

# Voting Rights and Election Law



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Cases, Explanatory Notes, and Problems

THIRD EDITION

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To Jennifer, for loving me . . . and tolerating election law;  
and  
To Justice Scalia, for his civic courage, “without which democracy is doomed.”\*  
M.R.D.

To Henry, Sophia, Edward, Robert, Grace, Peter, & Eva, that they  
may inherit a prosperous, free, and democratic republic.  
B.A.S.

To Pat, Jane, and Jimmy.  
M.E.S.

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\* *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment).



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# Preface

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The law of politics is one of the most exciting, consequential, and fun subjects in the law-school curriculum. Disputes about political power involve much more than a single controversy; rather, they set the rules for the resolution of future disputes and go a long way toward determining who will resolve those disputes and how those disputes will be resolved. But courts don't (or aren't supposed to) make up these rules themselves; it is the political process itself that sets its own rules. Evaluating the judicial role in overseeing those rules and the process that creates them is a constant theme throughout this text. We hope the subject fascinates you as it fascinates us.

The third edition is the product of a comprehensive review and streamlining of the second. This edition is shorter than the previous one, owing to the deletion of several principal cases and close editing of the ones that remain. Our overall philosophy in editing this book has remained true to our original impetus for writing it: We wanted to present the subject in a thorough but understandable way that approaches election law primarily as *law* rather than as an exercise in political theory. That is, we have written this book not primarily for political-science students but for law students, whether or not they intend to practice in the field. This book, therefore, combines an emphasis on doctrine with Notes and Questions that encourage students to think about the proper role for the courts in policing politics.

In accordance with these goals, we have presented narrative introductions and Notes that clearly set forth and explain the law, while generally editing cases to allow the students to appreciate judicial reasoning by reading the courts' own words. On occasion, however, we have summarized courts' language to save space. We have also provided several Problems to test students' understanding of the material and to provide opportunities to apply the law to real-life scenarios. We believe that the final product presents the law in a form that is both teachable and sophisticated.

There have been several additional changes in this edition besides its more efficient presentation of the subject. We have, of course, updated the text to account for developments in election law and voting rights over the last five years. Users of the second edition will note the reorganization of several parts of the book. Material on congressional power to enact the original Voting Rights Act of 1965 has been moved from Chapter 1 to Chapter 3, where it joins our (slimmed-down) coverage of pre-clearance. The second edition's coverage of the political-question doctrine in

Chapter 2 and the one-person, one-vote doctrine in Chapter 3 have been combined in a new Chapter 2 on “Redistricting and One Person, One Vote.” That change has permitted us to address partisan gerrymandering (a political-question topic) after the one-person, one-vote cases that are central to the partisan-gerrymandering debate.

Our coverage of third parties and ballot access has been split from the rest of the former Chapter 6 on political parties’ rights, and it now joins the term-limits material in the former Chapter 7 to form a new Chapter 6 that gives comprehensive coverage to states’ power to design, and to control access to, the ballot. We have also moved the material on anonymous speech out of the former Chapter 8, and we have moved the material on campaign-finance disclosure rules out of the former Chapter 9. Both of those sections now combine to form a new Chapter 9 that comprehensively considers the tradeoffs between disclosure and anonymity.

Finally, we have also thoroughly redesigned the coverage of election administration. Whereas the second edition treated polling-place restrictions and vote-counting rules in separate chapters, Chapter 10 of this edition covers all manner of election-day rules. In practice, disputes over the casting and counting of ballots overlap because often whether a vote should be counted depends on the manner in which it was cast. Therefore, vote-casting and vote-counting disputes are often analytically similar and it makes sense to consider them in a single chapter. This new structure also allows us to devote attention to the electoral college and to other federal rules that affect the casting and counting of votes, even as elections are administered by state and local officials.

Readers should be aware of certain conventions we have used in editing cases. Footnotes, citations, and section headings have been deleted without indication. Our deletions of text are marked by asterisks (“\* \* \*”). Ellipses (“ . . .”) appear in the material we are quoting. Our insertions of text are indicated by brackets (“[ ]”). Footnotes appearing in the cases have retained their original numbers; our footnotes are indicated by letters. Paragraph breaks have occasionally been altered. We use braces (“{ }”) to indicate that text has been moved.

There are many persons with whom we have shared portions of this book, and whose suggestions have improved the final product. Among those persons, Heather Gerken, Allison Hayward, and Gene Mazo deserve special mention. We wish to express our thanks to the students who have taken our classes and seminars in election law; this new edition has benefited from their input. We are also indebted to others whose scholarship has created a field of election law, and whose work has enriched our understanding of the subject: Rick Hasen, Sam Issacharoff, Pam Karlan, Dan Lowenstein, Rick Pildes, and Dan Tokaji. In addition, we have benefited from several on-line resources, including Hasen’s Election Law Blog and listserv, as well as Election Law @ Moritz and Ballot Access News.

We are thankful for the administrative support of Connie Miller, as well as the research assistance of Lisa Bemboom, Kaleigh Boyer, Bill Cash, Alexander

Czebiniak, Gregory Darr, Jacob Dean, Keely Espinar, Megan Harmon, Carol Herdman, Joe Holaska, Aaron Kaufer, Jessica Lehman, Lauren Linsenbach, Cecille Lucero, Clarke Madden, Julie Olivas, Evelyn Stoner, Justin Swartz, Jesse Unruh, and Shawn-Ryan White.

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This is the first edition published by Carolina Academic Press. We would like to thank all the friendly and professional staff at CAP, particularly Linda Lacy and Susan Trimble, who have welcomed us with great patience and kindness.

Please contact us with ideas for improving the book in the next edition.

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