-21. She further argued that, “unsubstantiated allegations of voter fraud, which serve to decrease confidence in the electoral system, have no place in a court of law, and particularly in this court.” *Id.* at 33-34.

<sup>80</sup> Brief of Jennifer Brunner, *supra* note 29, at 23.

followed if the Court had given that interpretation the force of law.<sup>81</sup> “The notion that a newly-registered voter must wait an additional 30 days to procure an absentee ballot is not merely unsupported by the Revised Code, it is contradicted by the plain language of the Code.”<sup>82</sup> In other words, the Secretary contended that the ORP was incorrect in its interpretation that a voter may not receive an absentee ballot until he or she has been registered for thirty days (the point at which a voter would reach the ORP’s definition of who is a qualified elector).<sup>83</sup> “The flaw in the analysis is that it reads words into the statute.”<sup>84</sup> While the Constitution and statute both state that a voter is a qualified elector if he or she has been registered to vote for thirty days,<sup>85</sup> nowhere does it state, “one must be registered for 30 days *at the time one receives one [sic] ballot.*”<sup>86</sup> At best, the law is ambiguous, “[a]nd if the law is ambiguous, it is well-established that the Courts must give deference to the interpretation of the Secretary, who is by statute the chief elections official in the state.”<sup>87</sup>

Secretary Brunner further pointed out an important piece of language in section 3503.06(A) of the Revised Code:

No person shall be entitled to vote at any election, or to sign or circulate any declaration of candidacy or any nominating, or recall petition, unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days *at the time of the next election.*<sup>88</sup>

Secretary Brunner contended that this confirmed, “the relevant date for testing the qualifications of an elector is Election Day.”<sup>89</sup> This interpretation was consistent with other applications of Ohio election law.<sup>90</sup> “For example, the relevant date for testing the qualifications of persons signing referendum petitions is the date the petition is filed, not the date the petition is signed.”<sup>91</sup> It follows that if one may sign a referendum petition without having been registered for thirty days, yet still do so as a qualified elector, then one may also receive an absentee ballot without having been registered for thirty days and also be a qualified elector in that situation.

Secretary Brunner further argued that other statutory language

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<sup>81</sup> *Id.* at 26.

<sup>82</sup> *Id.* at 23.

<sup>83</sup> *Id.* at 24.

<sup>84</sup> *Id.*

<sup>85</sup> OHIO CONST. art. V, § 1; OHIO REV. CODE ANN. § 3503.01.

<sup>86</sup> Brief of Jennifer Brunner, *supra* note 29, at 24 (emphasis in original).

<sup>87</sup> *Id.* (citing *State ex rel. Herman v. Klopffleisch*, 651 N.E.2d 995, 999 (Ohio 1995)).

<sup>88</sup> OHIO REV. CODE ANN. § 3503.06(A) (emphasis added).

<sup>89</sup> Brief of Jennifer Brunner, *supra* note 29, at 24.

<sup>90</sup> *Id.* at 25.

<sup>91</sup> *Id.* (citing *State ex rel. Oster v. Lorain County Bd. of Elections*, 756 N.E.2d 649 (Ohio 2001)).

supported her interpretation.<sup>92</sup> Ohio law states that, “[a]ny qualified elector may vote by absent voter’s ballots at an election,”<sup>93</sup> but voting does not occur when a voter receives an absentee ballot. Rather, “[t]he act of voting occurs only on Election Day, irrespective of when the voter mails or hands in the ballot.”<sup>94</sup> This would mean that a voter’s qualified status is only important in relation to Election Day.<sup>95</sup> Furthermore, if the voter submits a ballot but it is determined sometime before Election Day that the voter has failed to meet the registration requirements, the ballot will be disallowed, “just as any other improperly registered voter will be denied a ballot upon arrival at the polls.”<sup>96</sup>

According to Secretary Brunner, the ORP’s reading also led to absurdity in that if qualifications are determined when an absentee ballot is given, then that affects the ability to receive an absentee ballot entirely.<sup>97</sup> Taking into account the fact that a voter must have “been a resident of the state thirty days immediately preceding the election,”<sup>98</sup> no voter could ever be given an absentee ballot because there would be no possible way for an election official to determine positively that the voter will not move out of state sometime before Election Day.<sup>99</sup> In effect, the ORP’s position would mean that unless an election official could accurately predict the future, “the only time one could obtain an absent voter ballot would be on Election Day itself. Of course, the last day to obtain an absentee ballot is the day before Election Day.”<sup>100</sup>

The most significant result of the ORP’s interpretation would have been that every person who requests an absentee ballot would have to be registered to vote for thirty days prior to making that request.<sup>101</sup> Because voters began requesting applications for absentee ballots on January 1, 2008,<sup>102</sup> such a ruling could have retroactively voided applications made throughout the year.<sup>103</sup> This would have required “the county boards to undertake the massive job of examining *every* absentee ballot application to compare the date of the request with the date of registration.”<sup>104</sup> The boards would then have had to “notify the prospective voters that their absentee ballot requests had been voided, so that they could return to the Board and

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<sup>92</sup> *Id.*

<sup>93</sup> OHIO REV. CODE ANN. § 3509.02(A).

<sup>94</sup> Brief of Jennifer Brunner, *supra* note 29, at 25 (citing *Millseps v. Thompson*, 259 F.3d 535, 545-46 (6th Cir. 2001)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 26.

<sup>98</sup> OHIO REV. CODE ANN. § 3503.01.

<sup>99</sup> Brief of Jennifer Brunner, *supra* note 29, at 26.

<sup>100</sup> *Id.*

<sup>101</sup> See Merit Brief of Relators, *supra* note 42, at 2.

<sup>102</sup> OHIO REV. CODE ANN. § 3509.03(I); Brief of Jennifer Brunner, *supra* note 29, at 26-27.

<sup>103</sup> Brief of Jennifer Brunner, *supra* note 29, at 27.

<sup>104</sup> *Id.*

try to start the process over.”<sup>105</sup>

In conclusion, the Secretary stated:

It makes no sense to say that qualified elector status should be measured on the day the voter picks up the ballot. Being a qualified elector the day a person picks up the ballot does not guarantee he will be a qualified elector on Election Day. Qualified elector status must be measured on Election Day. Measuring electoral status on this earlier date, as [the ORP] suggest, is a fruitless exercise that adds no protection to the voting process and simply creates a needless obstacle to exercising the fundamental right to vote.<sup>106</sup>

#### b. Federal Law Violations

Secretary Brunner also made a series of arguments relating to violations of federal law that would have resulted if the Court followed the ORP’s statutory interpretation.<sup>107</sup> Federal law as well as Ohio law governed the 2008 presidential election, and although states have the power to regulate the “time, place, and manner” of elections,<sup>108</sup> this power is constrained by Congress’ authority to “make or alter such regulations.”<sup>109</sup> In particular, “Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law.”<sup>110</sup> “Here, the proposed state law—the 30-day absentee waiting period—squarely conflicts with multiple federal statutes, as well as the Fourteenth Amendment to the United States Constitution.”<sup>111</sup> In addition, “[b]ecause Congress has ordered that persons must be given an absentee ballot in any Presidential election at least seven days before the election, Ohio law must be read in such a manner as to comply with this requirement.”<sup>112</sup> Secretary Brunner went on to detail that if the ORP’s statutory interpretation had been followed, it would have resulted in violations of the Voting Rights Act of 1970,<sup>113</sup> the National Voter

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 28.

<sup>107</sup> *Id.* at 2-3, 14-23.

<sup>108</sup> *Id.* at 14 (quoting U.S. CONST. art. I, § 4, cl.1).

<sup>109</sup> Brief of Jennifer Brunner, *supra* note 29, at 14 (quoting U.S. CONST. art. I, § 2, cl.1).

<sup>110</sup> *Id.* (citing *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493, 509 (1989)).

<sup>111</sup> *Id.* at 14-15.

<sup>112</sup> *Id.* at 15.

<sup>113</sup> *Id.* at 15-16. The Voting Rights Act specifically states that voters must be allowed to vote in a presidential election as long as they are registered “not later than thirty days immediately prior to any presidential election.” 42 U.S.C. § 1973aa-1(d) (2006); Brief of Jennifer Brunner, *supra* note 29, at 15. The Act also states that any voter must be permitted to request an absentee ballot “not later than seven days” before a presidential election. 42 U.S.C. § 1973aa-1(d); *see* Brief of Jennifer Brunner, *supra* note 29, at 16. “If Ohio law were read in such a way as to mandate that a person be a registered voter for at least 30 days before obtaining an absentee ballot, Ohio law would violate the Voting Rights Act.” Brief of Jennifer Brunner, *supra* note 29, at 16.

Registration Act of 1993,<sup>114</sup> and two potential equal protection problems in violation of the Fourteenth Amendment.<sup>115</sup>

### 3. The Ruling of the Ohio Supreme Court

The Ohio Supreme Court held that Secretary Brunner:

correctly instructed boards of elections that an otherwise qualified citizen must be registered to vote for 30 days as of the date of the election at which the citizen offers to vote in order to be a qualified elector entitled to apply for and submit an absentee ballot at the election, and that the citizen need not be registered for 30 days before applying for, receiving, or completing an absentee ballot for the election.<sup>116</sup>

In other words, the Court rejected the ORP's interpretation and upheld the legality of the same-day registration overlap.<sup>117</sup>

In coming to this result, the Court relied on many points.<sup>118</sup> For the purposes of this comment, the most important of these points was the Court's analysis of the statutory language and a consideration of the likelihood of voter fraud.

#### a. Statutory Interpretation

The primary focus of the Court's decision was on statutory interpretation of Ohio law.<sup>119</sup> First, the Court noted that neither in Article V, section 1 of the Ohio Constitution nor in section 3503.01(A) of the Revised Code does it "expressly tie[] the 30-day registration period to any of the

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<sup>114</sup> Brief of Jennifer Brunner, *supra* note 29, at 16-17. In the National Voter Registration Act of 1993 ("NVRA"), Congress mandated that each state must allow voters to register up to thirty days before a federal election. 42 U.S.C. § 1973gg-6(a)(1)(A)-(B) (2006); Brief of Jennifer Brunner, *supra* note 29, at 17. The ORP's statutory interpretation would have conflicted "with the NVRA because it effectively requires some voters to register 31 days before Election Day." Brief of Jennifer Brunner, *supra* note 29, at 17.

<sup>115</sup> Brief of Jennifer Brunner, *supra* note 29, at 18-21. First, if a voter must be registered for at least thirty days before he or she can be given an absentee ballot, as the ORP contended, "such a durational residency requirement violates the Fourteenth Amendment and prior United States Supreme Court precedent" by "effectively creating a durational residency requirement for new voters who vote absentee that is greater than the requirement imposed on other Ohio citizens for voting absentee." *Id.* at 18. Second, if county boards of elections would have ignored the Secretary's directives, as the legal opinions of three corresponding county prosecuting attorneys suggested, there would have been a non-uniform application of Ohio election law creating "a situation . . . in which similarly situated individuals will be treated differently in violation of *Bush v. Gore*." *Id.* The issue of the county boards of elections and the county prosecuting attorneys' opinions that conflicted with Brunner's directives was dealt with extensively in *Project Vote*, 2008 WL 4445176, at \*1.

<sup>116</sup> *Colvin*, 896 N.E.2d at 982.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 992. The court identified ten overall points in favor of its holding. *Id.* at 988-92.

<sup>119</sup> *Id.* at 988-93.

dates [the ORP] advocate.”<sup>120</sup> In other words, the law does not explicitly say that one must be registered for thirty days before one may “apply for, receive, or submit absentee ballots.”<sup>121</sup> As a result, the Court noted, “[w]e cannot generally add a requirement that does not exist in the Constitution or a statute.”<sup>122</sup> Because of this lack of express language, the Court said that it could therefore apply the *in pari materia* rule of construction.<sup>123</sup>

Following this guidance, the Court closely examined the language of section 3503.06, which “specifies the registration and residency periods for voting and certain other acts by expressly providing that the determinative date for the 30-day registration requirement is ‘at the time of the next election.’”<sup>124</sup> Specifically, the statute says, “[n]o person shall be entitled to vote at any election . . . unless the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days *at the time of the next election*.”<sup>125</sup> Thus, Section 3503.06(A) provides that one must be registered for at least thirty days at the time of Election Day to be entitled to vote at that election.<sup>126</sup> The measuring point for being qualified is on Election Day. “Notably, R.C. 3503.06 makes no distinction between entitlement to vote in person or by absentee ballot at an election, so its plain, broad language must apply to both.”<sup>127</sup>

Similarly, the Court also recognized section 3503.07, which states that a person qualifies as an elector and may register as such once that person reaches “the age of eighteen years or more at the next ensuing November election.”<sup>128</sup> Once again, the statute measures the qualifying point in relation to Election Day<sup>129</sup> and not in relation to a floating thirty-day period as the ORP contended.

Section 3503.01 leads to a similar conclusion. “That statute specifies that one of the requirements for being a qualified elector is that the person ‘has been a resident of the state thirty days *immediately preceding the election at which the citizen offers to vote*’ . . . .”<sup>130</sup>

The Court also recognized a previous decision that held, “albeit in a different context, that a 30-day residency requirement need not be applied at

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<sup>120</sup> *Id.* at 988.

<sup>121</sup> *Id.*

<sup>122</sup> *Colvin*, 896 N.E.2d at 988.

<sup>123</sup> *Id.* “Under this rule, statutes that relate to the same subject matter must be construed in *pari materia* so as to give full effect to the provisions.” *Id.*

<sup>124</sup> *Id.* at 988-89 (quoting OHIO REV. CODE ANN. § 3503.06(A)) (emphasis in original).

<sup>125</sup> *Id.* at 989 (quoting OHIO REV. CODE ANN. § 3503.06(A)) (emphasis in original).

<sup>126</sup> OHIO REV. CODE ANN. § 3503.06(A).

<sup>127</sup> *Colvin*, 896 N.E.2d at 989.

<sup>128</sup> *Id.* (quoting OHIO REV. CODE ANN. § 3503.07).

<sup>129</sup> See OHIO REV. CODE ANN. § 3503.07; *Colvin*, 896 N.E.2d at 989.

<sup>130</sup> *Colvin*, 896 N.E.2d at 988 (quoting OHIO REV. CODE ANN. § 3503.01(A) (Supp. 2009)) (emphasis in original).

the time a candidate filed a statement of candidacy including a declaration under R.C. 3513.261 that the candidate ‘is an elector qualified to vote for the office the candidate seeks.’<sup>131</sup> Once again, the measuring point for qualification is Election Day.<sup>132</sup> As the Court stated, “the pertinent statutes do not prevent the date of the election from being used as the applicable date for the 30-day registration period . . . .”<sup>133</sup>

Next, the Court made it clear that “an elector who submits an absentee ballot does not actually vote at an election until the ballot is tabulated on election day [sic].”<sup>134</sup> “Therefore, an otherwise qualified elector is authorized by R.C. 3509.02(A) to vote by absentee ballot at the November 4 election as long as the elector will have been registered for 30 days by the date of the election.”<sup>135</sup>

Concluding its statutory interpretation, the Court acknowledged, “the secretary of state’s construction is consistent with our duty to liberally construe election laws in favor of the right to vote.”<sup>136</sup> The Court appeared to resort to this language almost as an afterthought, but it reads more like an exclamation point than a footnote.

#### b. The (Un)Likelihood of Fraud

The Court also briefly considered the likelihood of voter fraud.<sup>137</sup> While the threat of voter fraud is a prominent issue in the press, in the minds of the public, and in the rhetoric of the parties preceding this case,<sup>138</sup> it took up precious little space among the ORP’s other arguments,<sup>139</sup> and the Court reflected that in its opinion.<sup>140</sup> Because newspaper articles are “‘hearsay of the remotest character,’”<sup>141</sup> the Court stated, “we need not consider as evidence two newspaper articles submitted by [the ORP] to support their ‘concerns’ about fraud caused ‘by unlawful votes by unqualified electors,’ including college students and homeless people.”<sup>142</sup> As “neither college students nor homeless people are per se ineligible to vote,”<sup>143</sup> the ORP’s arguments about the likelihood of voter fraud were dismissed out of hand and given no weight whatsoever in the Court’s conclusion.<sup>144</sup>

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<sup>131</sup> *Id.* at 990 (quoting OHIO REV. CODE ANN. § 3513.261 (2007)).

<sup>132</sup> *See id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 989.

<sup>135</sup> *Id.*

<sup>136</sup> *Colvin*, 896 N.E.2d at 992.

<sup>137</sup> *Id.* at 991.

<sup>138</sup> *See* Editorial, *Suppressing the Vote*, *supra* note 19.

<sup>139</sup> *See* Merit Brief of Relators, *supra* note 42, at 14-15.

<sup>140</sup> *See Colvin*, 896 N.E.2d at 991.

<sup>141</sup> *Id.* (quoting *Heyman v. Bellevue*, 108 N.E.2d 161, 165 (Ohio 1951)).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at 991-92.

### III. ANALYSIS

Despite the political pressure to decide the case differently and despite a narrow four to three vote,<sup>145</sup> the Ohio Supreme Court made the correct decision in *Colvin v. Brunner*. First, the decision shifted the meaning of qualified elector under Ohio law, but the practical effects of this change were limited, and Republican fears about the overlap period never materialized. The decision also highlighted the reality that the stated concern about voter fraud was merely a political issue rather than a legal one. Second, the decision brings up the issue of whether new changes in Ohio's election laws are necessary, and it illuminates the fact that Ohio would be better served by election law stability as opposed to more legislative changes.

#### A. *The Implications of the Shifted Meaning of "Qualified Elector"*

The implications of the Ohio Supreme Court's decision in *Colvin v. Brunner* are subtle, but the change is important nonetheless. First, the Court has shifted and clarified the meaning of qualified elector within Ohio law.<sup>146</sup> This shift brings two of the ORP's questions immediately to mind (the same fears that caused the ORP to bring the case to court in the first place<sup>147</sup>). Did the overlap period increase voter turnout, and did the overlap result in widespread voter fraud?

##### 1. The Clarified Meaning of Qualified Elector

The shift in meaning of qualified elector under Ohio law has been slight, but the difference could influence future questions of law. The Court summarized this shift by stating, "an otherwise qualified citizen must be registered to vote for 30 days as of the election in which the citizen offers to vote in order to be a qualified elector, but need not be registered for 30 days before applying for, receiving, or completing an absentee ballot."<sup>148</sup> Inserting this language into the statutory definition of qualified elector, section 3503.01 of the Ohio Revised Code would read as follows:

Every citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote for thirty days [as of Election Day],

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<sup>145</sup> *Id.* at 992. Given the violations of federal law that would have resulted if the ORP had prevailed, it is surprising that the decision was so narrow.

<sup>146</sup> See *Colvin*, 896 N.E.2d at 982.

<sup>147</sup> Mark Niquette, *GOP Fear: Votes Cast Too Soon, Immediate Registration, Voting During 5-day Span Is at Issue*, COLUMBUS DISPATCH, Aug. 14, 2008, at 01A, available at 2008 WLNR 15323585.

<sup>148</sup> *Colvin*, 896 N.E.2d at 988.

has the qualifications of an elector and may vote at all elections in the precinct in which the citizen resides.<sup>149</sup>

It is not the definition of qualified elector that changed; rather, the Court clarified when the determination of qualification is to be measured. Qualification is measured in relation to Election Day. In *Colvin v. Brunner*, this means that qualification was not measured, as the ORP argued, when a voter submitted an absentee ballot, but rather, the qualification was measured based on when Election Day occurred.

A natural question raised by this decision is whether the Court engaged in judicial lawmaking. If one accepts the proposition that the duty of the judiciary is to say what the law is, not what the law should be, then it is possible to argue that the Court went beyond the bounds of its authority. In that sense, this is a classic dispute over the separation of powers between the courts, the legislature, and the executive. A pure argument over the proper role of the courts may have yielded a different result in this case. This consideration may provide an explanation for the three dissenting votes of the minority,<sup>150</sup> despite the fact that they focused on the idea that “[t]he act of voting occurs when a voter relinquishes dominion and control over a ballot,”<sup>151</sup> rather than the majority position that a vote is not actually cast until Election Day.<sup>152</sup> However, such a result, while perhaps preserving the ideological purity of the Court’s role, would have created serious ramifications for smooth administration of the election. Additionally, it almost certainly would have caused the decision to be appealed in the federal system because of the resulting violations of federal law as Secretary Brunner suggested in her arguments to the Court.<sup>153</sup>

## 2. Did the Overlap Period Increase Voter Turnout?

One of the ORP’s main fears, whether it was reflected in the legal arguments or not, was that the overlap period might increase voter turnout, especially among those who were likely to vote Democratic.<sup>154</sup> Did an increase in voter turnout result from the Court’s decision in *Colvin v. Brunner*?

In the 2008 presidential election, Republicans faced a perceived “enthusiasm gap” within the American electorate.<sup>155</sup> Given the fact that one

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<sup>149</sup> OHIO REV. CODE ANN. § 3503.01.

<sup>150</sup> *Colvin*, 896 N.E.2d at 992.

<sup>151</sup> *Id.* at 994 (O’Donnell, J., dissenting).

<sup>152</sup> *Id.* (O’Donnell, J., dissenting).

<sup>153</sup> Brief of Jennifer Brunner, *supra* note 29, at 2-3, 14-23.

<sup>154</sup> Philip Elliott, *Ohio Voting Law May Be a Boon for Obama Supporters*, COLUMBUS DISPATCH, Aug. 13, 2008, <http://www.dispatchpolitics.com/live/content/nationalworld/stories/2008/08/13/obohio.html?sid=101>.

<sup>155</sup> Michael Crowley, *McCain's Campaign Is in Danger of Fracturing*, GUARDIAN, Aug. 31, 2008, <http://www.guardian.co.uk/commentisfree/2008/aug/31/barackobama.johnmccain>.

million more Ohioans voted in the March 2008 Democratic presidential primary than on the Republican side,<sup>156</sup> many feared that an excited Democratic base, combined with the Obama campaign's well-funded get-out-the-vote operation, would overwhelm traditional Republican strength in Ohio with millions of newly registered voters.<sup>157</sup> The overlap period magnified this concern as it allowed supporters to be bussed directly from campaign rallies straight to boards of elections where they could register and vote simultaneously.<sup>158</sup> This was especially worrying for the ORP given Obama's two-to-one polling advantage over McCain among voters aged eighteen to thirty-four years old,<sup>159</sup> a demographic that is known for being notoriously difficult to register and even more difficult to turn out on Election Day.<sup>160</sup> Combined with the fact that there were more than 470,000 college students in Ohio at the time, ninety percent of whom were Ohio residents,<sup>161</sup> it is easy to understand why the ORP tried to shut down the overlap period. If the Obama campaign could have delivered the votes of even one-third of those 470,000 college students, that alone could have delivered a victory, considering that President George W. Bush won Ohio in 2004 by only 118,000 votes.<sup>162</sup>

Another part of what drove Republican fear of voter turnout and the overlap period was the reported numbers on early voters. It was widely reported that the party identifications of 30,000 Franklin County early voters were roughly fifty percent registered Democrats, forty-five percent unaffiliated, and only five percent registered Republicans.<sup>163</sup> Even considering the historical Republican strength with absentee ballots,<sup>164</sup> "registered Democrats still dominated the pre-election balloting by a 2-to-1 margin over registered Republicans."<sup>165</sup> Whether these numbers held up as true in the final analysis of the election is another matter, but the mere fact that it was so widely reported at the time was an indication of the fear that Republicans had about a seemingly unbeatable Obama get-out-the-vote operation.

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<sup>156</sup> Dan Balz, *Flip Side of Democrats' Spat: Higher Turnout*, WASH. POST, Mar. 26, 2008, at A08.

<sup>157</sup> Alec MacGillis, *Obama Camp Relying Heavily on Ground Effort*, WASH. POST ONLINE, Oct. 12, 2008, [http://www.washingtonpost.com/wp-dyn/content/article/2008/10/11/AR2008101102119.html?hpid=topnews&sid=ST2008101300691&s\\_pos](http://www.washingtonpost.com/wp-dyn/content/article/2008/10/11/AR2008101102119.html?hpid=topnews&sid=ST2008101300691&s_pos).

<sup>158</sup> Jim Provan, *Ohio GOP Sues to Block Early Voting: Secretary of State's Decision Claimed to Be Illegal*, THE BLADE (Toledo), Sept. 13, 2008, available at 2008 WLNR 17412481.

<sup>159</sup> Elliott, *supra* note 154.

<sup>160</sup> See Posting of Kos to Daily Kos, <http://www.dailykos.com/story/2004/11/2/225719/807> (Nov. 2, 2004 19:57 PST); see also Exit Poll Analysis Suggests Obama Victory Due to Surge in Youth and Minority Voting, <http://www.futuremajority.com/node/4087> (Nov. 25, 2008, 20:54).

<sup>161</sup> Elliott, *supra* note 154.

<sup>162</sup> *Id.*

<sup>163</sup> Walter Shapiro, *How Obama Might Just Win Ohio*, SALON.COM, Oct. 31, 2008, <http://www.salon.com/news/feature/2008/10/31/ohio>.

<sup>164</sup> Michael Moss, *Both Parties See New Promise When Ballot Is in the Mail*, N.Y. TIMES, Aug. 22, 2004, at 16.

<sup>165</sup> Shapiro, *supra* note 163.

Despite these apparently valid fears, the overlap period did not result in hundreds of thousands of Obama votes. In fact, only 13,141 Ohioans simultaneously registered and voted during the overlap period.<sup>166</sup> While a full analysis of Ohio's turnout numbers is beyond the scope of this comment, it may prove telling that 1.5 million people voted during the entire thirty-five day early voting period.<sup>167</sup> However, the vote total in the Ohio presidential election was over 5.7 million.<sup>168</sup> Consequently, the 13,141 votes that resulted from the overlap period were insignificant. In fact, the Obama campaign's overall get-out-the-vote effort was credited with delivering the state; twice as many Ohioans said they had been contacted by an Obama volunteer as said they had been contacted by a McCain supporter.<sup>169</sup> Taking these facts in conjunction with the apparent lack of enthusiasm and low turnout among McCain supporters,<sup>170</sup> it is easy to conclude that it would have been wiser for the ORP to deliver its base vote, rather than spending resources on legal battles and running television commercials criticizing Secretary Brunner who was not even on the ballot in 2008.<sup>171</sup>

### 3. Did the Overlap Period Result in Voter Fraud?

A second publicly voiced concern of the ORP was that the overlap period would result in instances of voter fraud.<sup>172</sup> The ORP feared that if a voter was able to register and cast a ballot on the same day that would open the door to fraud because there would not be enough time to process the new registration and verify that the vote was therefore valid.<sup>173</sup> Did actual voter fraud result from the overlap period and the decision of *Colvin v. Brunner*?

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<sup>166</sup> Terry Kinney, *About 200K Ohio Voters Have Records Discrepancies* (Oct. 15, 2008), <http://www.wcpo.com/news/local/story/About-200K-Ohio-Voters-Have-RecordsDiscrepancies/QxK648u6hEe2-bfeS2T8yw.csp>.

<sup>167</sup> Associated Press, *Ohio House Shrinks Early Voting Period* (Dec. 17, 2008), [http://www.nbc4i.com/cmh/news/local/local\\_govtpolitics/article/ohio\\_house\\_shrinks\\_early\\_voting\\_period/10786](http://www.nbc4i.com/cmh/news/local/local_govtpolitics/article/ohio_house_shrinks_early_voting_period/10786).

<sup>168</sup> Dennis J. Willard, *Ohio Needs to Overhaul Weak Voting System Now: Kilroy-Stivers Race Exposes Flaws in State's Current Election Process*, AKRON BEACON J., Jan. 25, 2009, <http://www.ohio.com/news/38289469.html>.

<sup>169</sup> Sam Dillon, *Election Results 2008: Ohio, State Highlights*, N.Y. TIMES, Dec. 9, 2008, <http://elections.nytimes.com/2008/results/states/ohio.html>.

<sup>170</sup> Mark Niquette, *Experts Confounded: Turnout Higher in Ohio in 2004*, COLUMBUS DISPATCH, Nov. 7, 2008, available at 2008 WLNR 21292590.

<sup>171</sup> Chisun Lee, *GOP Offers Scant Proof of Voter Fraud*, POLITICO.COM, Nov. 2, 2008, <http://www.politico.com/news/stories/1008/15155.html>; You Tube, *Fight Ohio Fraud*, <http://www.youtube.com/watch?v=FRtutvTMGycU> (last visited Mar. 3, 2009). Ironically, some credit the ORP's attacks on Brunner with raising her name recognition enough to declare her candidacy for the Senate seat vacated by outgoing Senator George Voinovich. Dennis J. Willard, *Race Crucial for Fisher, Brunner: Voters Know Little About Either Candidate*, AKRON BEACON J., Feb. 22, 2009, at B1, available at 2009 WLNR 3550640.

<sup>172</sup> Niquette, *supra* note 147.

<sup>173</sup> *Id.*

### a. The Hype Versus the Reality of Voter Fraud

Voter fraud, as politicians portray it, is not a reality in Ohio. The numbers are simply not there to back up the claims, and non-partisan experts are unanimous on this fact.<sup>174</sup> But what about the many political leaders who raised the specter of voter fraud during the run-up to the election<sup>175</sup> and called for investigations?<sup>176</sup> The typical sequence of events occurred as follows: high profile political leaders claimed that fraud was rampant,<sup>177</sup> concerned citizens who believed these claims made reports to their local authorities when they saw suspicious, but otherwise legal, electioneering activities;<sup>178</sup> local prosecutors began investigations to check these reports,<sup>179</sup> and completing the cycle, the same high-profile leaders who began the process cited to the prosecutors' investigations as proof that fraud was ongoing.<sup>180</sup> That was the completion of the political cycle perhaps, but the legal cycle continued, and the results of investigations were clear when they concluded that actual instances of fraud were exceedingly rare.<sup>181</sup>

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<sup>174</sup> S. REP. NO. 110-522, at 30 (2008); JUSTIN LEVITT, BRENNAN CENTER FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 3 (2007), available at [http://brennan.3cdn.net/e20e4210db075b482b\\_wcm6ib0hl.pdf](http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib0hl.pdf); LORRAINE C. MINNITE, PROJECT VOTE, THE POLITICS OF VOTER FRAUD 3 (2007); Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1; Jeffrey Toobin, *Poll Position*, NEW YORKER, Sept. 20, 2004, at 62; Joel Bleifuss, *The Fraudulence of Voter Fraud*, IN THESE TIMES, Apr. 18, 2007, [http://www.inthesetimes.com/article/3135/the\\_fraudulence\\_of\\_voter\\_fraud/](http://www.inthesetimes.com/article/3135/the_fraudulence_of_voter_fraud/); Daphne Eviatar, *A Myth of Voter Fraud*, WASH. INDEP., Oct. 28, 2008, <http://washingtonindependent.com/15217/voter-fraud/>; Rick Hasen, *Voting Rights Watch: New Senate Judiciary Report Reveals Right Over 'Voter Fraud'*, FACING SOUTH, Nov. 19, 2008, <http://www.southernstudies.org/2008/11/voting-rights-new-senate-judiciary.html>; Lee, *supra* note 171. The reporting on this issue, official and otherwise, is overwhelming. The inevitable conclusion is that voter fraud is simply not a reality as politicians claim.

<sup>175</sup> Suzanne Goldenberg, *Democrats Accused of Trying to Steal Election*, GUARDIAN, Oct. 8, 2008, at 17, available at <http://www.guardian.co.uk/world/2008/oct/15/uselections2008-democrats/>; Lee, *supra* note 171. Consider the following statements: Republican presidential candidate, John McCain, said that ACORN, the Association of Community Organizations for Reform Now, "is now on the verge of maybe perpetrating one of the greatest frauds in voter history in this country, maybe destroying the fabric of democracy." Paul Krugman, *The Republican Rump*, N.Y. TIMES, Nov. 3, 2008, at 31. John Fund, the well-known conservative political journalist and author, said, "fraudulent voters have already started to impact the presidential election." Phil Brennan, *John Fund: Fraudulently Registered Voters Do Vote*, NEWSMAX.COM, Oct. 23, 2008, [http://www.newsmax.com/insidecover/fund\\_fraudulent\\_voters/2008/10/23/143368.html](http://www.newsmax.com/insidecover/fund_fraudulent_voters/2008/10/23/143368.html). Ohio Republican Party Deputy Chairman Kevin DeWine said, "we will not stand by and allow Democrats to create illegal loopholes that allow the system to be exploited." Ohio Republican Party, *supra* note 15.

<sup>176</sup> Lee, *supra* note 171.

<sup>177</sup> *Id.*

<sup>178</sup> Kimball Perry, *Vote Fraud Claims Were Wrong: Deters' Charges Didn't Pan Out, Special Prosecutor Says*, CINCINNATI ENQUIRER, Jan. 28, 2009, at 1B, available at <http://news.cincinnati.com/article/20090128/NEWS01/901280317/1056/col02>; Michael D. O'Neil, Report of the Special Prosecutor (2009), <http://news.cincinnati.com/assets/AB127202127.PDF> [hereinafter Report of the Special Prosecutor].

<sup>179</sup> Mark Niquette, *Election Night May Be a Mess in Ohio*, COLUMBUS DISPATCH, Oct. 21, 2008, at 01A, available at 2008 WLNR 20033458; Ohio GOP Requests Voter Registration Info from Licking County, [http://blog.cleveland.com/openers/2008/10/ohio\\_gop\\_requests\\_voter\\_regist.html](http://blog.cleveland.com/openers/2008/10/ohio_gop_requests_voter_regist.html) (Oct. 14, 2008, 21:39 EST).

<sup>180</sup> See Peter Bronson, Editorial, *Ohio Is Lucky 2008 Election Was Not Within the Margin of Corruption*, CINCINNATI ENQUIRER, Dec. 18, 2008, at 7C.

<sup>181</sup> *Supra* note 174.

Hamilton County, Ohio was a representative example.<sup>182</sup> The local prosecutor there began an investigation because of numerous reports of voter fraud.<sup>183</sup> After recusing himself from the investigation because of his ties to Republican John McCain's presidential campaign,<sup>184</sup> a special prosecutor took over.<sup>185</sup> The result was that out of over 400,000 votes cast in Hamilton County,<sup>186</sup> only two instances of voter fraud were discovered.<sup>187</sup> One case involved a Connecticut man who voted absentee as an Ohio resident (his vote was not counted), and the second case was of an inmate who voted twice from jail.<sup>188</sup> The entirely predictable part of these results is not that it will tamp down future claims of massive voter fraud—it is quite the opposite. These results provide anecdotal proof that voter fraud exists. That second case in particular was tailor made for political exploitation. It will not be long until an enterprising politician decries Ohio's election system by saying that things are so rotten not only are convicted felons voting from prison, but they are actually allowed to vote twice.

Former Ohio House Speaker, Republican Jon Husted, provided the classic example of such behavior when he cited the Hamilton County conviction of the Connecticut man as an example of the fraud that the overlap period generated and used it as justification for why the overlap period should have been repealed.<sup>189</sup> Husted failed to mention, as the Special Prosecutor did, that despite the fact that the investigation "reviewed numerous additional allegations of voter fraud, illegal voting and bribery," it "did not substantiate any of these remaining allegations."<sup>190</sup> The ironic thing about Husted's use of that particular example of voter fraud was that at that time, Husted himself was under investigation by the Montgomery County Board of Elections because of allegations that he did not reside at

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<sup>182</sup> Hamilton County was the site of one of many such investigations around Ohio. Many other Ohio counties began similar investigations in response to accusations of voter fraud. Nancy Bowman, *Miami County Probes Suspected Voter Fraud*, DAYTON DAILY NEWS, Oct. 31, 2008, <http://www.daytondailynews.com/n/content/oh/story/news/local/2008/10/31/ddn103108miamiballotsweb.html>; Catherine Candisky, *A Third of New Voters Must Be Verified, Brunner Says*, COLUMBUS DISPATCH, Oct. 15, 2008, available at 2008 WLNR 19641888; Niquette, *supra* note 179.

<sup>183</sup> Amy Merrick, *Campaign '08: Ohio Voting Disputes Take on New Intensity*, WALL ST. J., Oct. 22, 2008, at A6; Perry, *supra* note 178; *Judge Appoints Special Prosecutor For Voter Fraud Probe: Hamilton Co. Prosecutor Says He Has Evidence Of Fraud*, WLWT.COM, Oct. 20, 2009, <http://www.wlwt.com/politics/17762242/detail.html>.

<sup>184</sup> Perry, *supra* note 178.

<sup>185</sup> Kimball Perry, *Conn. Man Sentenced for Illegal Ballot Here*, CINCINNATI ENQUIRER, Dec. 30, 2008, at A1, available at 2008 WLNR 26267480.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Voter Fraud Conviction, <http://jonhusted.wordpress.com/2009/01/03/voter-fraud-conviction/> (Jan. 3, 2009, 19:35 EST). It is argued that regardless of the small number of votes it produced, the overlap period was nonetheless valuable as it made the act of voting easier and more convenient for Ohio's voters.

<sup>190</sup> Report of the Special Prosecutor, *supra* note 178.

the residence where he was registered to vote.<sup>191</sup>

The results in Hamilton County were typical of the results throughout Ohio. The simple reality is that while isolated cases of voter fraud do occur and will almost certainly continue in the future, in relation to the over 5.7 million votes cast in Ohio on Election Day 2008,<sup>192</sup> this is not a concern that warrants more attention than it already receives from law enforcement.<sup>193</sup>

#### b. The Politics of Voter Fraud

The fact that the Ohio Supreme Court discussed the concern about fraud so briefly<sup>194</sup> underscores the point that the threat of voter fraud in this case was a political issue and not a legal issue. This becomes obvious when one considers that the instances of actual fraud are miniscule in relation to voting as a whole<sup>195</sup> and in relation to the prominent discussion it receives in

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<sup>191</sup> In other words, Husted was spreading fears of voter fraud by touting the discovery of a person who registered to vote where he did not live while he himself was under investigation for registering to vote where he did not live. Lynn Hulsey, *Husted Fights Claim He Doesn't Live in His District*, DAYTON DAILY NEWS, Jan. 8, 2009, at A5, available at <http://www.daytondailynews.com/search/content/oh/story/news/local/2009/01/07/ddn010709hustedweb.html>; Perry, *supra* note 185. Even more ironic, because the board of elections deadlocked, as of March 16, 2009, the final determination on Husted's residency status is in the hands of the Ohio Secretary of State—Jennifer Brunner. Stranger still, it is widely reported that Husted is considering running against Brunner for that position in 2010. Jim Otte, *Brunner To Consider Husted Residency*, WHIOTV.COM, Feb. 25, 2009, <http://www.whiotv.com/politics/18794326/detail.html>. Politics makes strange bedfellows indeed.

<sup>192</sup> See Willard, *supra* note 168.

<sup>193</sup> The death threats to Secretary Brunner and former Secretary Blackwell are examples of the shocking and sad reality of voter fraud hype. Mark Niquette & Joe Hallett, *Is Ohio Doomed to Ballot Battles?*, COLUMBUS DISPATCH, Oct. 26, 2008, at 01A, available at [http://www.dispatchpolitics.com/live/content/local\\_news/stories/2008/10/26/copy/why\\_elections\\_explode.ART\\_ART\\_10-26-08\\_A1\\_8SBMPRH\\_ghml?sid=101](http://www.dispatchpolitics.com/live/content/local_news/stories/2008/10/26/copy/why_elections_explode.ART_ART_10-26-08_A1_8SBMPRH_ghml?sid=101). The threats against Secretary Brunner in particular included the shutdown of her official website due to a hacker attack, menacing and threatening phone calls and emails, receipt of a “suspicious package covered with threatening messages and containing an unidentified powder,” and death threats against Secretary Brunner and her family. Andrea Hopkins, *Ohio Election Web Site Shut Down After Hacked*, REUTERS, Oct. 21, 2008, available at <http://www.reuters.com/article/idUSTRE49K96820081021>. The response of Kevin DeWine to the hacking of Secretary Brunner's website was to question whether it was her “latest excuse or whether in fact there was a real security breach.” Breaking! Columbus Man Admits Planning Attacks on Secretary of State Brunner, <http://www.progressohio.org/page/community/post/daveharding/CLDZ> (Oct. 24, 2008, 19:05 EDT). In stark contrast, the response of the Ohio State Highway Patrol was to provide Secretary Brunner with “around-the-clock security.” William Hershey, *Security Costs for State Officials Who Were Threatened Reach \$73,673: Investigations Continue into Threats Against Jennifer Brunner and Helen Jones-Kelley*, DAYTON DAILY NEWS, Dec. 4, 2008, at A3, available at 2008 WLNR 23416489. Additionally, the Ohio State Highway Patrol arrested and charged Dana McArtor, a 51-year-old Columbus man and registered Republican, with intimidation, a third-degree felony, for threatening to assassinate Brunner or her family. Mark Ferenchik, *Bail Set at \$1 Million in Threat against Secretary of State*, COLUMBUS DISPATCH, Oct. 25, 2008, available at [http://www.dispatch.com/live/content/local\\_news/stories/2008/10/25/mcartor.html?sid=101](http://www.dispatch.com/live/content/local_news/stories/2008/10/25/mcartor.html?sid=101); FRANKLIN COUNTY BD. OF ELECTIONS: VOTER PROFILE PAGE (2009), <http://vote.franklincountyohio.gov/voter/voterSearch.cfm?mode=&registrationID=921106777> (last visited Mar. 3, 2010).

<sup>194</sup> Colvin, 896 N.E.2d at 991.

<sup>195</sup> Minnite, *supra* note 174, at 3. “Voter fraud is extremely rare. At the federal level, records show that only 24 people were convicted of or pleaded guilty to illegal voting between 2002 and 2005, an average of eight people a year. The available state-level evidence of voter fraud, culled from interviews, reviews of newspaper coverage and court proceedings, while not definitive, is also negligible.” *Id.* (emphasis omitted).

the press. Analyzing voter fraud as a legal issue is unnecessary and unproductive, and does not give one a full understanding of its use and purpose in this particular case or in modern America in general. In actuality, voter fraud is merely a political issue, and it can only be understood through a political analysis.

In this particular case, the political issue of voter fraud (meaning one side charging the other with perpetrating voter fraud) had at least two identifiable purposes.<sup>196</sup> The first purpose was the ORP's desire to politically weaken Secretary Brunner. The second purpose was that both sides used the threat of voter fraud to motivate its base supporters.

One use of the charge of voter fraud was that the ORP's efforts in 2008 were not meant to win that election, but rather, it was part of a larger strategy of Republican reconquest designed to take back Ohio in 2010. As many have speculated,<sup>197</sup> the focus of litigation against Secretary Brunner was merely a prelude to the Republican electoral strategy of 2010. Some observers concluded that former Secretary Blackwell's overwhelming defeat in the 2006 Governor's race<sup>198</sup> was due, at least in part, to how he was criticized as an overly partisan secretary of state who bent the rules to help elect George W. Bush and other Republicans.<sup>199</sup> If such a strategy was effective in defeating Blackwell in 2006, then the ORP may have hoped to replicate that strategy in 2010. By branding Secretary Brunner as a known partisan who is continually sued for electoral unfairness and incompetence, she may become vulnerable to defeat in 2010. This explains statements such as the one from ORP Chairman Bob Bennett when he called Secretary Brunner "the most partisan secretary of state in Ohio history."<sup>200</sup>

A second political use of the charge of voter fraud is as a tool to motivate one's base supporters. This is especially apparent when allegations of voter fraud are used as a fundraising tool. For example, Ohio GOP Deputy Chairman Kevin DeWine wrote, "The Democrats are—right now—attempting to violate state election law by creating a loophole that opens the

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<sup>196</sup> One may easily identify many other purposes behind making charges of voter fraud, but for brevity's sake, this comment will only consider two examples specifically relating to Ohio.

<sup>197</sup> Laura A. Bischoff, *Smooth Election Hasn't Stopped Brunner Criticism*, DAYTON DAILY NEWS, Nov. 16, 2008, at A17, available at 2008 WLNR 22330444; William Hershey, *Husted Eyes Possible Run for State Office*, DAYTON DAILY NEWS, Dec. 23, 2008, at A3, available at 2008 WLNR 24608520; Dennis J. Willard, *GOP Attacks with an Eye on 2010 Race*, AKRON BEACON J., Aug. 31, 2008, at B1, available at 2008 WLNR 16710398.

<sup>198</sup> In the 2006 Ohio Governor's race, Ted Strickland won with 60% of the vote to Ken Blackwell's 36%. Ohio Secretary of State, Governor and Lieutenant Governor: November 7, 2006, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2006ElectionsResults/06-1107GovLieutGov.aspx> (last visited Mar. 4, 2010).

<sup>199</sup> Bob Fittrakis & Harvey Wasserman, *Will Ken Blackwell Find the Ways to Steal Ohio 2006 as He Did in 2004?*, FREE PRESS, Oct. 25, 2006, <http://freepress.org/departments/display/19/2006/2195>.

<sup>200</sup> Terry Kinney, *Appeals Court Sides with Ohio Secretary of State*, USA TODAY, Oct. 11, 2008, [http://www.usatoday.com/news/politics/2008-10-11-1579329418\\_x.htm](http://www.usatoday.com/news/politics/2008-10-11-1579329418_x.htm). A lot of good reporters covered this theory in much detail. See, e.g., Bischoff, *supra* note 197; Hershey, *supra* note 197; Willard, *supra* note 197.

door to vote fraud,” and then followed that up with a plea to “donate \$50, \$100, \$250 or \$500 today to help us prevent this election from being stolen.”<sup>201</sup> This makes it very easy to see how political leaders have a strong interest in making people believe the worst about the security of the ballot box. Even Barack Obama’s promises to change politics as usual<sup>202</sup> apparently did not extend to changing this tried and true fundraising tactic. One is left to wonder whether he was more concerned about voter disenfranchisement or raising money when he sent out a fundraising email accusing Republican political operatives of “attempting to disenfranchise Ohio voters,” by suing to stop same-day registration and voting.<sup>203</sup>

### *B. Recommendation for Stability in Ohio’s Election Law*

Ohio’s election law is in need of a period of stability rather than more changes. While the present system does have problems, they are all relatively manageable in the short term, and the virtue of stability outweighs the need for immediate changes.

To avoid a trap for the unwary practitioner who may foolishly assume that the plain language of the code is controlling, one sensible change would be to add language to Ohio Revised Code section 3503.01(A) to reflect the Court’s opinion in *Colvin v. Brunner*. This would make it clear to all that, as the Court ruled, the qualifications for a qualified elector are to be measured in relation to Election Day.<sup>204</sup> A second sensible change would be to fix Ohio’s provisional ballot system. Besides these two relatively straightforward measures, the urge to engage in legislative tinkering should be avoided. Instead, the law should be left as it is so that flaws may be identified and dealt with through the process of inevitable and otherwise unavoidable litigation.

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<sup>201</sup> Posting of Mark Niquette to The Daily Briefing, [http://blog.dispatch.com/dailybriefing/2008/08/ohio\\_gop\\_makes\\_appeal\\_for\\_lega.shtml](http://blog.dispatch.com/dailybriefing/2008/08/ohio_gop_makes_appeal_for_lega.shtml) (Aug. 15, 2008, 08:37 EDT).

<sup>202</sup> Yvonne Mintz, *Early Missteps Harm Obama’s Credibility*, THE FACTS (Texas), Feb. 5, 2009, <http://thefacts.com/story.lasso?ewcd=c3c44af4bbffc200>.

<sup>203</sup> Mark Naymik, *Ohio 2008: New Names, Same Election Angst*, CLEVELAND PLAIN DEALER, Oct. 21, 2008, at A7, available at <http://www.cleveland.com/news/naymik/index.ssf?base/opinion-0/1229008751111840.xml&coll=2>; Posting of Anastasia P to Daily Kos, <http://www.dailykos.com/story/2008/9/18/603239/-The-Ghost-of-Ken-Blackwell> (Sept. 18, 2008, 17:50 EST). When it comes to using unfounded charges of voter fraud, Democrats are not blameless. This comment focuses on the ORP’s charges of voter fraud simply because the issues played out that way in *Colvin v. Brunner* and in the 2008 presidential election. Democrats have their own favorite charges, namely that Republicans discourage registration and engage in voter suppression. Tom Curry, *Parties Wage War over Voter Fraud, Intimidation: Democrats See Vote Suppression, McCain Alleges Fraud by Obama Ally*, MSNBC.COM, Oct. 10, 2008, <http://www.msnbc.msn.com/id/27100918/>. The truth of such accusations are beyond the scope of this comment, but it is clear that Democrats are not above using false charges of voter fraud for their own political purposes.

<sup>204</sup> *Colvin*, 896 N.E.2d at 982.

## 1. Fix the Provisional Ballot Problem

One genuine problem that could have a negative impact at some point in the future is Ohio's over reliance on provisional ballots.<sup>205</sup> Although this is not an immediate problem, it is a ticking time bomb that will need to be addressed eventually—either by legislation or by litigation.<sup>206</sup> Provisional ballots are meant to be used when there is some question about a voter's status,<sup>207</sup> such as when there are voter registration problems or when a voter has applied to vote by mail but instead chooses to cast his or her ballot at the polls.<sup>208</sup> However, Ohio relies on provisional ballots heavily, with about 200,000 provisional ballots cast in Ohio during the 2008 presidential election—about 3.2 percent of the total votes.<sup>209</sup> Because Obama won the state by about four percentage points, this was not an issue after the 2008 presidential election, but if the margin of victory were closer, there could have been a serious and prolonged controversy over the counting of provisional ballots.<sup>210</sup> It has been estimated that “any statewide race decided by 20,000 or fewer votes would probably end up within the margin of litigation” because of the high rate of provisional ballots that are never counted—roughly twenty percent.<sup>211</sup> In fact, there was at least one Ohio race during the 2008 election that involved litigation around this exact issue,<sup>212</sup> and the winner was not decided until well over a month after Election Day.<sup>213</sup> Admittedly, close statewide races are rare, and this problem will not arise frequently. Even so, this problem should be addressed if only because over-reliance on provisional ballots, and the fact that so many of them are never counted,<sup>214</sup> means that otherwise valid votes are senselessly thrown out. As a matter of principle alone, this problem should be fixed.

## 2. Voting Is a Political Act and Should Be Managed Through the Political Process

One recommendation frequently seen is for Ohio to move to a non-partisan system, controlled by unelected officials who would be barred from

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<sup>205</sup> Steve Hoffman, *The Long View from an Elections Summit: Ohio's Secretary of State Sees the Real Issues*, AKRON BEACON J., Dec. 4, 2008, <http://www.printthis.clickability.com/pt/cpt?action=cpt&title=Ohio.com+-+The+long+view+from+an+elections+summit%23&expire=&urlID=32860567&fb=Y&url=http%3A%2F%2Fwww.ohio.com%2Feditorial%2Fhoffman%2F35523169.html&partnerID=214517>.

<sup>206</sup> *Id.*

<sup>207</sup> Willard, *supra* note 168.

<sup>208</sup> Erin Ferns, *Lawmakers Target Individual Voters, While Failing to Address Systemic Problems*, OPEDNEWS.COM, Dec. 5, 2008, <http://www.opednews.com/articles/Lawmakers-Target-Individual-by-Project-Vote-081204-218.html>.

<sup>209</sup> Hoffman, *supra* note 205.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Election Law @ Moritz, Information and Analysis, OH-15 Race Resolved, Kilroy Wins and No Recount Triggered, <http://moritzlaw.osu.edu/electionlaw/news/articles.php?ID=4189> (last visited Mar. 4, 2010).

<sup>213</sup> Willard, *supra* note 168.

<sup>214</sup> Hoffman, *supra* note 205.

any partisan activities.<sup>215</sup> This would be a mistake.<sup>216</sup> Elections, by their very nature, are political affairs. Regardless of who controls the machinery of elections, any election officials will invariably invite criticism and partisan attack. When that machinery is in the hands of elected partisans, such officials may defend themselves within the political arena. That is something non-partisan administrators would be unable to do, as they would have to maintain the appearance of neutrality in any political battle. As an analogy, attacking the media is a favorite political tactic, in part because the media does not fight back. Its supposedly non-partisan stance does not allow it to fight back effectively. This makes the media the perfect scapegoat when things go wrong. In fact, the media can be blamed for just about anything, no matter how nonsensical it may appear. The same would be true of a non-partisan controller of elections. Such an administrator would be a punching bag for every disgruntled politician who ever lost an election. At least when other politicians hold the machinery of elections, they can defend themselves within the political arena. Besides, expecting any politician to relinquish such power willingly—the power to run elections—seems to border on the naive.

Furthermore, when the secretary of state is in charge, voters have the final say and can punish supposed failings at the ballot box. Ken Blackwell was often criticized for being an overly partisan and corrupt secretary of state,<sup>217</sup> yet even he did not hold enough power over the electoral machinery to get himself elected as governor.<sup>218</sup> If a secretary of state were powerful enough to sway an election, then Blackwell would not have lost his 2006 governor's race by the very wide margin that he did.<sup>219</sup> In other words, let the voters punish supposed wrongdoing by secretaries of state. Ken Blackwell proved that such a system works, regardless of the appearance of messiness.

Just because the electoral machinery is in the hands of a non-partisan administrator, that does not mean there will be any lessening of electoral litigation. There is no logical correlation between those two elements. In fact, one can expect that as long as there are elections (and lawyers and money), there will *always* be accompanying litigation, regardless of the state of the law. Therefore, attempting to rid the state of messy-appearing litigation may well be impossible.

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<sup>215</sup> Editorial, *For Credibility's Sake, Ohio Must Change to a Non-Partisan Election Authority*, CLEVELAND PLAIN DEALER, Nov. 2, 2008, available at <http://www.cleveland.com/editorials/plaindealer/index.ssf?/base/opinion/1229012849111840.xml&coll=2>; [hereinafter Editorial, *For Credibility's Sake*]; Niquette & Hallett, *supra* note 193.

<sup>216</sup> Although what I write here is the product of my own thoughts, as it turns out, this opinion is not unique. See, e.g., Niquette & Hallett, *supra* note 193.

<sup>217</sup> Fittrakis & Wasserman, *supra* note 199.

<sup>218</sup> Editorial, *For Credibility's Sake*, *supra* note 215.

<sup>219</sup> *Id.* In the 2006 Ohio Governor's race, Ted Strickland won with 60% of the vote to Ken Blackwell's 36%. Ohio Secretary of State, *supra* note 198.

### 3. Stability and Litigation Can Sort Through Most of the Current Flaws

Besides the two changes suggested above,<sup>220</sup> it would be best if there were no additional changes in Ohio's current election laws. A partial cause of recent problems is that past legislative changes have been rushed and ill considered.<sup>221</sup> It is possible that Secretary Brunner, Governor Strickland, and a bi-partisan team of Democratic and Republican House and Senate leaders could be successful in crafting wise and judicious changes before the 2010 election. However, considering the partisan atmosphere in Ohio, the closely divided legislature, and the extremely important and looming 2010 elections, the results of which will play a big part in future redistricting,<sup>222</sup> it is doubtful that any changes in Ohio's election laws will meet the criteria of bipartisanship and wisdom. Instead, the citizens of Ohio, comforted by Secretary Brunner's reasonably competent handling of the 2008 election,<sup>223</sup> would be better to stop any changes and allow the current process of selective litigation to work through the problems presently in the system.

### 4. Litigation Will Eventually Slow Down

Vexatious litigation appears to be a permanent feature of our current political system, and to some extent that is true, but there are forces at work that will inevitably slow this process in the future. While it may be true that unprecedented amounts of campaign cash and a seemingly limitless supply of motivated partisans could produce an uptick in electoral litigation in the future, it is more likely that we will naturally see a slow decline in this activity within Ohio. This is true for two primary reasons.<sup>224</sup> First, courts will deal with the most contentious issues, and second, political strategies will change in the future.

#### a. Courts Will Deal with the Most Contentious Issues

As each election cycle comes and goes, the number of issues open to litigation will naturally shrink as courts make more and more definitive rulings, putting to rest controversies one by one. With this dynamic in mind, the lack of change in election law becomes a virtue given that eventually the courts will deal with the biggest controversies as they are litigated. It is only where the courts do not address problems thoroughly or

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<sup>220</sup> *Supra* Parts III.B, III.B.1.

<sup>221</sup> Alan Johnson, *GOP Crying Foul over Absentee-Voting Law It Passed*, COLUMBUS DISPATCH, Aug. 15, 2008, at 01B, available at 2008 WLNR 15328526; Dennis Willard, *Dennis Willard: Election Reforms Rejection Expected*, OHIO.COM, Dec. 16, 2008, at B1, available at <http://www.ohio.com/news/willard/36279279.html>.

<sup>222</sup> Redistricting Concerns Stand Between Jennifer Brunner, Charlie Crist, and Senate Races, <http://campaigndiaries.com/2009/02/04/of-the-importance-of-redistricting> (Feb. 4, 2009).

<sup>223</sup> See Bischoff, *supra* note 197.

<sup>224</sup> Others can be identified, but for brevity's sake, only two are considered here.

effectively that the legislature will need to step in.<sup>225</sup>

Broad legislative action is often more of a danger to election law stability, as lawmakers routinely make wholesale changes without proper study and consideration, creating new problems by the same measures that attempt to solve existing problems. The overlap period is the perfect example of this dynamic. In attempting to solve the problem of long lines at the polls experienced on Election Day 2004,<sup>226</sup> the expansion of no-fault voting created the unforeseen problem of the overlap period.<sup>227</sup> While the expansion of no-fault voting was a useful change that made it easier for some Ohioans to vote, it is only natural that more changes will create more unforeseen problems. These problems will inevitably be litigated in the future, especially if such changes are ill considered, hasty, or have any hint of partisanship.

Stability in a flawed system is better than continual legislative tinkering. If the laws remain unchanged over time, the inevitable litigation will eventually flush out and fix obvious problems. New laws, even wise ones that successfully solve known problems, will almost automatically result in fresh litigation, thereby starting the cycle anew. A system where perceived problems are dealt with through litigation over time can be more successful at producing a fair and stable set of election procedures. While hiring litigators is not a realistic solution available to everyone, for political candidates and parties who have ready access to free or discounted legal services, or plenty of donated campaign cash to cover costs, such a system is highly practical.

Of course, a system of litigation would be dependent on a non-partisan judiciary. Whether Ohio has such a judiciary, especially given the total Republican dominance of the Ohio Supreme Court,<sup>228</sup> is a question open to debate. Such fears are usually overblown though given Ohio's otherwise competent and professional judiciary. Even if such concerns about a partisan judiciary are a reality, they may be somewhat limited (or perhaps exacerbated) by the ability of litigators to shop for favorable judges and forums.<sup>229</sup>

#### b. Political Strategies Will Change in the Future

Fear, cynicism, and conspiracy theories are political tactics that

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<sup>225</sup> Such a model could not work where the predominant philosophical view of the court's role was one limited strictly to interpreting the law rather than occasionally imposing judicial lawmaking. In such a conservative climate, the legislature would be forced to take a more active role to deal with problems the courts left unresolved.

<sup>226</sup> Terri L. Enns, *Ohio's Expanded Absentee Voting Rules: Some Thoughts on Their Impact*, ELECTION LAW @ MORITZ, Oct. 3, 2006, <http://moritzlaw.osu.edu/electionlaw/comments/2006/061003.php>.

<sup>227</sup> Johnson, *supra* note 221.

<sup>228</sup> Joe Hallett, *Checkmark Question: Ballot-Application Case Goes to Court*, COLUMBUS DISPATCH, Sept. 18, 2008, at B5, available at 2008 WLNR 17721916.

<sup>229</sup> Willard, *supra* note 221.

have been widely used by both Democrats and Republicans recent years.<sup>230</sup> This dynamic could change in the future if President Obama and the Democratic Party have continued success with their recent message of “hope and change.”<sup>231</sup> While it is uncertain if this tactic will be successful in the future, if it is successful, then it will inevitably be copied. Fear will always play a role in politics, but it is not always productive for it to play such a prominent role.

Continually “crying wolf” over voter fraud will eventually cease to be effective. The ORP ran anti-Brunner ads that asked, “[c]ould Ohio’s election be stolen?”<sup>232</sup> and set up a website entirely devoted to fighting “the effort to steal Ohio’s election.”<sup>233</sup> These tactics, however, cannot be continually successful with a majority of the electorate without any eventual showing that voter fraud is more than just a theoretical possibility. While it is easy to present anecdotal evidence of voter fraud,<sup>234</sup> and some will inevitably believe that this is proof of larger conspiracies, such tactics cannot work indefinitely for more than a limited purpose. As Abraham Lincoln supposedly said, “[y]ou can fool all the people some of the time and some of the people all the time, but you cannot fool all the people all the time.”<sup>235</sup> Merely fooling some of the people is not enough to win elections in our winner-take-all system.

#### IV. CONCLUSION

Despite the pressure to decide the case differently, the Ohio Supreme Court made the correct decision in *Colvin v. Brunner*. This decision shifted the meaning of qualified elector under Ohio law, but the practical legal and political effect of this change was limited. The Court clarified the law only slightly, and Republican fears about the overlap period never materialized.

The decision also highlighted the reality that the concern about voter fraud was merely a political issue, rather than a legal one, and had very little to do with the actual motivations for litigating the case. Finally, the decision brings up the issue of whether new changes in Ohio’s election laws are necessary. Beyond the obvious changes of altering the statutory language to reflect the Court’s decision in *Colvin v. Brunner* and fixing Ohio’s over-reliance on provisional ballots, Ohio would be better served by election law stability as opposed to another round of hastily considered, partisan legislative changes.

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<sup>230</sup> Editorial, *For Credibility’s Sake*, *supra* note 215; Paul Krugman, *Hoping for Fear*, N.Y. TIMES, Aug. 14, 2006, at A21; Bridgette Outten, *Brunner Puts Safeguards in Place to Protect Voters*, DAYTON DAILY NEWS, Oct. 29, 2008, <http://www.daytondailynews.com/story/content/oh/story/news/local/2008/10/29/sns102908brunner.html>; Editorial, *Suppressing the Vote*, *supra* note 19.

<sup>231</sup> Editorial, *Barack Obama for President*, N.Y. TIMES, Oct. 23, 2008, at A30.

<sup>232</sup> Lee, *supra* note 171; Fight Ohio Fraud, *supra* note 171.

<sup>233</sup> Fight Ohio Fraud, <http://www.fightohiofraud.com/> (last visited Mar. 4, 2010).

<sup>234</sup> See *supra* Part III.A.3.a.

<sup>235</sup> Speeches of Abraham Lincoln at Clinton, Illinois, in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81 n.1 (Roy P. Basler ed., 1953).