3-1-2009

Introduction: Developments in Election Law

Richard L. Hasen

Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol42/iss3/1
INTRODUCTION:
DEVELOPMENTS IN ELECTION LAW

Richard L. Hasen*

Ten years ago, the *Loyola of Los Angeles Law Review* published a symposium on the topic "Election Law as Its Own Field of Study." The symposium examined whether election law deserved to be considered its own field, wholly apart from constitutional law and political science. In my Introduction to the symposium, I pointed to objective indicia of independence: the course was "taught in many fine law schools; it is the exclusive subject of two casebooks; an Internet-based discussion group for scholars on the subject has over 150 subscribers; and the number of law review articles and symposia on the subject has mushroomed in the last decade."2

Today, no one would think to ask whether election law deserves to be considered its own field. It is taught in many more law schools now than it was in 1999, by many professors who were not teaching, or were not teaching election law, in 1999;3 election law casebooks are now in their third and fourth editions;4 the Internet-based election law discussion group now has over 800 participants;5 and law review articles and symposia have continued to proliferate, along with dedicated coverage in a peer-reviewed quarterly journal, the *Election Law Journal*, now in its eighth volume. A number of election law

---

* William H. Hannon Distinguished Professor of Law, Loyola Law School, Los Angeles.


blogs also have emerged, along with a nationally respected center on election law at Ohio State University, Moritz College of Election Law.

What explains the phenomenal growth in this field? Though many factors undoubtedly are at work, the 2000 controversy over the presidential election in Florida, culminating in the United States Supreme Court's decision in *Bush v. Gore*, certainly spurred scholarly writing in the field. In the 1999 symposium, election law scholars Sam Issacharoff and Rick Pildes rightly characterized the field as focused on the big questions of democracy rather than as having a "tedious focus on the narrow regulatory questions of most interest to political junkies . . . ." Dan Lowenstein similarly remarked in the 1999 symposium that nuts-and-bolts questions of election law had increased in number in the courts but that scholars "do not teach these issues and we do not write about them in law reviews; not because they are not there but because, for various reasons, we do not find them sufficiently interesting." After the 2000 Florida debacle—which saw the Supreme Court end a presidential recount that appeared to turn on the counting of "dimpled chads" in punch card ballots—election law scholars turned increasingly to issues of election administration. Since 2000, nuts-

---


12. Among the legal scholars writing with a significant focus on election administration are Chris Elmendorf, Heather Gerken, and Dan Tokaji, none of whom were in academia in 1999.
and-bolts scholarship is "in," though broad election law scholarship on democracy and the courts certainly is not "out." 13

As scholarship on election law has flourished in the last decade, election law litigation has exploded as well. 14 In the pre-2000 period, state and federal courts handled an average of about ninety-four election cases per year. As shown in figure 1 below, during the 2001–2008 period, that number has more than doubled to an average of 237 election cases per year.

**Election Challenge Cases**

in Federal and State Courts, 1996–2008

![Figure 1](image_url)

The above figure includes both state and federal court cases. As figure 2 below shows, in the last twelve years, state court cases made up the majority of election challenge cases heard in the courts during every year but one. In the period of the early 2000s, over 80 percent of the election challenge cases were heard in state courts. The figure has dropped somewhat, but it stood at 54 percent of cases heard in 2008. 15

---


14. The data here are drawn from my study appearing in Richard L. Hasen, The Democracy Canon, 62 STAN. L. REV. (forthcoming 2009). The count is based upon a Lexis search of state and federal court databases using a year restriction and "election w/p challenge," culling out cases that are obviously inapplicable.

15. Id.
The reasons for the litigation explosion are unclear. One theory posits that election law has become part of a "political strategy" followed by politicians in an effort to manipulate the rules of the game to get elected and to win in the event of an election recount or contest. \(^{16}\) It is also possible that *Bush v. Gore* spurred more litigation by creating new equal protection claims, though Charles Anthony Smith and Christopher Shortell have found a significant rise in litigation related to presidential elections beginning in 2000, before *Bush v. Gore*. \(^{17}\) Other factors may be at work as well; election litigation might be a manifestation of the increased party polarization in American politics. \(^{18}\)

The Supreme Court also continues to see its share of election law litigation. The election litigation explosion in the Supreme Court began in the 1960s, when the amount of litigation rose from an average of ten cases per decade to an average of sixty cases per decade. \(^{16}\)

---


INTRODUCTION

decade. Though the number of cases the Supreme Court has decided thus far in the first decade of the twenty-first century appears to have declined markedly, along with a general decline in the Court's caseload, qualitatively the Court has decided very significant cases this decade in campaign finance, voting rights, redistricting, and other areas.

In this Developments issue of the Loyola of Los Angeles Law Review, five law review members tackle some interesting and vexing election law questions that have emerged from the Supreme Court's recent election law jurisprudence. The topics here are diverse—from statutory interpretation of the Voting Rights Act, to voter identification issues, to the standards for redistricting, to judicial recusal, to the constitutionality of public financing laws—but the common thread in these studies is the difficulty of meshing theories of democratic representation with statutory and constitutional law. Each article uses Supreme Court and other judicial cases to enhance the body of election law scholarship.

The Supreme Court's voting rights cases have been among its most controversial election law decisions, and I, among others, have expressed the view that the Roberts Court is less likely than the Rehnquist Court to protect minority voting rights. Chief Justice


22. See Hasen, No Exit, supra note 20, at 678–82.
Roberts drew a great deal of attention when he wrote in his opinion in a 2006 redistricting case that “[i]t is a sordid business, this divvying us up by race.” He raised more eyebrows during oral argument in the 2008 case of Riley v. Kennedy, when he suggested an interpretation of section 5 of the Voting Rights Act that would markedly limit its coverage. Under this potential reading of the Act, the only changes that “covered jurisdictions” would have to preclear with the Department of Justice are those that differ from the rules in effect in 1964, 1968, or 1972.

The Supreme Court in Riley was able to avoid passing on the Chief Justice’s novel view of the Act, but Sabina Jacobs delves into it in her Developments article, The Voting Rights Act: What Is the Basis for the Section 5 Baseline? Jacobs examines the question as a matter of statutory interpretation. Using textual analysis, legislative history and intent, judicial precedent, and agency interpretation, Jacobs makes her case against Chief Justice Roberts’s “static” reading of section 5 in favor of a “dynamic baseline.”

One of the most controversial election law cases since Bush v. Gore is the Supreme Court’s 2008 opinion in Crawford v. Marion County Election Board. In Crawford, the Supreme Court upheld Indiana’s requirement that voters show one of a limited number of pieces of photographic identification before voting. In As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After Crawford v. Marion County Election Board, Julien Kern takes a close look at the likely aftermath of the Supreme Court’s recent decision. Three Justices on the Court in Crawford rejected a facial constitutional challenge to the Indiana law but left open the

28. See id. at 580–620.
30. Id. at 1624.
INTRODUCTION

possibility that voters, or groups of voters, could bring an as-applied challenge to the extent these voters could demonstrate that the laws would impose heavy burdens on them, thereby violating their equal protection rights.\(^\text{32}\)

Kern is skeptical that such lawsuits could successfully protect those voters facing heavy burdens imposed on them by voter identification laws. She finds that because of the realities of litigation and the nature of pro bono representation, it will be difficult for individuals to bring suits to vindicate their constitutional rights in these cases. Class actions are no more promising, Kern argues, because of the difficulty of creating a workable "class" of burdened voters under the existing structure of Federal Rule of Civil Procedure 23. She concludes that the promise of an as-applied challenge is an empty one.

The Supreme Court has considered a number of cases involving judicial elections, and recently considered an important one about judicial recusal, in Caperton v. A.T. Massey Coal Co., Inc.\(^\text{33}\) In The Need for Effective Recusal Standards for an Elected Judiciary,\(^\text{34}\) Molly McLucas argues that litigants should have a constitutional right to judicial recusal in some circumstances. Under existing Supreme Court doctrine, states may not constitutionally limit independent spending for or against candidates for office.\(^\text{35}\) Moreover, according to the Supreme Court’s decision in Republican Party of Minnesota v. White,\(^\text{36}\) states cannot bar certain candidate statements during a judicial campaign that could raise questions about a judicial candidate’s impartiality.\(^\text{37}\) Given these two constraints, judicial recusal appears to be one of the only ways to ensure that individuals with cases before elected judges have a hearing that is impartial and that has the appearance of impartiality.

Anticipating the Supreme Court’s decision in Caperton,\(^\text{38}\) McLucas argues that the Due Process Clause of the United States

\(^{32}\) Crawford, 128 S.Ct. at 1644 (Souter J., dissenting.)


\(^{35}\) Id. at 695–696.

\(^{36}\) 536 U.S. 765 (2002).

\(^{37}\) Id. at 788.

\(^{38}\) McLucas completed her initial draft before the Supreme Court’s decision in Caperton.
Constitution mandates that an elected judge recuse herself when a litigant appearing before the judge has donated to the judge’s electoral campaign or to an independent group supporting the judge (or opposing her opponent) in such a way as to raise reasonable concerns about the judge’s ability to remain impartial. She further argues that objective factors must be devised to guide the judges’ evaluation of their own impartiality in such circumstances, and that procedural protections hold more promise than the exclusive reliance on judicial self-policing. Her suggestion of objective factors to decide recusal issues offers courts some structure for implementing the murky Caperton holding.

Though some of the Supreme Court’s precedents in the election law field go back decades, some fundamental questions about those precedents remain unresolved. In Defining Population for One Person, One Vote, 39 Joshua M. Rosenberg analyzes a fascinating question recently brought to the fore by Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit in his opinion in Kalson v. Paterson. 40 At issue is the question of implementing the Supreme Court’s requirement that states draw state legislative districts with roughly equal populations. 41 Though the Court has unequivocally set forth this one person, one vote principle, there remains considerable controversy, as discussed in Kalson, whether district equality requires an equality of persons or an equality of voters in a district. 42 The two will not be the same, once one recognizes that some districts may have more persons—more children, felons (especially if the district includes a prison), or noncitizens—than other districts.

In Kalson, Judge Calabresi endorsed an “equal persons” standard. 43 Rosenberg, drawing upon both case law and political theory, argues that states should have the freedom to choose between “equal persons” and “equal voters” standards in complying with the one person, one vote rule. He contends that imposing a one-size-fits-

---

40. 542 F.3d 281 (2d Cir. 2008).
42. 542 F.3d at 284.
43. Id. at 290.
all solution to districting violates principles of federalism by depriving states of their ability to choose a theory of representation.

Of all doctrinal areas, campaign finance law may be the most volatile as the Roberts Court distinguishes or overrules past precedent. In Davis v. Federal Election Commission: *Muddying the Clean Money Landscape*, Emily C. Schuman examines a potential (intended or unintended) consequence of the Supreme Court’s recent decision in *Davis v. Federal Election Commission*. In *Davis*, the Court struck down a provision of the Bipartisan Campaign Reform Act of 2002 that allowed congressional candidates to accept larger contributions from individuals when the candidates faced a self-financed opponent. Schuman argues that the way in which the Supreme Court struck down the “Millionaire’s Amendment” undermines a key feature of public financing plans that have been adopted in a number of states and cities: a trigger mechanism granting larger amounts of public funds to candidates who participate in the plan and face large private spending by a nonparticipating candidate or an outside group. Schuman further argues that *Davis* “indicates a shift in the Court’s focus with respect to campaign finance reform, away from the interests of the voting public and toward those of individual candidates.”

Together, these five articles in this Developments issue greatly advance our understanding of the Supreme Court’s past and future election law jurisprudence. I concluded my Introduction to the 1999 symposium “Election Law as Its Own Field of Study” by proposing that the symposium be reconvened “in ten years to see how election law has progressed from puberty to adulthood—and perhaps to see how we have progressed to middle age and beyond, as well.” Rather than focus on the bulging waistlines and receding hairlines of the election law scholars who participated in the last symposium, I am happier to see the baton passed here to another generation of people who are fascinated by the intersection of law and politics, and

---

46. *Id.* at 2770.
47. Schuman, *supra* note 44, at 741.
who are eager to explore how law can continue to be crafted in the service of democracy.