

SYMPOSIUM

INTRODUCTION: A SYMPOSIUM ON THE LAW OF DEMOCRACY

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The first decade of the twenty-first century has come to a close, and it has certainly been an interesting one for the rapidly maturing field of election law. The new century commenced with what might be described as the “big bang” of election law—the drama of *Bush v. Gore*.¹ *Bush v. Gore* looms large for at least a couple of reasons. First, the case put an exclamation point on the growth in the constitutionalization of election law.² Second, the events in Florida during the 2000 election created what now amounts to a third recognized subfield of election law—election administration—to accompany the other already prominent subfields of voting rights and campaign finance.

Beyond *Bush v. Gore*, the first decade of the new century also brought a wave of judicial decisions and statutory shifts. Sticking with election administration for a moment, 2002 saw enactment of the Help America Vote Act (HAVA)³ as a reaction to the events surrounding the hotly disputed 2000 election. The HAVA introduced the concepts of statewide voter registration databases and provisional ballots to the entire country while also taking aim at improving the mechanisms (i.e., machinery) that voters use to cast ballots. The HAVA, in turn, spawned new thinking about election administration by the states, with several adopting controversial provisions requiring registered voters to present government-issued photo identification as a condition of casting a countable ballot.⁴ Indeed, Indiana was one of the states that passed such a law, and a subsequent equal protection challenge to Indiana’s law ultimately worked its way to the United States Supreme Court in *Crawford v. Marion County Election Board*.⁵ Moreover, the federal government’s work in election administration was not limited to passage of the HAVA. In 2009, Congress passed the Military and Overseas Voter Empowerment Act (MOVE),⁶ representing yet another landmark in the

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1. 531 U.S. 98 (2000).

2. See generally Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55-83 (2004).

3. Pub. L. No. 107-252, 116 Stat. 1666 (2002).

4. Senate Enrolled Act No. 438, Pub. L. No. 109, 2005 Ind. Acts p.2005.

5. 553 U.S. 181 (2008).

6. Pub. L. No. 111-84, 123 Stat. 2190 (2009).

continuing effort to fully enfranchise military and overseas voters.

The voting rights sphere was equally as active. As always, the Supreme Court issued a number of decisions interpreting the statutory framework found in the Voting Rights Act. At the beginning of the decade, the Court rendered opinions in *Reno v. Bossier Parish School Board*⁷ and *Georgia v. Ashcroft*⁸ that limited the application of the Section 5 preclearance provision. Congress, however, legislatively reversed both of these judicial decisions in 2006 by amending Section 5 while also extending the preclearance provision for another twenty-five years.⁹ That same year, the Court for the first time in two decades found a violation of the Section 2 “results” test in the context of Texas’s wild post-2000 redistricting battles.¹⁰ Yet by the end of the decade, the Court had returned to its more skeptical view of the Voting Rights Act. In *Bartlett v. Strickland*,¹¹ the Court limited the application of Section 2. And in *Northwest Austin Municipal Utility District No. One v. Holder*,¹² the Court interpreted Section 5 in a novel manner to expand the ability of local governments to escape the preclearance requirement while simultaneously using extensive dicta to call into question the constitutionality of Congress’s 2006 extension of the preclearance regime.

Like voting rights, the area of campaign finance also witnessed an extensive conversation between Congress and the Court about regulation and its constitutional limits. In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA)¹³ as a means of limiting the influence of money in elections. At first, the Court was deferential to the new regulations, upholding several important provisions of the BCRA in *McConnell v. Federal Election Commission*.¹⁴ But a shift in the Court that traded Chief Justice William Rehnquist and Justice Sandra Day O’Connor for Chief Justice John Roberts and Justice Samuel Alito resulted in what appears to be a major transformation of the Court’s views on campaign finance regulation. In a series of decisions in the last half of the decade from *FEC v. Wisconsin Right to Life, Inc.*¹⁵ to *Davis v. FEC*¹⁶ to *Citizens United v. FEC*,¹⁷ the Court rolled back on its deferential posture and demonstrated a far greater willingness both to limit the scope of campaign finance regulations and to strike them down in their entirety.

7. 528 U.S. 320 (2000).

8. 539 U.S. 461 (2003).

9. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified in scattered sections of 42 U.S.C.).

10. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

11. 129 S. Ct. 1231 (2009).

12. 129 S. Ct. 2504 (2009).

13. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 42 U.S.C.).

14. 540 U.S. 93 (2003), *overruled in part by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

15. 551 U.S. 449 (2007).

16. 128 S. Ct. 2759 (2008).

17. 130 S. Ct. 876 (2010).

It was with many of these events in mind when thirteen law professors gathered on April 8 and 9, 2010, at Indiana University School of Law—Indianapolis to discuss the past, present, and future of the law of democracy. In front of a large audience (thus signifying the tremendous public interest in these issues), these prominent legal academics explained, critiqued, and advocated for change in the areas of election administration, voting rights, and campaign finance. The discussion that commenced on those days now continues in this volume with nine articles certain to inform future debate related to the law of democracy. What follows here, then, is a brief description of the contents of this volume.

Even a decade later, the 2000 presidential election still lingers in the minds of many, and a couple of articles in this volume use that election as a launching point for discussion of where election administration needs to go. Edward Foley notes how that election and the decision in *Bush v. Gore* exposed a critical weakness in that the United States Constitution does not create an institution for resolving disputed elections. Professor Foley then sets out to answer the question of why the Founders did not provide for such an institution. His answer is that the Founders had no experience in resolving disputed elections for executive positions; after all, their primary experience with executive power had been a king. Moreover, when confronted with such a dispute during the New York gubernatorial election in 1792, the Founders were at a loss for answers about how to resolve the dispute. Professor Foley then digs deep into the history of that 1792 election—focusing on the views of such luminaries as Hamilton, Jefferson, Madison, and Jay—for lessons that might help us today.

Nathaniel Persily uses *Bush v. Gore* as a means of pointing out what the rest of the world might learn from our experience in terms of election administration. After recounting the litany of problems (e.g., voter registration and ballot design) during Florida 2000, Professor Persily identifies several election administration goals that reformers around the world should try to meet, including accurately capturing the preferences of those who cast ballots, widespread participation, and public confidence in the administration of elections. Professor Persily then, importantly, discusses the need to measure whether those values are being met.

Daniel Tokaji tackles a different issue that has moved to the forefront following *Bush v. Gore* and passage of the HAVA: in what situations should there be a private right of action to sue for violations of federal election statutes? Professor Tokaji notes how in recent years the Supreme Court has curtailed private enforcement of federal statutes. While not necessarily quibbling with the Court's overall doctrinal shift, Professor Tokaji does take issue with the application of the doctrine in the context of federal election statutes. He argues that the Court needs to shift its doctrine and allow greater access for private litigants to the courts because of the vital role federal courts play in overseeing elections.

Angelo Ancheta provides a bridge between election administration and voting rights. His piece focuses on the laws aimed at assisting voters who are members of language-minority groups in casting ballots by providing things like registration materials and ballots in languages other than English. At the federal level, these requirements are embodied in certain provisions of the Voting Rights

Act. Professor Ancheta, however, demonstrates the inadequacy of federal laws and, importantly, shifts the focus to state and local government activity designed to foster participation among language-minority voters. In doing so, he identifies several conditions under which state and local governments have adopted laws and procedures in the absence of an explicit federal mandate. Even more importantly, he shows how the goals of local laws aimed at ballot access for language-minority groups do not reflect a response to past discrimination but rather reflect a desire to foster civic participation.

Kareem Crayton focuses on another integral provision of the Voting Rights Act: the preclearance requirement embodied in Section 5. That provision requires certain state and local governments to get preapproval for any change they wish to make to their election laws in order to prevent the implementation of changes that would discriminate against racial and ethnic minority voters. Taking a cue from recent academic and Supreme Court skepticism about the efficacy of Section 5 in the twenty-first century, Professor Crayton thinks that Section 5 needs to be reinvented in order to solve a number of the “pathologies” that have developed over the years as a result of the preclearance provision. In designing that reinvention, Professor Crayton thinks there would be great utility in looking for guidance from another reinvention effort—the Reinventing Government initiative undertaken by President William Jefferson Clinton’s administration. In the end, what Professor Crayton suggests is an alternate framework that helps establish a set of metrics for determining when a jurisdiction has achieved the goals of the preclearance process.

While developments in the last decade related to election administration and voting rights generated substantial discussion at the symposium, the event that may have loomed largest was the ground-breaking decision in *Citizens United v. FEC*. In that case, a majority of the Supreme Court held that corporations had the constitutional right to make independent expenditures in federal elections. Three of the authors in this volume focused on the ramifications that case will have for the future of campaign finance regulation.

Michael Kang sees *Citizens United* as potentially being the most important campaign finance decision in decades due to the Court’s narrowing of the government interest in campaign finance regulation. For many years the Rehnquist Court had been fairly deferential to campaign finance regulation, subtly expanding the government interest in enacting those regulations. In contrast, Professor Kang views *Citizens United* as a move to narrow the government interest to quid pro quo corruption as the sole grounds upon which campaign finance regulation may rest. Professor Kang then examines how this narrowing of the government interest may impact other areas of campaign finance regulation, including restrictions on “soft money.”

Lloyd Hitoshi Mayer provides insight into a less-noticed aspect of the *Citizens United* decision—the Court’s 8-1 vote to uphold regulations requiring corporations to disclose their donors. Professor Mayer identifies the policy and constitutional debate over disclosure as a fight between those who support disclosure because it makes for a more informed electorate and those who oppose disclosure because it can chill speech by opening the door to retaliation against publicly-identified donors. Professor Mayer points out, however, that neither side

has a great deal of evidence to support its claims of the benefits or burdens of disclosure. In the absence of compelling evidence, Professor Mayer makes some suggestions for improving the disclosure scheme.

Allison Hayward examines *Citizens United* but also focuses more broadly on the recent increased scrutiny the Supreme Court has given to campaign finance regulations in contexts apart from union and corporate spending. In essence, what Professor Hayward focuses on might be termed the “nuts-and-bolts” aspects of campaign finance regulations. What she sees is a need for existing campaign finance regulations to accommodate the recent jurisprudential shift in areas ranging from limits on spending by candidates, to limits on contributions to candidates, to limits on spending by foreign nationals. In the end, she calls on Congress to re-evaluate the campaign finance regulations to make them simpler, clearer, and less burdensome.

The capstone of this volume, though, is Heather Gerken’s call to arms for election law academics. Tears for Fears once sang, “Everybody wants to rule to world.”¹⁸ Professor Gerken has slightly more modest goals for the field of election law; she’d be pleased if election law ruled constitutional law. Put a bit less vividly, Professor Gerken thinks that some of the dynamic, structuralist, institutional thinking in which election law scholars engage should become a key part of the dialogue in other areas of constitutional law, such as equal protection and executive power. What her article and, indeed, the other articles in this volume demonstrate is that election law has matured in a way that might have been unimaginable prior to this decade. Professor Gerken is most certainly onto something when she says that the time has come for election law to export its contributions to other realms.

Beyond the individual contributors to this volume mentioned above,¹⁹ there are many people who deserve praise for bringing this symposium volume to fruition. First, the entire staff of the *Indiana Law Review*—the “troops on the ground”—engaged in an amazing effort to make the trains run on time both during the live event held in April 2010 and in editing this volume in the months that followed. Those troops, though, needed leadership. On this score, Ann Harris Smith and Daniel Pulliam did a superb job of seizing the reins for coordinating the live event during the 2009-2010 academic year before handing things off to Sara Benson and Kate Mercer-Lawson, who worked tirelessly during the summer and fall of 2010 to put the finishing touches on this written volume. In the end, this volume of articles is in many ways a tribute to their diligence.

18. TEARS FOR FEARS, *Everybody Wants to Rule the World*, on SONGS FROM THE BIG CHAIR (Phonogram Records 1985).

19. In addition, Professors Adam Cox, Gilda Daniels, Jim Greiner, and Franita Tolson graciously participated in the “live” portion of the symposium.

