The adoption of these changes would lead to a more responsive voting system. A displaced voter would be able to visit the nearest polling location, no matter where he is. Poll workers could verify his identity using computerized and networked interstate voter registries. Next, the poll workers could update his status in the registry to ensure that his identity could not be used elsewhere. The poll workers could download his local ballot and then upload his votes so that they could be counted in his home state.

Attempting to hold elections under intense political pressure can ultimately lead to devastating results.[66] Without laws and procedures in place to ensure that such elections can be held fairly — when people most need to be assured of the legitimacy of their government — the process will fail. As the 1998 OSCE report noted: "The results of . . . administrative problems, apart from being humiliating for both voters and polling officials, are a decrease in confidence and general mistrust in the whole electoral process."[67] In a time of crisis, the country can ill afford a decrease in confidence.

E. Conclusion

Fortunately, events that cause massive displacements of people are rare. The devastation of Hurricane Katrina was shocking because it was a unique event. However, as long as enemies of the United States seek to use increasingly terrible weapons, Americans should not presume that displacements of such an epic scale will not recur. If the towns, cities, and states of this nation are to hold special elections following an attack, governments should ensure that those elections are the true celebrations of democracy and legitimate government that they claim to be. A failure to act risks that preventable, yet serious, problems will occur in the moments of greatest vulnerability.

VII. ELECTION ADMINISTRATION: JUDICIAL REVIEW AND REMEDIAL DETERRENCE

Recent years have brought a dramatic increase in litigation challenging America's elections.[1] Much election-related litigation concerns the details of election administration, with voters, voters' groups, or

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[66] *See* James Zahradka, *"Reasonably Democratic, Balkans-Style:" Observations on Municipal Elections in "Pax Americana" Bosnia and Herzegovina*, 4 U.C. DAVIS J. INT'L L. & POL'Y 201, 210 (1998).

[67] 1998 ELECTION REPORT, *supra* note 58, at 15.

[1] *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration To Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958 (2005) (estimating a 100% increase in election-related litigation in 2000 over each of the prior four years and a further 50% increase from 2000 to 2002).

political parties bringing suit to challenge state voter registration, balloting, or vote counting processes as violative of statutory or constitutional rights.[2] Judges reviewing these administrative practices frequently face a situation in which no remedy seems available. It may appear impossible to change a contested procedure because an election is nearly underway, because a judge is not aware of suitable administrative alternatives, or because a judge feels uncomfortable mandating a specific election procedure from the bench. Judges may be less willing or less likely to find rights violations in these circumstances merely because no viable remedy seems apparent. Professor Daryl Levinson has termed this general judicial response to remedial concerns "remedial deterrence."[3]

Because partisan elected officials devise many election administration practices,[4] however, strong judicial oversight is particularly important to ensure fairness. Indeed, scholars have recently advocated judicial review of partisan officials' decisions as key to policing election administration and restoring faith in the democratic process.[5] To decrease the effect of remedial deterrence and consequently increase the effectiveness of judicial review in such cases, plaintiffs should highlight and judges should consider both feasible administrative alternatives that could eliminate rights violations and more forward-looking rulings. These approaches will help prevent remedial concerns from obstructing full evaluation of election practices, rendering essential judicial review in this area more effective.

A. The Rise of Legal Challenges to Election Administration

State and local election officials have tremendous power over key parts of election administration, including voter registration, election-day procedure, and ballot counting. Administration in each of these areas was challenged in court on various grounds in the weeks leading

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[2] *See generally* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 74 GEO. WASH. L. REV. 1206 (2005) (chronicling state and local administration of the 2004 presidential election and related legal challenges).

[3] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–99 (1999).

[4] *See* Hasen, *supra* note 1, at 974–76 (noting that the "Chief Elections Officer[s]" of thirty-three states are the victors of partisan elections). Even in the remaining states, appointment processes are typically partisan. *Id.*

[5] *See id.* at 991; Tokaji, *supra* note 2, at 1249; *see also* Recent Case, Sandusky County Democratic Party v. Blackwell, *387 F.3d 565 (2004)*, 118 HARV. L. REV. 2461, 2464 (2005) (advocating less deferential court review of the unilateral interpretations of federal election law made by partisan state election officials).

up to recent elections.[6] Litigation may have increased in part due to passage of the Help America Vote Act of 2002[7] (HAVA). Designed to improve the fairness and uniformity of federal elections, this federal law contains several mandates to states regarding election administration.[8] The local rules, interpretations, and plans for implementation that state and local officials promulgated in response to HAVA likely increased the number of administrative directives available to form the basis of a legal challenge. Despite the increase in election-related lawsuits before the 2004 election, many problematic election administration practices survived court scrutiny and remain in place today.[9]

B. The Obstacle of Remedial Deterrence

Given increased litigation and a strong public sentiment that elections are not fairly administered,[10] why were more election procedures not successfully defeated in court? Scholars have proposed that threshold procedural obstacles, such as standing or ripeness, may prevent judges from even reaching the merits of such cases.[11] These threshold issues, however, may not be the greatest impediment to a successful challenge of election administration. As shown below, plaintiffs' claims in election administration cases frequently overcome threshold obstacles and instead fail when a judge does not find an election rights or election law violation. Such decisions may reflect the simple fact that no such violation has occurred, but legal realists might locate other factors that explain a judge's decision to rule against plaintiffs, even if a violation has occurred.

Professor Levinson characterizes remedial deterrence as "the threat of undesirable remedial consequences motivating courts to construct [a] right in such a way as to avoid those consequences. At the extreme where no viable remedy is at hand, courts may define the right as non-

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[6] *See, e.g.*, Tokaji, *supra* note 2, at 1234–39. Newspapers across the country also chronicled the increasing salience of election procedure issues and litigation. *See, e.g.*, Gregg Aamot, *Tension over Election Fraud, Security Builds: Minnesota Secretary of State Feels the Squeeze*, ST. PAUL PIONEER PRESS (Minn.), Sept. 26, 2004, at A25 (detailing Minnesota election administration directives and litigation); Laura A. Bischoff, *Blackwell Plays Pivotal Role in Election*, DAYTON DAILY NEWS, Oct. 4, 2004, at A1 (describing public and legal responses to the Ohio Secretary of State's "high profile" involvement in election administration).

[7] Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C.).

[8] *See generally* Brian Kim, Recent Development, *Help America Vote Act*, 40 HARV. J. ON LEGIS. 579 (2003).

[9] *See* COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 3 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf.

[10] *See, e.g.*, *id.* at 1 (reporting that less than half of Americans feel strongly confident that U.S. election administration practices result in an accurate vote count).

[11] *See, e.g.*, Hasen, *supra* note 1, at 994.

existent."[12] As an example of remedial deterrence, Professor Levinson offers the observation that lower court judges are more likely than appellate judges to find *Batson*[13] violations, perhaps in part because such a finding at the trial level results in the easy-to-implement remedy of a prospective change to the jury's composition rather than the comparatively burdensome appellate remedy of reversal.[14]

Though remedial deterrence likely impacts nearly all areas of law, there are several reasons why it may be especially prevalent in judicial review of election practices. Election administration challenges usually protest a state or locality's treatment of a broad class of voters. Court correction of such violations requires judicially mandated systemic change — a complex remedy affecting the conduct of many election officials. Judges may be deterred from ordering a systemic remedy because it appears more difficult to implement than the remedy in a standard case between individuals. Further, the many deadlines imposed by substantive election laws to coordinate elections are distinctly public and urgent. Because of such deadlines, if a judge is unable to imagine an immediately feasible administrative alternative, he or she may be especially unwilling to find a violation out of fear that an order to stop a contested practice would completely prevent the administration of an upcoming election.[15] These deadlines also mean that deterrence will be amplified at each stage of judicial review: if a lower court is deterred from ordering a change in election procedure, an appellate court is even more likely to be deterred because its review will occur even closer to an election.

In addition to being more common, remedial deterrence may also be of greater concern in election administration cases. It has long been argued that where the political branches are likely to make self-

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[12] Levinson, *supra* note 3, at 885.

[13] *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), held that jurors could not be subject to peremptory challenges based on race.

[14] Levinson, *supra* note 3, at 890–92 (citing Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2020–22 (1998)). Professor Levinson acknowledges that other explanations, such as deferential appellate review, might explain the dropoff, but concludes that remedial deterrence likely plays a role. *See id.*

[15] *See, e.g.*, Sw. Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131, 1145 (C.D. Cal.) (denying the plaintiffs' request to postpone an election until "alternative voting mechanisms" decreasing the chance of rights violations were in place in part because doing so would force the state "to conduct the election outside the time frame required by the California Constitution, or . . . cancel the election to avoid that predicament"), *rev'd per curiam*, 344 F.3d 882 (9th Cir.), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003). *But see, e.g.*, Barry Massey, *Supreme Court Rules Nader Can Be on Ballot*, ALBUQUERQUE J. ONLINE, Sept. 28, 2004, http://albuquerquejournal.com/elex/apnader09-28-04.htm (reporting that the New Mexico Supreme Court ordered presidential candidate Ralph Nader's name onto New Mexico's 2004 ballot after the deadline for mailing absentee ballots and after the ballots had been printed and mailed without Nader's name).

interested decisions, review by the judicial branch is especially necessary.[16] If judicial review of partisan election officials' action is hampered by severe remedial concerns, such essential review will be less effective. Whether or not searching judicial review of election administration is necessary to protect the political process,[17] it is necessary at least to maintain public faith in the fair administration of elections.[18] Taken together, these factors imply that lessening the effect of remedial deterrence on judicial review of election administration should be an important goal.

C. Case Studies

Review of recent legal challenges to election administration in three areas — voter registration, the acceptance of provisional ballots, and the certification of particular voting machines — reveals that remedial deterrence indeed affects judges' findings about rights and election law violations. Analysis of these cases also shows how election reform advocates might lessen the effect of remedial deterrence on similar decisions in the future.

1. Voter Registration Form Requirements. — Disputes over voter registration form requirements provided one of the earliest sources of litigation challenging state and local officials' administration of recent elections.[19] Generally, administrative determinations that permitted increased voter registration went unchallenged[20] while those that limited voter registration were challenged either by public outcry[21] or in the courts.

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[16] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 117 (1980); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (implying that increased judicial scrutiny may be required of action that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").

[17] Even Ely's theory has its critics. *See generally* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW 4–5 (2003) (citing critics Dan Lowenstein and Mark Tushnet, who argue respectively that the judicial branch is no better at neutral arbitration of political disputes than other self-interested branches and that Ely's theory generally is not value neutral).

[18] *See* Hasen, *supra* note 1, at 945 (noting that both "the actuality and the appearance of neutrality" may "bolster[] the public's faith" in election administration); Levinson, *supra* note 3, at 937 (commenting that in any area of law, "[n]o matter in which direction political theory proceeds, it is important to recognize that the legitimacy of judicial review, as a sociological matter, depends far more on its practical consequences than on any political theory developed to defend it").

[19] *Cf.* COMM'N ON FED. ELECTION REFORM, *supra* note 9, at 3 (noting disputes arising from the 2004 presidential election about registration form requirements and processing).

[20] For example, Ohio Secretary of State J. Kenneth Blackwell issued an unchallenged directive permitting registration when a voter failed to check boxes to indicate citizenship status. *See* Tokaji, *supra* note 2, at 1224–25.

[21] For example, Secretary Blackwell's initial decision that local officials could accept only registration forms printed on very thick paper was decried in the media. *See* Editorial, *Playing with*

In Ohio, a local Democratic Party chapter challenged a directive from Ohio Secretary of State J. Kenneth Blackwell that prohibited the acceptance of certain registration forms.[22] Secretary Blackwell's rule implemented the HAVA requirement that a voter must provide an identifying number (for example, from a driver's license) on his or her voter registration form.[23] At issue in this case was whether the Secretary of State's directive gave proper guidance on distinguishing those voters who did not possess such identifying numbers from those who simply refused to provide them.[24] Although Secretary Blackwell's directive advised officials to permit registration by potential voters who wrote "none" in the box requesting an identification number, as registration proceeded, it was not clear whether voters who did not possess identifying numbers were ever told to write that word, or if they merely submitted forms with missing information and were denied registration.[25] With seventeen days remaining before the election, Judge Carr of the United States District Court for the Northern District of Ohio denied relief, holding that the plaintiffs had not proven the necessity of a preliminary injunction.[26]

Judge Carr's opinion reveals evidence of remedial deterrence. His evaluation of the plaintiffs' claims under a preliminary injunction standard was muddled with remedial concerns. Regarding whether the plaintiffs had suffered irreparable harm, Judge Carr answered: "My denying plaintiffs' motion will cause them to suffer no irreparable harm. Simply put, there is no appropriate remedy available to the plaintiffs at this time."[27] Judge Carr's conclusion that no remedy was available, however, resulted from his rejection of just one possible remedy as infeasible: "[I]t would be improper . . . to order County Boards now to register people to vote who, in fact, may not be properly entitled to be registered under HAVA."[28] Similarly, he held "it would be entirely improper, and substantially disruptive of the election process . . . to order Ohio's County Boards to re-open in-person registration from now until election day."[29] Judge Carr's perception that

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the Election Rules, N.Y. TIMES, Sept. 30, 2004, at A28. Secretary Blackwell later rescinded this directive. Tokaji, *supra* note 2, at 1227–28.

[22] Lucas County Democratic Party v. Blackwell, 341 F. Supp. 2d 861 (N.D. Ohio 2004).

[23] 42 U.S.C. § 15483(a)(5)(A) (Supp. II 2002).

[24] Under HAVA, voters who do not possess identifying numbers from other sources are entitled to receive an identifying number and are permitted to register while voters who simply refuse to provide such information cannot register. *Id.*; *see also Lucas*, 341 F. Supp. 2d at 863.

[25] *Lucas*, 341 F. Supp. 2d at 864.

[26] *Id.* at 863.

[27] *Id.* at 864.

[28] *Id.*

[29] *Id.* at 864–65.

the plaintiffs' suggested remedy was infeasible thus influenced his decision not to find any violation of HAVA in the details of Secretary Blackwell's directive.[30]

This deterrence may not have been necessary, however, had Judge Carr been able (or been urged by the plaintiffs) to perceive the case in a different way. Finding it was "improper" to reopen the election registration process did not require Judge Carr to rule against the plaintiffs. Because many voter registration forms had been brought in bulk to local offices, there was a possibility that some counties retained registration forms with blank ID-number boxes or were still processing such forms.[31] As a way of limiting the required remedy, Judge Carr could have required election officials (in cases in which a form had not yet been discarded) to ask a potential voter for missing information on election day, eliminating the need to "re-open in-person registration from now until election day."[32]

Judge Carr also focused on the timing of the lawsuit, finding that "there is not enough time between now and the election to develop the evidentiary record necessary to determine if the plaintiffs are likely to succeed on the merits of their claim."[33] Had the plaintiffs also requested, or had Judge Carr considered, a more forward-looking order — for example, one applicable only to future elections — the plaintiffs could have had more time to prove their case. Because the case appeared only as a request for an injunction applicable to an immediately upcoming election, Secretary Blackwell's recommended treatment of voter registration forms with missing information did not receive adequate scrutiny. After the injunction was denied, the case did not continue to trial.

2. *Provisional Balloting.* — Remedial deterrence may also have affected judicial evaluation of local policies on provisional balloting. Under HAVA, states must provide provisional ballots to citizens who

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[30] The threshold issues that others have suggested often will defeat election administration claims, *see, e.g.*, Hasen, *supra* note 1, at 994, did not appear in this case and therefore played no role in the failure of the plaintiffs' claims.

[31] Investigation after the election revealed that as of October 18, 2004 — three days before the *Lucas* decision — approximately 4500 to 7000 voter registration forms remained unopened in the Lucas County Board of Elections office alone. *See* Memorandum from Richard Weghorst, Dir. of Campaign Fin. & Faith Lyon, Bd. of Elections Liaison, to J. Kenneth Blackwell, Ohio Sec'y of State 10 (Apr. 5, 2005), *available at* http://www.sos.state.oh.us/sos/electionsvoter/lucas/LucasCountyInvestigationReport.pdf.

[32] *Lucas*, 341 F. Supp. 2d at 864–65. Although Judge Carr noted there was "not sufficient time to . . . determine if the other eighty-seven counties in Ohio have acted as Lucas County has" in retaining unprocessed registration forms, *id.* at 864, such a lack of evidence is not a valid reason to refrain from ordering counties to treat such forms in a HAVA-compliant way if they possessed them.

[33] *Id.* at 863.

appear in person to vote but whose names do not appear on local rolls.[34] While some state legislatures passed statutes implementing this HAVA requirement,[35] others left provisional balloting details entirely to state and local election officials.[36] As with voter registration, the resulting administrative directives prompted legal challenges from voters and voters' groups claiming constitutional and HAVA violations.[37]

In Colorado, the Secretary of State issued rules before the 2004 election directing election officials not to count provisional ballots cast outside a voter's home precinct.[38] A Colorado voters' group contested this rule as inconsistent with HAVA's requirement that provisional ballots be given to voters who declared that they were registered in the "jurisdiction in which [they] desire[d] to vote."[39] The group claimed HAVA mandated provisional balloting for voters attempting to vote within the county in which they certified they had registered.[40] Colorado District Judge Hoffman evaluated the legislative history of HAVA and cited practical concerns to deny the plaintiffs' preliminary injunction request.[41]

Although Judge Hoffman engaged deeply with statutory interpretation and legislative history,[42] a close reading of his evaluation of the plaintiffs' preliminary injunction request reveals the overinfluence of remedial concerns on his decision. In rejecting the plaintiffs' claims, he noted that the system devised by the Secretary of State (prohibiting out-of-precinct voting) was "the only sensible way" to organize the state's elections and cited Colorado's longstanding precinct system.[43]

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[34] *See* 42 U.S.C. § 15482(a), (d) (Supp. II 2002).

[35] *See, e.g.*, COLO. REV. STAT. §§ 1-9-301 to 1-9-306 (2003) (repealed 2005) (guiding implementation of provisional balloting).

[36] For example, Ohio enacted no legislation addressing HAVA's provisional balloting requirements. Tokaji, *supra* note 2, at 1229. Even in states that enacted implementing legislation, the Secretary of State was often forced to promulgate additional directives to flesh out the plan. *See, e.g.*, Colo. Election Rule 26.12(a)–(b), *codified at* 8 COLO. CODE REGS. § 1505-1 (2004) (repealed 2005).

[37] *See* Tokaji, *supra* note 2, at 1228 n.195 (collecting cases).

[38] Colo. Election Rule 26.12(a); *see* Colo. Common Cause v. Davidson, No. 04CV7709, 2004 WL 2360485, at *6 (Colo. Dist. Ct. Oct. 18, 2004).

[39] 42 U.S.C. § 15482(a).

[40] *Davidson*, 2004 WL 2360485, at *10. The plaintiffs also successfully challenged the Secretary of State's rule denying provisional ballots to voters who had requested absentee ballots. *Id.* at *11–12.

[41] *Id.* at *11. For a similar analysis of and conclusion about Ohio's provisional balloting directives, see *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam).

[42] *See Davidson*, 2004 WL 2360485, at *9–11 (elaborating on potentially conflicting purposes of HAVA and evaluating how the Secretary's proposed scheme fit such purposes).

[43] *Id.* at *11. The Ohio opinion also cited the chaotic consequences of out-of-precinct provisional balloting, *Sandusky*, 387 F.3d at 568, 575, and the tradition of a precinct-based system, *id.*

These reflections imply that Judge Hoffman's unwillingness or inability to picture a better way of organizing Colorado's elections contributed to his finding that the Secretary's interpretation was acceptable.[44] Yet this conclusion was not necessarily compelled by the facts; other states have successfully crafted and implemented procedures for counting out-of-precinct provisional ballots, even against the backdrop of historic precinct-based systems.[45]

Judge Hoffman did, however, take an important step that limited the effect of remedial deterrence on his decision, noting that a precinct-based system was appropriate "*at least until 2006*, when Colorado will, as required by HAVA, have a complete and integrated real-time statewide list of registered voters, hopefully coupled with the computer technology to print an appropriate ballot for any voter in any precinct or county."[46] By qualifying his holding in this way, Judge Hoffman implied he might have found a HAVA violation had there been technology in place to allow election officials an alternate course of action. This holding acknowledges that if alternate remedies were available (or conceived of) that might better balance the demands of election administration with a voter's right to cast a ballot, judges might require implementation of such measures to ensure HAVA compliance.

Judge Hoffman could have gone one step further, however, by ordering that Colorado implement such a system as rapidly as possible.[47] Although HAVA requires such databases in all states by 2006,[48] additional pressure from courts to meet this deadline could have provided a needed extra push to state officials.[49] Judge Hoffman could have applied such pressure by finding a HAVA violation and thereby high-

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at 578, to conclude HAVA did not require states to count out-of-precinct provisional ballots, *id.* at 576–79.

[44] Note again that threshold procedural issues did not contribute to the defeat of the plaintiffs' claims in Ohio or Colorado. *See Sandusky*, 387 F.3d at 572–74 (rejecting standing and other procedural defenses); *Davidson*, 2004 WL 2360485, at *6–7 (same).

[45] *See* ELECTIONLINE.ORG, BRIEFING: SOLUTION OR PROBLEM, PROVISIONAL BALLOTS IN 2004, at 6, 12 tbl.4 (Apr. 2005), http://www.electionline.org/Portals/1/Publications/ERIP10Apr05.pdf (noting that seventeen states accepted out-of-precinct provisional ballots in the 2004 election).

[46] *Davidson*, 2004 WL 2360485, at *11 (emphasis added).

[47] Statewide voter registration databases are currently in use in seventeen states, demonstrating the general feasibility of this approach. electionline.org, Statewide Voter Registration Database Status, http://electionline.org/Default.aspx?tabid=288 (last visited Jan. 15, 2006). Fifteen states had such a database in place in time for the 2004 election. ELECTIONLINE.ORG, ELECTION PREVIEW 2004, at 23 (2004), http://electionline.org/Portals/1/Publications/Election.preview.2004.report.final.update.pdf.

[48] 42 U.S.C. § 15483(a)(1)(A) (Supp. II 2002).

[49] *See* electionline.org, *supra* note 47 (highlighting that a majority of states did not establish voter databases by HAVA's deadline).

lighting the need for an electronic database or other corrective measure.

3. Voting Machines. — The legality of particular voting machines is a third area of election administration that has recently provoked significant litigation. In several cases following the 2000 presidential election, the ACLU and voters challenged the constitutionality of states' continuing use of punch-card ballot machines.[50] Different outcomes in Ohio and Illinois punch-card cases demonstrate the potential effects of a judge's perception of remedial concerns on rights-violation findings.

In 2002, voters brought a class action lawsuit to prohibit election officials from continuing to certify punch-card machines for use in certain Ohio counties.[51] In the course of holding that use of such machines did not violate statutory or constitutional rights, Judge Dowd noted: "The primary thrust of this litigation is an attempt to federalize elections by judicial rule or fiat via the invitation to this Court to declare a certain voting technology unconstitutional and then fashion a remedy."[52] Within this remedial framework, he found that the plaintiffs "failed to make a case for judicial intervention"[53] in large part because he believed that states should be permitted to experiment with various types of election administration rather than submit to a judge's selection.[54] Given that Judge Dowd approached the case as if he had been asked to mandate a single design for all of Ohio's elections, it is understandable that he believed judicial intervention was inappropriate. Had he perceived the remedial aspect of his role differently, however, Judge Dowd could have found a rights violation without limiting the ability of states to experiment with different technologies.

By contrast, in a similar case, an Illinois district judge found punch-card machines presented sufficient statutory and constitutional problems to justify denying a motion to dismiss.[55] Judge Guzman did not equate a rights-violation finding with judicial prescription of a single ideal voting system:

> Neither the federal courts, nor likely anyone, can guarantee to every eligible voter in this country a perfect election with 100% accuracy. The

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[50] *See* Tokaji, *supra* note 2, at 1210 n.26 (citing cases); *see also* Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (considering a challenge to punch-card ballots in the California recall election).

[51] Stewart v. Blackwell, 356 F. Supp. 2d 791, 794–95 (N.D. Ohio 2004).

[52] *Id.* at 804–05.

[53] *Id.* at 807.

[54] *See id.* at 808–09. Again, threshold issues were not factors in the denial of the voters' claims. *See id.* at 796–97 (rejecting standing and mootness defenses).

[55] *See* Black v. McGuffage, 209 F. Supp. 2d 889, 896–902 (N.D. Ill. 2002).

courts can, however, by enforcing the Fourteenth Amendment to the U.S. Constitution and the Voting Rights Act of 1965, guarantee the equal treatment of voters who attempt to have their votes counted, their voices heard.[56]

Like Judge Dowd, Judge Guzman was concerned about the difficulty courts might face in devising a "perfect" system, but indicated that such concerns would not deter him from protecting voting rights. Judge Guzman therefore overcame remedial deterrence because he perceived that a judge can protect such rights by indicting one administrative practice without designing and mandating a perfect alternate system.[57]

D. Recommendations

The effect of remedial deterrence on judicial review of election procedures seems apparent. One way plaintiffs may decrease remedial concerns and resultant judicial deterrence is to seek relief far in advance of any election, permitting a court to limit its scope of action to finding a rights violation free of the pressure of an injunction request or imminent election.[58] But election reform advocates, voters, and voters' groups will not always have sufficient notice of potential election administration issues to implement this recommendation. Further, it is not clear such a strategy would eliminate remedial deterrence, as evidenced by Judge Dowd's opinion, which rejected the challenge to punch-card ballots even absent the threat of an upcoming election. Thus the question arises: are there alternate methods to decrease remedial deterrence and thereby improve judicial review of election administration?

As the above case studies demonstrate, two alternate approaches may help decrease the effect of remedial deterrence in the election con-

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[56] *Id.* at 891.

[57] Judge Guzman's stance may be partially explained by the fact that he ruled on a motion to dismiss rather than an injunction request.

[58] A series of cases challenging voting technology in California reveals the feasibility of this approach. In 2001, voters challenged the use of punch-card machines in any California election. Common Cause v. Jones, No. 01-03470 SVW(RVX), 2002 WL 1766436, at *1 (C.D. Cal. Feb. 19, 2002). After the Secretary of State, having lost a motion for judgment on the pleadings, agreed to decertify such machines, the district judge remained involved, set a deadline for the machines' replacement, *id.* at *1–2, and refused to reconsider his decision, Common Cause v. Jones, 213 F. Supp. 2d 1110, 1115 (C.D. Cal. 2002). By contrast, when voters later asked the court to intervene on this same issue by postponing the California recall election until after punch-card machines had been eliminated, their request was denied in part because of the immediate impact judicial action would have on the upcoming election. *See* Sw. Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131, 1145 (C.D. Cal.), *rev'd per curiam* 344 F.3d 882 (9th Cir.), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003). Depending on when they confronted the issue, therefore, judges in this series of cases reviewed the state's use of punch-card machines differently.

text: first, increasing judicial access to information about successful, alternate election administration practices, and second, focusing on requests for forward-looking injunctions that allow time for review of and change in administrative practices. Although potential plaintiffs may play the key role in advancing these strategies, judges and election law scholars might assist them by increasing attention to and research in these areas.

The case studies demonstrate the viability of the first recommendation. The outcome in the Ohio challenge to voter registration form requirements might have been different had the plaintiffs highlighted alternate administrative practices that could have corrected the alleged HAVA violation without forcing the reopening of voter registration. Similarly, increased judicial awareness of alternate vote-counting technologies that have been successfully implemented in other states might have made judges more comfortable invalidating selected punch-card technology.[59] In both circumstances, judges were concerned by a perceived need to order a sweeping remedy that might significantly interfere with an upcoming election. This approach to decreasing remedial deterrence may become easier as more information about best practices in election administration becomes available.[60]

In cases in which a judge may be concerned about disrupting an imminent election, plaintiffs might decrease remedial deterrence by requesting an injunction applicable to the upcoming election only if feasible, and in the alternative applicable just to future elections. Such concerns impacted the provisional balloting cases discussed above, in which available remedies appeared constrained by technological limits. In the Ohio voter registration form case, too, the judge expressed concern that an immediately upcoming election allowed insufficient time for litigants to demonstrate a rights violation. To decrease the interference of remedial concerns in such cases, plaintiffs might request

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[59] Some may argue this approach leads to excessive judicial involvement in the selection of proper administrative practices (a choice perhaps better left to the executive branch). In the administration of federal law, however, state election officials do not have special expertise compared to judges. Judges may be well-positioned to balance the state's oft-competing interests in voting rights and efficient elections. Further, increased discussion of alternate administrative practices during a legal challenge would not necessarily force a judge to mandate a specific practice. Rather, awareness of viable alternatives could merely make a judge more willing to invalidate a specific practice, leaving the ultimate choice among alternate practices to election officials.

[60] Professor Heather Gerken recently suggested that the newly formed Election Assistance Commission (EAC) should promulgate "objective comparative measures for state election practices." Heather Gerken, *For Shame*, NEW REPUBLIC ONLINE, Sept. 28, 2005, http://www.tnr.com/docprint.mhtml?i=w050926&s=gerken092805. Although Professor Gerken made her suggestion primarily to facilitate an annual ranking of states' practices, *see id.*, an increased role for the EAC in distributing information about election administration practices would also be useful in overcoming remedial deterrence.

that judges first evaluate potential rights violations, and then consider separately whether those violations can be remedied in time for imminent elections or only more prospectively.

Use of this technique has potential downsides: plaintiffs presenting the option of an injunction applicable only in future elections may be less likely to obtain relief for the immediately upcoming election. This loss might be outweighed, however, by long-term gains. After all, many practices challenged in 2004 will be sources of contention again in future elections.[61] If plaintiffs truly believe certain administrative practices violate HAVA, constitutional, or other rights (that is, they are not just bringing claims, as is often argued, in an attempt to influence the outcome of an immediately upcoming election), they should be interested in eliminating such practices not only from imminent elections but also from future contests.

E. Conclusion

A review of recent cases challenging election administration reveals that the outcomes of such cases may be influenced by limits on judges' willingness or ability to craft election administration remedies. HAVA and public pressure alone may spur some reform of election administration to eliminate the problems highlighted in the above litigation. Judicial intervention, however, especially to review administrative decisions made by partisan state election officials, will also be necessary. To make this review effective, interested parties should advocate for the aggregation and publication of information on alternative election procedures. Plaintiffs should highlight such alternate practices and suggest how their existence may permit a rights-violation finding while limiting remedial concerns. Plaintiffs should also consider requests for reform in future elections in addition to requests for immediate correction of current practice. Implementation of these suggestions may help judges in future election administration cases mandate change to election administration while avoiding the specters of election chaos or unfettered judicial control over elections.

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[61] *See, e.g.*, ELECTIONLINE.ORG, *supra* note 47, at 10 (summarizing continuing issues, debates, litigation, and legislative proposals surrounding the use of provisional ballots).