Loyola of Los Angeles Law Review

Volume 48
Number 3 *Developments in the Law: Election Law; Developments in the Law: Law of War*

Article 1

Spring 2015

Election Law—Introduction

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Election laws dictate the ways in which we structure our government. Decisions concerning issues such as who can vote, how legislative district lines are drawn, and how money is spent in our elections help to define the contours of our representative democracy. These choices delineate vital issues concerning who we consider to be part of our community for purposes of allowing people to exercise the fundamental right to vote, how we structure elections for those who represent us, and who and how people can attempt to affect the electoral process.

In this issue of the *Loyola of Los Angeles Law Review*, five articles address these vitally important topics.

I. CAMPAIGN FINANCE LAW

In this issue there are two articles discussing issues related to campaign finance law. Campaign finance laws are designed to regulate the transfer of power amassed in the economic marketplace to power in the political marketplace.[1] These laws are premised on a belief that when large sums of money flow freely to candidates, political parties, and independent groups, negative consequences can result for both electoral and political processes.[2]

∗ Clinical Professor of Law, Loyola Law School. The author wishes to thank the fantastic editorial team of the *Loyola of Los Angeles Law Review*, including Marleina Paz, Diana De Leon, and Karen Roche. The author also wishes to express great respect for the hard work of each of the student authors—Sarah Harding, Rudy Klapper, Erika Stern, Rosemarie Unite, and Jessica Medina—who wrote pieces for this issue. Professors Karl Manheim and Aaron Caplan provided invaluable guidance, editorial comments, and support for the articles contained in this issue. Each of the three professors involved with this issue was primarily responsible for overseeing one to two articles.

1. *See* Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why* Buckley v. Valeo *Is Wrong*, 47 UNIV. OF RICH. L. REV. 881, 890 (2013); *see also* Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998).

2. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659–60 (1990) (noting the "corrosive and distorting effects" of large campaign contributions "accumulated with the help of the corporate form") *overruled by* Citizens United v. Federal Election Com'n, 130 S. Ct. 876 (2010).

In the wake of the Watergate scandals, Congress passed our nation's first piece of comprehensive campaign finance legislation, the Federal Election Campaign Act (FECA).[3] As amended, the FECA created limits on campaign contributions and expenditures, required that in some instances those giving and spending money in an effort to influence elections disclose those sums,[4] and established a system of voluntary public financing for presidential candidates.[5]

In 1976, in *Buckley v. Valeo*[6]—the case that remains the bedrock of campaign finance jurisprudence—the Supreme Court ruled on the constitutionality of many provisions of the FECA.[7] The Court held that money given and spent in campaigns is entitled to First Amendment protection.[8] As a result, any campaign finance restriction must survive a high level of scrutiny under the First Amendment. In that case, the Court upheld limits on campaign contributions and disclosure provisions and struck down limits on campaign expenditures.[9]

II. HOW CAN WE LIMIT MONEY SPENT IN ELECTIONS?

In *Buckley*, the Court ruled that when performing a First Amendment analysis, the only sufficiently important, or compelling, governmental interest is preventing corruption or the appearance of corruption.[10] This of course means that if a restriction is viewed as serving to prevent corruption or the appearance thereof it will be upheld if it is properly tailored, but if the restriction is not seen to serve those interests it will be struck down. Hence the determination of how narrowly or broadly the Court defines corruption, and whether or not it recognizes other interests as sufficiently important, often dictates whether or not campaign finance restrictions will be upheld.

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3. Federal Election Campaign Act of 1971, PUB. L. NO. 92-225, 86 Stat. 3 (1971) (codified as amended at 2 U.S.C. §§ 431–455 (2012)).

4. 2 U.S.C. § 434.

5. *See id.* §§ 431–455.

6. 424 U.S. 1 (1976).

7. *Id.*

8. *Id.* at 19–23.

9. *Id.* at 23, 29.

10. *Id.* at 26–27, 33. The government has at times argued that additional interests should be viewed as compelling. *See* Randall v. Sorrell, 548 U.S. 230, 240 (2006); Nat'l Bank of Bos. v. Belotti, 435 U.S. 765, 787–88 (1978); *Buckley*, 424 U.S. at 48–57.

After the Court's decisions in 2010 in *Citizens United v. Federal Election Commission*,[11] and in 2014 in *McCutcheon v. Federal Election Commission*,[12] corruption now means only *quid pro quo* corruption.[13] *Quid pro quo* means "something for something."[14] The Court has thus defined corruption in its narrowest form.

In one article, author Jessica Medina traces the history of the Court's ever-changing definition of corruption, and the cases in which the Court has treated other governmental interests as sufficiently important to uphold campaign finance restrictions.[15] As Medina notes, the definition of corruption often contracts or expands depending on the person or entity spending the money.[16] For instance, prior to its decision in *Citizens United*, the Court recognized that in the case of corporate expenditures, reducing corruption—broadly defined as distortion—could be an interest sufficient to uphold restrictions.[17]

In her piece, Medina criticizes the current approach, arguing that corruption should be defined as broader than merely quid pro quo corruption.[18] Medina contends that the legislative purposes behind campaign finance restrictions are not served by the Court's adoption of a narrow definition of corruption.[19]

Finally, Medina concludes by proposing a "sliding scale" in which the definition of corruption varies according to the person or entity making political expenditures.[20] This approach, Medina argues, sufficiently protects the First Amendment speech rights of spenders while also serving the guard against the evils campaign finance laws were designed to thwart.[21]

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11. 130 S. Ct. 876 (2010).
12. 134 S. Ct. 1434 (2014).
13. *Citizens United*, 130 S. Ct. at 909–11.
14. BLACK'S LAW DICTIONARY 1367 (9th ed. 2009); *see* Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 130 (1997).
15. Jessica Medina, *When Rhetoric Obscures Reality: The Definition of Corruption and Its Shortcomings*, 48 LOY. L.A. L. REV. 597 (2015).
16. *Id*. at 602.
17. *Id*. at 609.
18. *Id*. at 623.
19. *Id*. at 626.
20. *Id*. at 637.
21. *Id.* at 645.

III. WHEN CAN WE REQUIRE DISCLOSURE BY THOSE GIVING AND SPENDING MONEY IN ELECTIONS?

Campaign finance restrictions do more than limit the amount of money that can be given and spent in campaigns. These laws also require, under certain circumstances, the disclosure of the identity of those giving and spending money.[22] In *Buckley*, the Supreme Court upheld the disclosure provisions contained in the FECA.[23] First, as it did when it upheld contribution limits, the Court found that disclosure provisions could prevent corruption or the appearance of corruption, because disclosure of campaign contributors and spenders will provide the public the information necessary to determine whether there is an improper connection between contributors or spenders and candidates.[24] Second, the Court concluded that disclosure gives the public fundamental information about candidates and their place on the political spectrum, and the sources behind political advertising.[25]

Robust disclosure must, of course, be balanced against the right to privacy. It cannot and should not be that campaign contributors and spenders forfeit privacy interests the moment they decide to enter the political forum. Such a situation could chill both speech and associational rights as contributors and spenders are deterred from giving money to and spending money to support or oppose candidates or measures. Hence, courts must strike a delicate balance between the interests supporting disclosure and transparency and those supporting the right to privacy.

As the Court continues to strike down limitations on the amount of money that can be spent in elections, legislators (and the voters via the initiative process) are increasingly turning to disclosure as the best vehicle through which to reduce corruption and its appearance, and to provide the public with vital information about those spending money in attempt to influences voters.[26]

In her article, Sarah Harding tackles how best to strike the balance between the government's interests in disclosure laws and

22. 2 U.S.C. § 434 (2012).

23. Buckley v. Valeo, 424 U.S. 1, 84 (1976).

24. *Id.* at 76.

25. *See id.*

26. *See, e.g.*, Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 103, 116 Stat. 81, 87–88 (2002) (amending 2 U.S.C. § 434 to include more disclosure requirements).

the potential harms that disclosure laws can pose.[27] Harding traces the history of disclosure laws and the Court's treatment of many of those laws.[28] Harding also criticizes the Court's current analytical framework as devoid of useful guidelines and lacking necessary clarity.[29] Harding concludes by proposing factors that legislators and members of the judiciary should consider when determining the constitutionality of campaign disclosure provisions.[30]

IV. VOTING

The right to vote is arguably the fundamental right to end all fundamental rights.[31] The right to vote is preservative; it protects one's ability to exercise other rights.[32]

People have not only the right to vote, but also with some limitations, the right to an "effective" vote.[33] Thus legislatures can affect the right to vote with various mechanisms, such as by laws limiting who can vote. One of the articles in this issue addresses the question of who can vote in our representative democracy. Legislatures can also make laws affecting the right to an effective vote when they enact redistricting plans. Another article in this issue explores this topic.

When exercising their right to vote, members of the electorate may weigh in not only on representatives, but also on pieces of legislation. In many states and localities throughout the nation, voters can completely bypass the legislative process and directly enact legislation via the mechanisms of direct democracy. Another article in this issue explores one of these mechanisms, the initiative process.

V. WHO CAN VOTE?

Rules restricting the ability of certain individuals to vote define who we, as a society, want to be part of our community. By

27. Sarah Harding, *Balancing Disclosure and Privacy Interests in Campaign Finance*, 48 LOY. L.A. L. REV. 651 (2015).

28. *Id.* at 656.

29. *Id.* at 679.

30. *Id.* at 691.

31. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

32. *See id.*

33. *Id.* at 555 n.29 ("'The right to vote includes the right to have the ballot counted.'" (quoting South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting))).

prohibiting some individuals from voting, we are telling those people that we do not want them to weigh in on decisions affecting our representative democracy. The propriety of these regulations has been hotly debated for decades.

Currently, many laws targeting who can vote in our elections focus on felons. There are millions of individuals who are prohibited from exercising their right to vote because of past convictions for felony offenses.[34] State laws differ greatly as to when, whether, and how felons can regain their voting rights. All but two states[35] prohibit felons from voting for some period of time following their convictions.

In her article, Erika Stern discusses the issue of felon disenfranchisement.[36] Stern traces the history of laws limiting the ability of felons to vote by comparing those laws to past restrictions on the right vote, such as poll taxes, literacy tests, and laws prohibiting women from voting.[37] Stern then argues the act of voting is entitled to First Amendment protection.[38] Stern next avers that the reason states place limitations on the ability of felons to vote is that legislators (and perhaps the citizens they represent) simply do not trust felons.[39] Stern concludes by arguing that under the First Amendment there can be no constitutional justification for prohibiting felons from voting, particularly given that the legislature's stated rationale for such restrictions is a mistrust of the judgment of felons.[40]

VI. HOW CAN WE BURDEN THE RIGHT TO VOTE?

In addition to limiting *who* can vote, other laws may affect one's right to an effective vote. Via the redistricting process, legislators, or in some instances, commissioners, draw legislative lines on the local,

34. *See* Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 239 (2004).

35. *Id.* (citing Maine and Vermont as the only two states that allow voting while incarcerated).

36. Erika Stern, *"The Only Thing We Have to Fear Is Fear Itself": The Constitutional Infirmities with Felon Disenfranchisement and Citing Fear as the Rationale for Depriving Felons of Their Right to Vote*, 48 LOY. L.A. L. REV. 703 (2015).

37. *Id*. at 709.

38. *Id*. at 718.

39. *Id*. at 739.

40. *Id*. at 752.

state, and federal levels.[41] This process has been described as "musical chairs with switchblades" because how lines are drawn plays a large role in determining who is in power.[42] Political jockeying is an ever-present facet of the redistricting process.[43]

After decades of discrimination against racial minorities, in 1965 Congress passed an historic piece of civil rights legislation, the Voting Rights Act (VRA).[44] There are two main sections of the Act that protect the right to vote.[45] The first is section 2, which prohibits voting practices or procedures that discriminate on the basis of race, color,[46] or membership in one of the language minority groups.[47]

The second is section 5, which requires that voting changes in certain "covered" jurisdictions receive "preclearance" by the United States attorney general, or by a United States District Court for the District of Columbia prior to going into effect.[48] Covered jurisdictions are those that have a history of discrimination against racial and language minorities. In 2013, in *Shelby County v. Holder*,[49] the Supreme Court invalidated section 4 of the VRA, which contains the formula to determine which jurisdictions would be "covered" and subject to preclearance.

Many challenges waged under both section 2 and the now-defunct section 5 of the VRA center on redistricting plans.[50]

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41. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 410 (2006); Seema Mehta, *Redrawing of District Boundaries Will Shake Up California Politics*, L.A. TIMES, June 10, 2011, http://articles.latimes.com/2011/jun/10/local/la-me-maps-20110610; *Redistricting*, BLACK'S LAW DICTIONARY (9th ed. 2009) (redistricting is the "[r]ealignment of a legislative district's boundaries to reflect changes in population and ensure proportionate representation by elected officials").

42. Jessica A. Levinson, *"California Redistricting—'Musical Chairs With Switchblades'"*, POLAWTICS (June 11, 2011), http://polawtics.lls.edu/2011/06/california-redistricting-musical-chairs.html.

43. *See, e.g.*, *Perry*, 548 U.S. at 410 ("Faced with a Republican opposition that could be moving toward majority status, the [Texas] state legislature drew a congressional redistricting plan designed to favor Democratic candidates.").

44. Voting Rights Act, 42 U.S.C. § 1973 (2012).

45. Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistricter"*, 30 U.S.F. L. REV. 1, 9–10 (1995).

46. 42 U.S.C. § 1973b.

47. 42 U.S.C. § 1973b(f)(2).

48. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 323 (2000) (citing 42 U.S.C. § 1973c).

49. 133 S. Ct. 2612 (2013).

50. *See, e.g.*, Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 129–130 (2010) (discussing "equality litigation" in the context of "minority vote dilution").

Redistricting plans, for instance, are often challenged for diluting minority voting power.[51] Now that section 5 stands dormant,[52] section 2 may be vulnerable to challenge.[53]

In her article, Rosemarie Unite examines a certain confluence of circumstances that may put section 2 at risk of being gutted or invalidated by the Supreme Court.[54] Unite begins by exploring why the dialogue between Congress and the Supreme Court with respect to section 2 may no longer be possible due to congressional polarization and gridlock.[55] The irony is that congressional polarization is caused, in part, by partisan gerrymandering, against which section 2 may be one of the only means of protection.[56]

Unite then discusses how a challenge to the statute might fare at the hands of an equally polarized Supreme Court,[57] led by a chief justice who fought the enactment of Section 2's current form during his early days as an attorney in the U.S. Department of Justice[58] Strong arguments exist both for and against the constitutionality of section 2, so the justices' individual views may indeed influence the outcome.[59]

Finally, Unite assesses the ramifications of a weakened or invalidated section 2 at a time when the minority vote begins to amass the potential to swing presidential elections and, by extension, the futures of the political parties.[60]

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51. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

52. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2648 (2013) (Ginsburg, J., dissenting) ("The Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional.").

53. Ellen Katz, Professor, Univ. of Mich., Remarks at the Voting Rights Act and Redistricting Panel at the George Washington University Law School: Law and Democracy: A Symposium on Political Law (Nov. 16, 2012) at 1:09:32, *available at* http://vimeo.com /user9108723/review/55780860/5749aec1a9 (arguing that section 2 is "undeniably vulnerable" for the same reasoning she surmises the Court will invalidate section 5).

54. Rosemarie Unite, *The Perrymander, Polarization, and Peyote v. Section 2 of the Voting Rights Act*, 46 LOY. L.A. L. REV. 1075 (2013).

55. *Id*. at 1107.

56. *Id*. at 1101, 1109.

57. *Id.* at 1128–39.

58. *Id*. at 1114.

59. *Id*. at 1114–28.

60. *Id*. at 1140.

VII. WHAT ARE WE VOTING FOR?

Direct democracy allows citizens to bypass state legislatures and directly enact and repeal legislation.[61] The most common mechanism of direct democracy is the initiative process, through which citizens can draft, circulate, and enact statutes and constitutional amendments.

Many states and localities enacted the initiative process to reduce the influence of special interests on elected officials and promote grassroots political activity and power.[62] The ballot initiative process essentially creates citizen legislators.[63] The initiative process has been described as the fourth branch of government.[64] In many states, laws enacted via the initiative process have drastically changed the structure of those state governments.[65] The sad irony of the initiative process is that the very interests it was designed to guard against—moneyed interests—now control the process.[66]

California adopted the processes of direct democracy in what was arguably the height of the Progressive Era in 1911.[67] In his article, Rudy Klapper explores and critiques California's ballot initiative process. Klapper argues that decisions by the California Supreme Court have upset the balance between our systems of direct

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61. Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1846 (1999).

62. Jessica A. Levinson & Robert Stern, *Ballot Box Budgeting in California: The Bane of the Golden State or an Overstated Problem?*, 37 HASTINGS CONST. L.Q. 689, 694 (2010).

63. *See generally* Elizabeth Garrett, *Who Directs Direct Democracy*, 4 U. OF CHI. L. SCH. ROUNDTABLES, 17, 17–19 (1996–1997).

64. CAL. COMM'N ON CAMPAIGN FIN., DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT (1992), *available at* http://policyarchive.org/handle/10207/bitstreams/215.pdf.

65. *See, e.g.*, Jennifer Steinhauer, *Top Judge Calls Calif. Government 'Dysfunctional'*, N.Y. TIMES, Oct. 11, 2009, at A23 (noting how California's referendum process allows voters to decide everything "from how parts of the state budget are spent to how farm animals are managed").

66. *See* Garrett, *supra* note 63 (arguing that special interests, rather than citizen-legislators, frame the initiative referendum process); *see also* Levinson & Stern, *supra* note 62, at 710 (arguing that some believe the initiative process has now been hijacked by the very special interests it was meant to guard against); *see also* Jessica A. Levinson, Op-Ed., *Four Ways to Reform the Initiative Process on Its 100th Anniversary*, L.A. DAILY J., Oct. 20, 2011, *available at* http://llsblog.lls.edu/faculty/2011/10/four-ways-to-reform-the-initiative-process-on-its-100th-anniversary.html.

67. Karl M. Manheim, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1185–88 (1998) (describing the political situation and pseudo-"Banana Republic" atmosphere that existed in California and directly led to the adoption of the initiative).

democracy and representative democracy.[68] Klapper focuses much of his discussion on the state supreme court's treatment of the three constitutionality limitations on the initiative power—the ability of the people to pass constitutional amendments, but not constitutional revisions via the initiative process; the requirement that initiatives address only one subject; and the limited ability of the legislature to amend statutory initiatives.[69]

Klapper discusses a number of the negative consequences that result from California's current system of direct democracy.[70] Klapper asserts, among other things, that as it stands, the initiative process allows a simple majority of Californians to pass laws that undermine core values of both republican government and the California constitution itself.[71] Klapper also contends that the initiative process has lead to extreme political gridlock.[72]

Klapper concludes by arguing that the California Supreme Court should change its approach and more strictly enforce the three constitutional limitations placed on the initiative process.[73] In addition, Klapper proposes that the California legislature reform the initiative process to make it a more deliberative process, rather than one that threatens to impose the "tyranny of the majority" over Californians.[74]

This issue contributes to the discourse by examining how laws governing our electoral processes help to shape our representative democracy and proposes noteworthy and significant changes that would deeply affect the underlying structure of our government.

68. Rudy Klapper, *The Falcon Cannot Hear The Falconer: How California's Initiative Process Is Creating an Untenable Constitution*, 48 LOY. L.A. L. REV. 755 (2015).

69. *Id*. at 761.

70. *Id*. at 784.

71. *Id*. at 803.

72. *Id*. at 755.

73. *Id*. at 761.

74. *Id*. at 804.