Introduction

Terry Smith

Follow this and additional works at: https://via.library.depaul.edu/jsj

Recommended Citation
Available at: https://via.library.depaul.edu/jsj/vol6/iss2/2
INTRODUCTION

TERRY SMITH*

Perhaps more than any other area of jurisprudence, election law is rife with contradictions that directly affect equality of citizenship. On the one hand, the Supreme Court has said that the right to vote becomes fundamental once it is conferred by the state.1 On the other, the Court has permitted states to burden that right based on speculative dangers for which there is no record evidence.2 The Supreme Court has declared that majority rule is a fundamental predicate of American democracy.3 Yet the Court's failure to remedy partisan gerrymandering allowed the major party that received the fewest votes in congressional elections last year to maintain its majority in the House of

* Terry Smith is Distinguished Research Professor of Law at DePaul University College of Law. Professor Smith is a well-known employment and labor law and voting rights scholar, and the author of Barack Obama, Post-Racialism, and the New Politics of Triangulation. Professor Smith received his undergraduate degree from Brown University, magna cum laude, and his law degree from New York University.
2 Crawford v. Marion County Election Board, 553 U.S. 181, 194-95 (2008) (Permitting the state of Indiana to enact a restrictive voter photo identification law to prevent voter fraud even though “[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history”).
3 Bartlett v. Strickland, 556 U.S. 1, 19 (2009) (Noting the “special significance, in the democratic process, of a majority”); Reynolds v. Sims, 377 U.S. 533, 565 (1964) (“Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.”)
Representatives. The Court has also mandated that in redistricting, race—defined narrowly and stereotypically by the Court as phenotype—must not predominate. Yet because the Republican Party in most of the former Confederate states is almost entirely White, the severe Republican gerrymanders produced in 2010 in North Carolina, South Carolina, Texas and other states simply could not have been achieved without intentionally focusing on race or its proxies.

The costs of these internal inconsistencies to American democracy are substantial. Voter suppression is no longer a whispered conspiracy but rather a public campaign using the Trojan horse of voter fraud as its justification, if any justification is offered at all. Thus, when Pennsylvania passed a restrictive voter photo I.D. law, the Republican state house majority leader offered no principled defense of the law but did inadvertently volunteer that voter photo I.D. was “gonna allow Gov. Romney to

---

4 See Vieth v. Jubilirer, 541 U.S. 267 (2004). In Vieth, the Court was unable to agree on a remedy for excessive partisan gerrymandering, though a majority of the Court concluded such claims remain justiciable. Thus, as a practical matter, even the most extreme instances of partisan gerrymandering remain constitutional. Although Democrats received 1.4 million more votes in congressional elections in 2012, Republicans held a 33-seat advantage in the United States House of Representatives. Sam Wang, The Great Gerrymander of 2012, N.Y. Times, Feb. 3, 2013 at Op1. This was only the second time since World War II that a national majority did not hold a majority of the seats in the House. Id.


6 As of 2011, 87 percent of Americans who identified themselves as Republican or who leaned Republican were non-Hispanic Whites. See TERRY SMITH, BARACK OBAMA, POST-RACIALISM, AND THE NEW POLITICS OF TRIANGULATION (2012). This racial stratification of the American two-party system is even more acute in the South, where partisan realignment has taken place almost entirely along racial lines. See Campbell Robertson, For Politics in South, Race Divide Is Defining, N.Y. Times, Oct. 2, 2011, at Op10 (Noting that in Mississippi in 2008, 96 percent of self-identified Republicans were White, while 75 percent of self-identified Democrats were Black).
Either Democratic voter fraud in the past five presidential elections before 2012 had been so pervasive as to deny Pennsylvania Republicans a victory, or, more likely, Republicans were simply trying to suppress the votes of the Democratic base.

A Republican county chairman and elections board member in Ohio made abundantly clear which part of the Democratic base Republicans in his state were targeting as they attempted to curtail in-person early voting the weekend prior to the election. "I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban — read African-American — voter-turnout machine," said Doug Preisse. Ohio's secretary of state attempted to allow in-person early voting during the weekend before the general election for military and overseas Ohioans but not for resident civilians. A federal court of appeals found the distinction invalid on equal protection grounds.

The Ohio decision aside, the Supreme Court has yet to fashion a coherent election-law doctrine that will demarcate voter suppression from legitimate ballot integrity measures. In Crawford v. Marion County Election Board, the Court adopted a regime that permits partisan state officials to proffer wildly speculative justifications for restrictive voter photo I.D. laws while requiring plaintiffs to be precise as to the burdens imposed on their exercise of the franchise. This one-sided approach is not limited to voter I.D. laws. Indeed, in the area of candidate access to the ballot, the Court has often refrained from requiring

---

states to set forth specific evidence in support of their justifications for stringent ballot access laws.\(^{11}\)

In its submission to the current volume, *Challenges to Ballot Access and the Challenges Therein*, the Citizen Advocacy Center observes that the deference the Supreme Court has accorded states in adopting candidate ballot access laws carries over into the implementation of those laws by local election boards. In *South Asian American Civic Engagement: Opportunity for Impact*, Ami Gandhi and Priyang Baxi of the South Asian American Policy and Research Institute also give readers a look at politics on the ground—specifically, a view of how Asians as an ethnic group experience the electoral system that is the composite of many of the Court's irreconcilable election-law decisions. Finally, a collection of articles and retrospectives on the 2012 Mexican Presidential Election challenges readers of this issue to think about democracy in comparative terms. The totality of these submissions highlights the importance of election law to the lives of everyday people around the globe and the imperative of judicial and legislative intervention to make the ideal of democracy a reality.

---

\(^{11}\) Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986) ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access.").