

I. INTRODUCTION: THE CHANGING FACE OF VOTING, DEMOCRACY, AND THE LAW

In a 1999 article entitled *Election Law at Puberty: Optimism and Words of Caution*, the introductory piece to a symposium examining “Election Law as Its Own Field of Study,” Professor Richard Hasen declared that “[a]fter reading the rich contributions to this symposium . . . , no one can seriously question whether election law is a subject in its own right.”¹ If 1999 marked the field’s maturity date, then it came not a moment too soon, as the next five years ushered in startling legal and political developments in the law of voting and democracy. Congress passed two major statutes regulating the political process — the Help America Vote Act of 2002² (HAVA) and the Bipartisan Campaign Reform Act of 2002³ (BCRA) — and the states responded with a plethora of new laws of their own. The Supreme Court decided a number of major election-related cases, including *California Democratic Party v. Jones*,⁴ *Easley v. Cromartie*,⁵ *Republican Party of Minnesota v. White*,⁶ *Georgia v. Ashcroft*,⁷ *McConnell v. FEC*,⁸ and *Vieth v. Jubelirer*.⁹ The latest round of redistricting brought with it a slew of legal and political fights, and even featured two instances of state legislatures redrawing district lines in the middle of the decade solely for partisan advantage.¹⁰ The terrorist attacks of September 11 disrupted an election in New York City (among many other things), prompting a wave of scholarship concerned with terrorism and elections.¹¹ And the 2004 election cycle, which included the first presiden-

¹ Richard L. Hasen, *Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1095 (1999).

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

³ Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

⁴ 530 U.S. 567 (2000) (striking down California’s blanket primary system for violating the First Amendment right of association of political parties).

⁵ 532 U.S. 234 (2001) (examining the interaction of political and racial motives in racial gerrymandering cases).

⁶ 536 U.S. 765 (2002) (holding unconstitutional, on First Amendment grounds, the Minnesota Supreme Court’s canon of judicial conduct barring judicial candidates from declaring their views on disputed legal or political issues).

⁷ 539 U.S. 461 (2003) (interpreting the retrogression standard under section 5 of the Voting Rights Act).

⁸ 124 S. Ct. 619 (2003) (deciding various constitutional challenges to BCRA).

⁹ 124 S. Ct. 1769 (2004) (considering the justiciability of partisan gerrymandering claims).

¹⁰ See Patrick Marecki, Note, *Mid-Decade Congressional Redistricting in a Red and Blue Nation*, 57 VAND. L. REV. 1935, 1935–36 (2004).

¹¹ See *infra* pp. 1178–79.

tial election in the post-*Bush v. Gore*¹² era, brought with it an onslaught of litigation in the state and federal courts.

The six Parts of this Development attempt to understand the law of voting and democracy in the midst of these changes. They discuss a variety of issues in the legal regulation of voting and democracy: campaign speech in judicial elections, voter identification requirements, judicial approaches to deducting illegal votes, state responses to redistricting abuses, the role of remedial concerns in election law litigation, and the administrative challenges that stem from holding elections following a major crisis. They are aimed at a variety of state and federal actors: legislators, judges, and administrators. All seek to shed light on inadequately understood issues in election law.

Part II examines campaign speech in judicial elections following the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*.¹³ In *White*, the Court found that a provision of Minnesota's Code of Judicial Conduct that prohibited judicial candidates from stating their views on disputed issues during their campaigns violated the First Amendment.¹⁴ Part II begins by situating *White* in the proper historical context and discussing the major lower court cases that have struggled to interpret *White*. Next, the Part identifies the emerging issues surrounding the restrictions on judicial candidates' speech that *White* has precipitated. The Part concludes by predicting future trends in cases brought in *White*'s wake.

Part III turns to a thorny issue that is rife with partisan rancor: state attempts to mandate that voters show identification at the polls. The Part describes the identification requirements in HAVA and discusses the various state provisions that are stricter than HAVA's minimums. The Part then contrasts the many unsuccessful legal challenges to state voter ID laws with a recent case, *Common Cause/Georgia v. Billups*,¹⁵ granting a preliminary injunction against a Georgia voter ID law.¹⁶ Finally, the Part uses recent litigation and controversies over voter ID laws to discuss why partisan tensions over these laws are likely to spark more litigation in the future, and offers valuable suggestions to legislators seeking to draft constitutionally acceptable statutes.

¹² 531 U.S. 98 (2000).

¹³ 536 U.S. 765 (2002).

¹⁴ See *id.* at 788.

¹⁵ No. 4:05-CV-201-HLM (N.D. Ga. Oct. 18, 2005) (order granting preliminary injunction), available at <http://www.acluga.org/briefs/voterID/condensed.pdf>, *stay of preliminary injunction denied*, No. 05-15784-G (11th Cir. Oct. 27, 2005), available at <http://www.votingrights.org/news/downloads/Order%20Denying%20Stay.pdf>.

¹⁶ See *id.* at 10.

Part IV uses the dramatic story of the 2004 Washington governor's race as a springboard to discuss an important but surprisingly neglected question: which legal standard should govern when a court is tasked with deducting illegal votes from candidate vote totals? Examining over 100 years' worth of disputed election cases, the Part groups courts' approaches into three categories and discusses the arguments courts use in favor of and against each of these approaches. The Part then shows how *Borders v. King County*,¹⁷ the case that ultimately settled the Washington governor's race, illustrates new problems with one of the three approaches — problems that may lead courts to modify the method or, more likely, abandon it altogether.

Part V analyzes trends in states' regulation of their own redistricting processes. The Part begins by describing how federal regulation of redistricting has slowly receded over the last fifteen years, especially in the context of political gerrymandering, resulting in a real need for state action. Next, the Part discusses how states have tried to respond to this need by implementing independent redistricting commissions, although these commissions have had relatively little success. The core of the Part is dedicated to highlighting the role that state courts recently have played in policing the redistricting process, and it argues that state courts are becoming more assertive in striking down improper redistricting plans. The Part concludes with a brief comparison of state courts and independent commissions as regulators of redistricting.

Part VI concerns itself with election administration in the post-September 11 world. Examining voting in times of crisis, the Part explores how existing laws and scholarship utterly fail to anticipate and prepare for the potential logistical challenges inherent in conducting elections following mass displacement of individuals in the wake of a natural disaster or a large-scale act of terrorism. The Part begins by showing that while mass displacement is a very real possibility, existing laws and scholarship on voting in emergency situations fail to account for such a scenario — a serious oversight given the importance of maintaining a legitimate government in times of crisis. Facing this dearth of on-point material at home, the Part looks abroad and discusses how the Federation of Bosnia and Herzegovina developed election procedures to handle a comparable situation. Drawing on lessons learned, the Part makes recommendations for American election administrators planning for the worst.

¹⁷ No. 05-2-00027-3 (Wash. Super. Ct. June 24, 2005), available at <http://www.secstate.wa.gov/documentvault/Final%20Judgement-694.pdf>.

Part VII steps back from specific subtopics in election law and takes a broader look at how a phenomenon known as “remedial deterrence”¹⁸ may affect the outcome of election law cases. After briefly discussing the concept of remedial deterrence — a scenario in which the difficulty of imposing a proper remedy incentivizes judges to find that there has been no substantive violation of legal rights — the Part explains why judges deciding election administration cases are especially vulnerable to remedial deterrence. The Part then substantiates this claim by analyzing a variety of recent election law cases to demonstrate that remedial deterrence may play a significant role in explaining their outcomes. The Part concludes with recommendations for litigants seeking to avoid the problem of remedial deterrence.

The topics covered by this Development are only a subset of the many issues raised by recent happenings in the law of voting and democracy. Nevertheless, they provide helpful analytical insights into a changing area of the law.

II. JUDICIAL ELECTIONS AND FREE SPEECH

In 2002, the Supreme Court injected a new urgency into a very old debate: whether the practice of electing judges is antithetical to judicial impartiality and independence.¹ In *Republican Party of Minnesota v. White*,² the Court struck down the “announce clause” of Minnesota’s Code of Judicial Conduct, a rule that had prohibited judicial candidates from announcing their views on disputed legal or political issues during their campaigns.³ Minnesota argued that the announce clause protected due process by preserving the real and perceived impartiality of its judiciary.⁴ In a 5–4 decision, the Court found that the clause violated the First Amendment because it was a poorly tailored,

¹⁸ See Daryl J. Levinson, *Constitutional Rights Essentialism and Remedial Equilibrium*, 99 COLUM. L. REV. 857, 889–99 (1999).

¹ See Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 626 (2005).

² 536 U.S. 765 (2002).

³ See *id.* at 768, 788. Such codes of conduct have the force of law in most states. Generally, the power to promulgate and enforce the codes is vested in state supreme courts and oversight commissions. See, e.g., *id.* at 787 n.15; *Weaver v. Bonner*, 309 F.3d 1312, 1315 (11th Cir. 2002). Penalties for candidates violating the codes include “disbarment, suspension, and probation” and, in the case of incumbent judges, “removal, censure, civil penalties, and suspension without pay.” *White*, 536 U.S. at 768.

⁴ Brief and Appendix for Respondents, *White*, 536 U.S. 765 (2002) (No. 01-521), 2002 WL 264727, at *9–10.