



ABA
humanrights

Section of Individual Rights and Responsibilities American Bar Association

Vol. 39, No. 1



Editorial Board

Chair Stephen J. Wermiel
Member Wilson Adam Schooley
Member Penny Wakefield
Member Kristen Galles
Member Aram Schvey

ABA Publishing

Editor Melissa Ladwig
Art Director Andrea Siegert

Section of Individual Rights and Responsibilities

Chair Stephen J. Wermiel
Chair-Elect Myles Lynk
Vice-Chair Mark I. Schickman
Secretary Lauren Stiller Rikleen
Finance Officer Toby Graff
Section Delegate Estelle H. Rogers
Section Delegate Walter White
Immediate Past Chair Kay H. Hodge
Section Director Tanya N. Terrell
Associate Section Director
Patrice Payne
Project Director (AIDS) and Director of
the ABA Center for Human Rights
Michael L. Pates
Project Director (Death Penalty
Moratorium) Sarah E. Turberville
Section Administrator Jaime T. Campbell

Section Office

740 15th St., N.W.
Washington, D.C. 20005
tel: 202/662-1030, fax: 202/662-1032
e-mail: irr@americanbar.org
www.americanbar.org/groups/
individual_rights.html

Cover Image iStock



Section of
**Individual Rights
and Responsibilities**

Introduction

By Estelle H. Rogers

The right to vote is a central tenet of our democracy. Not surprisingly, it has become a quintessential American “export” to Eastern European and Middle Eastern countries that have been aspiring to democratic values since the early 1990s. Government and private assistance to fledgling democracies writing constitutions and statutes to create the right to vote, and technical assistance to countries striving to run free and fair elections, are now staples of our international development programs. Yet, despite our willingness to teach the skills of democracy, we still have a lot to learn.

Quite by accident, I became a voting rights lawyer in the summer of 2004. It was supposed to be a temporary project, helping to make sure that newly registered voters—of which there were millions that year—actually made it onto the rolls. But it turned out that there was a lot more to do, even after the election, and I’ve been working on voter registration, election administration, and voting rights issues ever since. Unfortunately, the “arc of history,” with regard to the right to vote, seems to be bending backward. And I fear it will take a much more aware and engaged citizenry, as well as a lot of pro bono lawyers, to bend it toward justice again.

The “Human Rights Hero” column, on the back page of this issue, tells the story of the successive waves of citizens added to the voting rolls over our history. Like other rights, the right to vote was fought for and won by a series of popular movements on behalf of groups that had originally been thought unworthy—racial minorities, women, young people—and their enfranchisement was memorialized in several amendments to our Constitution. But, sadly, the intentionally difficult constitutional amendment process does not seem to be necessary to disenfranchise voters, only to add them to the electoral mix.

Since the 2010 elections, an astounding 180 laws restricting voting rights have been proposed in legislatures in forty-one states. Of these, twenty-three such laws have passed to date in eighteen states. Of these, twelve regressive laws are currently in effect in eight states. We expect several more to be added to that list. These laws include strict photo ID requirements to vote; proof of citizenship to register or vote; rollbacks of early voting, absentee voting, or same-day registration; onerous restrictions on community registration drives; and laws making it more difficult or impossible for felons to regain their voting rights. The vehicles employed to restrict registration and voting are practically limitless, and their proponents are becoming ever more creative—a county in Nebraska has proposed cutting its polling place locations by half, and this needs no legislative vote! Needless to say, this and many of the other laws we are encountering disproportionately constrain the rights of low-income, minority, disabled, and elderly citizens.

But there is some good news. At the outset, although the U.S. Constitution gives states wide latitude to run elections, federal voting rights laws exercise meaningful limits on state autonomy. Preeminent among the federal laws is the Voting Rights Act of 1965, often called the “crown jewel” of the civil rights movement, particularly its preclearance provision in section 5, which requires some jurisdictions to have prior approval before implementing voting changes. The preclearance process has been enacted as a backstop to a number of the egregious laws passed recently, including photo ID laws in Texas and South Carolina and registration drive restrictions, among others, in Florida.

But there are two dark clouds looming over this silver lining: First, preclearance is only necessary in limited jurisdictions (for example, only five counties of the sixty-seven in Florida); second, the preclearance provision of section 5 is itself under attack. Several constitutional challenges to preclearance, on the ground that it is unnecessary and discriminatory in the present racial environment, are in the pipeline and wending their way to the Supreme Court. Though the D.C. Circuit has recently rejected this argument in *Shelby County, Alabama v. Holder*, voting rights experts see a reprise of this issue in the high court (which found it unnecessary to address the constitutionality of section 5 in *Northwest Austin Municipal Utility District Number One v. Gonzales*) as all but inevitable.

continued on page 25

2 Barriers to the Ballot Box: New Restrictions Underscore the Need for Voting Laws Enforcement

A spate of new legislation, executive orders, ballot initiatives, and administrative practices is making it harder to register to vote and cast a ballot. These new laws could impede access for more than 5 million eligible voters in 2012. Understanding the implications of these proposals is imperative so Americans don't repeat history.

By Denise Lieberman

6 What Is Next for Section 5 of the Voting Rights Act?

Several pending cases will give the Supreme Court the chance to rule on the constitutionality of Congress's 2006 reauthorization of section 5 of the Voting Rights Act of 1965. The Court will likely approach these cases with caution due to the gravity of the issues, the powerful decisions by the lower courts, and the unique level of deference due to Congress when it acts to prevent racial discrimination.

By Robert A. Kengle and Marcia Johnson-Blanco

10 Redistricting in the Post-2010 Cycle: Lessons Learned?

Redistricting has long been a politically disruptive—and contested—process. The complex task of drawing district boundaries has traditionally resided with state legislatures, yielding maps that sacrifice voter interests for incumbent protectionism and partisan gain. Reformers shouldn't look to the federal courts for meaningful change; redistricting reforms will likely occur only at the grassroots level.

By J. Gerald Hebert and Megan P. McAllen

12 Demystifying Redistricting Through Community Engagement

The nation's shifting population requires state and local governments to redistrict once every ten years. How and where districts are drawn determines whether the districts violate the law and whether communities can elect representatives of their choice.

By Donita Judge

15 Democracy at Stake: Political Equality in the Super PAC Era

The role money plays in politics matters because it determines how Americans balance two core political and constitutional values—liberty and equality—and how they negotiate the boundaries between the political and economic spheres of their lives.

By Adam Lioz and Liz Kennedy

18 Judicial Elections: Justice for Sale?

America's courts face dual threats to their fairness and impartiality. Special interests are engaged in a spending spree to tilt judicial elections, while national groups are seeking to intimidate judges to influence their votes on hot-button legal issues.

By Bert Brandenburg

21 Elections Must Be About More Than Winning

Candidates can lose elections through technological problems and human error and when people in official duties create an advantage for one candidate over another. The good news is there are ways to improve elections and confidence in the accuracy of their outcome.

By Lillie Coney

22 Interview with Lawrence Baca: Thurgood Marshall Award Winner

Lawrence Baca, a Pawnee Indian, grew up on the proverbial wrong side of the tracks in California. He was also a fairly well-accepted kid at El Cajon Valley High, the first member of his family to attend college, and the ninth Indian to graduate from Harvard Law School. All these experiences helped shape Baca's thirty-two-year career as a pioneer in the fight for the civil rights of American Indians.

By Wilson Adam Schooley

26 Heroes of the Struggle for Voting Rights

The battle to secure the right to vote for women, African Americans, American Indians, and immigrants has been led by many people who devoted significant portions of their lives to the cause. But new heroes for voting rights are needed to continue these efforts for new generations who deserve to participate in the nation's democratic system.

By Stephen J. Wermiel



Printed on recycled paper

Human Rights (ISSN 0046-8185) is published four times a year by ABA Publishing for the Section of Individual Rights and Responsibilities (IRR) of the American Bar Association, 321 N. Clark St., Chicago, IL 60654-7598. An annual subscription (\$5 for Section members) is included in membership dues. Additional annual subscriptions for members are \$3 each. The yearly subscription rate for nonmembers is \$18 for individuals and \$25 for institutions. To order, call the ABA Service Center at 800/285-2221 or e-mail service@americanbar.org. The material contained herein should not be construed as the position of the ABA or IRR unless the ABA House of Delegates or the IRR Council has adopted it. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise) without the prior written permission of the publisher. To request permission, contact the ABA's Department of Copyrights and Contracts via www.americanbar.org/utility/reprint.html. *Postmaster*: Send notices by Form 3579 to *Human Rights*, 321 N. Clark St., Chicago, IL 60654-7598. Copyright © 2012, American Bar Association.

Barriers to the Ballot Box

New Restrictions Underscore the Need for Voting Laws Enforcement

By Denise Lieberman

Today, we are witnessing the greatest assault on voting in over a century. A spate of new legislation, executive orders, ballot initiatives, and administrative practices “effectuate a trifecta of voter suppression,” making it harder to register to vote, to cast a ballot, and to have a vote counted. Not since the post-Reconstruction era that heralded poll taxes and literacy tests has there been so much government action conditioning access to vote—through new rules restricting voter registration, advance voting, voter identification, purge practices, and more. These new laws could impede access for more than 5 million eligible voters in 2012.

While of interest due to their partisan motivations and potential political consequences, the impact of these measures extends beyond electoral politics to the heart of how we define democracy—with potentially long-lasting implications. The phenomenon underscores a contentious debate—one that is playing out in legal challenges to these measures—of whether voting is a right that cannot be burdened absent rigorous scrutiny, or whether it is a privilege that can more easily be conditioned. These debates on how we condition voting reveal America’s distasteful schisms in privilege and power, race and class, and judgments about the worth of a person’s citizenship and humanity.

As a nation, we have long struggled with the concept of electoral democracy. Though not specifically delineated as a fundamental right, there are more constitutional amendments protecting the right to vote than any other, guaranteeing that the right to vote cannot be

abridged on account of race, sex, language, ethnicity, religion, residency, payment of a poll tax, or age. The Supreme Court long ago explained that voting is “regarded as a fundamental political right, because [it is] preservative of all rights.” And despite the Court’s pronouncements that “[t]he 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,” and that “every voter is equal to every other voter,” our voting processes have never reflected the ideal that all citizens have an equal opportunity to cast a ballot. From our nation’s beginnings, which limited voting to only white male landowners, we have fought bloody—indeed deadly—battles to expand access, paving the way for significant court decisions and landmark federal legislation like the Voting Rights Act, and later the National Voter Registration Act and the Help America Vote Act.

But legislative activity in the states since the 2010 midterm elections marks a sharp departure from the trend of expanding access, with more than 180 restrictive voting bills introduced in forty-one states since last year. My organization, Advancement Project, has charac-



Hundreds of voters wait to cast their ballots two hours after the polls were supposed to close on the campus of the University of Miami in Coral Gables, Fla. This precinct was equipped with only five voting machines.

Associated Press, AP

terized this as “the most significant rollback of voting rights in a century.” Today, through mechanisms reminiscent of the Jim Crow measures ended by those landmark cases and statutes—and no less insidious—some two dozen new voting laws in eighteen states (representing two-thirds of electoral votes needed to win the presidency) stand to make it more difficult, if not impossible, for millions of voters to cast a ballot—disproportionately African Americans and Latinos, young voters, low-wage earners, people with disabilities, and senior citizens. The result is not only legal inequality, but a lingering social malaise that strikes at our identity. “Voting is

about basic human dignity,” says Pastor Kenneth Wheeler of Cross Lutheran Church in Milwaukee, one of my clients in a legal challenge to Wisconsin’s new photo ID law. “The right to vote is at the core of our citizenship. . . . We’re already facing extreme economic constraints, debilitating poverty, and social exclusion. This law only exacerbates the level of exclusion we face. Simply put, it devastates us. . . . Voting gives people hope. We have to underscore the right to vote as a sacred right.”

The Changing Face of the American Electorate

According to Pew Research Center, African-American voter turnout rose to 65 percent in 2008, nearly matching white turnout (66 percent) for the first time in our nation’s history. Youth voting was the highest in a generation. New voters in the lowest income and education brackets doubled from 2004 to 2008. Latino turnout rose to 50 percent—and is only likely to increase. In key battleground states, the number of eligible but unregistered Latino voters is in the hundreds of thousands or even millions, with another 8.1 million legal permanent residents who could be eligible for citizenship and could vote by this fall. In some states, like California, Texas, Florida, Arizona, Colorado, Georgia, New Mexico, and Nevada, the number of potential such voters is greater than the margin of victory.

New Restrictions on Voting

The record turnout of black and brown voters in 2008, along with census data showing the population of nonwhites rising fast, offers a glimmer of hope that the interests of people of color could more readily be heard in a nation fraught with a history of silencing their voices. This has not escaped those who stand to benefit from a less robust electorate. Conservatives who won majorities in statehouses across the country in 2010 have backed the coordinated measures, calling them necessary to

prevent voter fraud. But a federal panel last year found little to no election fraud in the United States that could be addressed by these laws, and this is backed up by every academic study on the subject.

Proponents discount that the groups most likely to be harmed by these requirements—blacks, Latinos, the poor, and college students—are groups that tend to vote against their interests. Worse, proponents have defended these laws with many of the same arguments used to defend the voter suppression laws of earlier generations, by suggesting, for example, that the racially disproportionate impacts are not about race, but a result of “socioeconomic status,” or due to “differences in motivation, or lack thereof,” to get needed documentation, and that the burdens are “mere inconveniences”—arguments that have been offered in defense of our lawsuit challenging Wisconsin’s photo ID law. During debates on a photo ID proposal in Missouri this year, one senator told a voter who recounted a two-day, fourteen-hour ordeal to get a state ID, “If it’s that hard for you to get an ID, I question whether you should be voting at all.”

These new barriers stand to systematically disenfranchise voters and prevent realization of a more just democracy that reflects the nation as a whole. These include the following issues.

Photo ID Requirements

Voter ID restrictions have been introduced in thirty-eight states and passed in nine since 2011. While thirty states require voters to show some form of ID, these laws limit the forms of acceptable ID voters must show at the polls to a nonexpired government-issued photo ID. Approximately 11 percent of voting-eligible citizens—about 21 million Americans—lack a nonexpired state-issued photo ID, disproportionately African Americans, Latinos, young voters, the elderly, and people with disabilities, who are up to twice as likely to lack an ID. In fact, one in

four African Americans nationwide lacks a state-issued photo ID. A University of Wisconsin study found that half of that state’s African Americans and Latinos lacked a Wisconsin driver’s license, the most common form of acceptable ID, and that among young voters, a whopping 78 percent of eighteen- to twenty-four-year-olds lack one. The rate of seniors without IDs tops 20 percent statewide, especially in minority populations.

Bettye Jones, a plaintiff in our litigation challenging Wisconsin’s photo ID law (described by one Wisconsin judge as “the single most restrictive voter eligibility law in the United States”), reflects a circumstance common to many African Americans of her generation—born in the South during segregation, she was born at home and never issued the formal birth certificate that is now necessary to procure a state-issued photo ID to vote. In court records, she describes her expensive, multimonth effort to get the needed documents as “harrowing.”

In South Carolina, where the Justice Department (DOJ) denied preclearance to the state’s new photo ID law under section 5 of the Voting Rights Act (noting that voters of color were 20 percent more likely to lack a state-issued ID compared to whites and were thus “disproportionately represented, to a significant degree,” among those who stood to be “rendered ineligible” to vote under the law), the local National Association for the Advancement of Colored People bluntly called the law “Jim Crow Jr.”

At a forum on voter ID laws in which I participated in St. Louis, the Rev. Al Sharpton, a vocal opponent of photo ID laws, spoke of the similarities to old Jim Crow laws: Now, he said, “We’re fighting ‘James S. Crow Jr. Esquire.’ He talks in a more refined way . . . but the result is the same.” U.S. Representative Emanuel Cleaver echoed that sentiment, noting that when he was young, “the poll tax was \$3.50” to

discourage blacks from voting. Now, he said, it's been replaced by a \$22 fee for the birth certificate needed to get a government-issued photo ID. Worse, the laws don't fix a problem; in-person voter impersonation, the only malady addressed by a photo ID requirement, is exceedingly rare. One study found that such a requirement would not prevent one fraudulent vote for every 1,000 eligible voters disenfranchised.

Limits on Early Voting

Florida, Georgia, Ohio, Tennessee, West Virginia, and Wisconsin passed laws last year reducing advance voting. In 2008, 30 percent of voters in these states cast early ballots, with African Americans twice as likely to do so than whites. In Florida, 53 percent of African Americans cast early ballots in 2008 compared to 27 percent of white voters. In Florida, Monroe County Elections Supervisor Harry Sawyer Jr. says, "Limiting early voting options is a dangerous path which will only make it more difficult to vote," not only eliminating opportunities to vote before election day, but increasing lines and wait times on election day to accommodate voters who would have voted early.

Voter Registration Restrictions

New voter registration requirements have halted voter registration drives in Texas and Florida. Florida's law, recently enjoined by DOJ, requires registration forms to be submitted within forty-eight hours, requirements that State Senator Arthenia Joyner believes "will cripple voter registration efforts." African Americans and Latinos are more than twice as likely as whites to register through a voter registration drive. In 2008, some 176,000 voters in Florida and 26,000 voters in Texas registered this way. This year, African-American and Hispanic voter registration has declined 10 percent in Florida, according to the *Washington Post*, with 81,000 fewer people registering to vote compared to the same period in 2008, according to *The New York*

Times. We remain a long way from full participation; according to the Voter Participation Center, more than 35 percent of all eligible Americans—over 73 million citizens—are not registered to vote, with voters of color, young voters, and women making up the bulk of this group.

Proof of Citizenship

Several states passed laws requiring documentary proof of citizenship to register to vote. Tennessee's law requires proof of citizenship only from voters the coordinator of elections believes to be noncitizens, opening the door to the kind of discretion that led to the racially discriminatory impact of literacy and "understanding" tests of the Jim Crow era, when passing the test was left to the discretion of whoever administered it. A challenge to Arizona's proof of citizenship law is now awaiting review before the U.S. Supreme Court. State records show that between 2005 and 2007, about 31,000 people in Arizona had their registration forms rejected because they did not provide adequate documentation.

Rights Restoration

Executive orders, such as those signed last year by governors in Florida and Iowa, revoked existing policies giving persons with felony convictions the ability to regain their right to vote and make it harder for people with past criminal records to restore their rights after they have paid their debt to society. Florida is one of three states that strip those with past felony convictions of their voting rights for life. This ban dates back to the Reconstruction period and historically was targeted at crimes thought to be committed by African Americans. Today, nearly one in four African-American men in Florida cannot vote because of this system. The only way to restore one's civil rights in Florida is through clemency from the governor, a burdensome and arbitrary process. The state's new rules have disenfranchised 100,000 ex-felons in Florida who were eligible before the change to have their rights restored and vote in 2012.

Voter Rolls Purges

The newest tactic in the voter suppression playbook includes efforts to purge purported noncitizens from the voter rolls using flawed lists by matching voter rolls against motor vehicle lists, even though citizenship documentation is not required to get a driver's license. In Florida, where the list has been found to have a 78 percent error rate, scores of eligible citizens have been targeted to have their names removed from the rolls if they don't take affirmative steps to prove their citizenship. Eighty-seven percent of those on Florida's purge list are minorities—and a majority are Hispanic.

The DOJ in June halted the program, saying that the state had violated section 5 of the Voting Rights Act and the National Voter Registration Act (NVRA). Many counties stopped the purge process amid concerns about the inaccuracy of the lists, which initially contained more than 180,000 potential noncitizens to be purged. As it became clear that eligible citizens were included on even a smaller list of 2,700 targeted by the state, lawsuits were filed.

My organization, Advancement Project, along with several partners, brought suit alleging that the purge practices violate the NVRA and section 2 of the Voting Rights Act, which prohibits voting practices that result in minority voters having "less opportunity than other members of the electorate to participate in the political process." Moreover, the practice has a chilling effect on eligible voters. "People are in fear," Lida Rodriguez-Taseff, a Miami lawyer working with my organization on the legal challenge, told the *Miami Herald*. "This is complicated and threatening." This is not Florida's first problematic voter purge. Back in 2000, some 12,000 voters—far more than the 537-vote margin of victory in the presidential election—were wrongly identified as convicted felons and purged from the rolls. The list was disproportionately made up of racial minorities.

Laws Make Their Way to the Courts

The new laws are now making their way to the courts, where some face scrutiny under section 5 of the Voting Rights Act, which applies to jurisdictions (mostly sixteen states in the South) with a history of discriminatory voting practices and requires preclearance by the DOJ or a U.S. district court before they can go into effect. The state must show that the law will not have a “retrogressive” or discriminatory effect compared to existing law. The DOJ, in its first rejection of such a law since 1994, objected to both South Carolina’s and Texas’s new photo ID laws, finding “significant racial disparities.” In South Carolina, they found that African Americans were 20 percent more likely to lack an ID; in Texas, the DOJ found that “Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack such identification.” Both South Carolina and Texas have filed lawsuits seeking clearance of their photo ID laws, and in both, the future of this section of the Voting Rights Act is at stake.

The laws are also being challenged under section 2 of the Voting Rights Act, which prohibits the use of any electoral practice or procedure that results in the “denial or abridgment of the right of any citizen of the United States to vote on account of race or color.” Vote diminution occurs when a group has “less opportunity than other members of the electorate to participate in the political process,” if, “on the basis of objective factors,” it results in minority voters having “unequal access to the electoral process.” In our lawsuit challenging Wisconsin’s photo ID law under this provision, we have argued that the law “in its operation and results is functionally indistinguishable from the laws employed during the Jim Crow era to suppress the African-American vote,” by imposing “unnecessarily difficult” requirements and “procedural hurdles” that turn the voting process into a “test of skill” and the “engine of discrimina-

tion,” with the predictable result of suppressing the minority vote.

These cases and others will test the continued viability of the Voting Rights Act. Section 5 was reauthorized (with bipartisan support) in 2006 but is now subject to legal challenges that will likely be resolved by the Supreme Court to determine whether we have reached a level of equality rendering this federal oversight unconstitutional. The last two years have seen nine challenges to the constitutionality of this provision (compared to just eight challenges total in the law’s first forty five years).

The laws are also facing scrutiny under the Fourteenth Amendment, highlighting a contentious debate on the nature of the right to vote. The legal standard is a confusing hybrid balancing test, not the strict scrutiny standard applicable to infringements on fundamental rights (requiring the state to show that a law is narrowly tailored to a compelling government interest). Instead, under the less strict “flexible” balancing test used in *Crawford v. Marion County Election Board*, the Supreme Court upheld Indiana’s photo ID law, finding that the “limited burden on voters’ rights” was outweighed by the “precise interests put forward by the State as justifications for the burden imposed by its rule.”

There was less evidence of the burdens on voters in Indiana than is being revealed in the newest cases, and Indiana’s law is less restrictive than the photo ID laws passed in the last year. But had the Court been applying a stricter standard, as did a state court in Missouri (which specifically defines the right to vote as “fundamental” under its constitution), the result would likely have been different. The Missouri Supreme Court, applying strict scrutiny, found that Missouri’s photo ID law wasn’t narrowly tailored to a compelling government interest and that the state thus had not justified the substantial impairment of the right to vote that the law would create. We are making a similar argument now in a lawsuit

challenging Pennsylvania’s photo ID law under its constitutional voting provisions. After the Missouri ruling, legislators sought to amend the constitution to carve an exception to the right to vote to allow for photo IDs; the ballot proposal recently failed in the courts as well. In Minnesota, after Gov. Mark Dayton vetoed a photo ID bill passed there last year, legislators also passed a constitutional ballot initiative, which is now being challenged in court.

The hybrid balancing test used in *Crawford* leads to arbitrary results. The government *should* have to demonstrate that it has a compelling justification before it can enact policies making it harder to vote and should have to show that the mechanism will actually advance that goal. But there is no affirmative right to vote that would require this. The United States is one of only eleven of the 119 democratic countries in the world that do not explicitly provide the right to vote in their Constitutions. Even the Afghan and Interim Iraqi constitutions guarantee the right to vote. The resulting patchwork of state and local rules gets arbitrarily applied, which not only has political consequences but impacts the social fabric of our nation. These disparities are a major obstacle to eliminating structural disenfranchisement.

Our legacy of voting in this country is not a proud one, and while the last century has seen a push toward expansion of the franchise, these new laws stand to turn back the clock. History tells us the dangers of this trend. The decade following the new voting measures of the post-Reconstruction era saw dramatic reductions of previously eligible voters. For example, Louisiana had over 130,000 African Americans registered to vote in 1896. It enshrined new voting amendments in its constitution in 1898 and by 1900, fewer than 5,000 African Americans were registered to vote. By 1910, only 730 remained on the rolls. The

continued on page 14

What Is Next for Section 5 of the Voting Rights Act?

By Robert A. Kengle and Marcia Johnson-Blanco

The Amici States urge this Court to uphold the constitutionality of the 2006 reauthorization of the Voting Rights Act. Any assertion that Section 5 constitutes an undue intrusion on state sovereignty does not withstand scrutiny. Section 5 does not place an onerous burden on States. States have been able to comply with Section 5 without undue costs or expense. More importantly, Section 5 has produced substantial benefits within the Amici States and our Nation as a whole.

Brief for the State of Arizona and five other states as *amici curiae*,
March 2009

There is no justifiable reason for infringing on Arizona's sovereignty and imposing the extreme burden of preclearance procedures on Arizona when Arizona does not engage in discriminatory practices against Hispanic voters.

First Amended Complaint for Declaratory and Injunctive Relief,
State of Arizona v. Eric Holder, September 2011

As the Supreme Court's new term takes shape, several pending cases will provide the Court with an opportunity to rule on the constitutionality of Congress's 2006 reauthorization of section 5 of the Voting Rights Act (VRA) of 1965, 42 U.S.C. 1973c. If and when the Court reaches that constitutional question, the decision will write a new chapter in the history of our nation's effort to overcome racial voting discrimination and to enforce the constitutional protections for which many risked and gave their lives.

Section 5 frequently is called one of the most effective civil rights laws ever passed by Congress, and it has been crucial to the historic political empowerment of minority voters in the South and Southwest. Since it was enacted in 1965, section 5 has led to thousands of racially discriminatory voting changes being blocked before they could be put into practice. The opening quotations, from dueling federal court pleadings filed by the State of Arizona, are examples of how section 5 has been cast as hero and villain in the unprecedented num-

ber of constitutional challenges that have been launched against section 5 since its 2006 reauthorization. Why now? What is at stake?

The answer begins with the fact that section 5 operates differently than traditional anti-discrimination litigation under the Fourteenth or Fifteenth Amendment, or under section 2 of the VRA, in which the plaintiff bears the burden of proof and the jurisdiction is free to use the challenged procedure unless and until it is halted by court order. In such cases, it may take years of complex and expensive litigation before the plaintiff obtains relief.

Section 5 requires that all changes in practices and procedures affecting voting in certain "covered" jurisdictions undergo federal review *prior* to their implementation. The federal review occurs before a three-judge panel in the U.S. District Court for the District of Columbia or, alternatively, via an administrative submission to the U.S. attorney general. The district court or the DOJ must deny "preclearance" if the covered jurisdiction fails to show that change in the

existing practice lacks a discriminatory purpose and effect. A jurisdiction is always free to seek preclearance from the district court regardless of whether the DOJ has denied preclearance or even reviewed the change at all. However, the jurisdiction is subject to what amounts to an automatic injunction if it attempts to use a voting change without preclearance. Thus, the latitude generally given to states to establish their own voting practices unless a violation of federal law has been proven is diminished where section 5 coverage is in place, leading to what the Supreme Court has called the "substantial federalism costs" of section 5.

The covered jurisdictions include all of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia; California, Florida, North Carolina, and New York have substantial populations covered in multiple counties; and Michigan, New Hampshire, and South Dakota each has relatively small populations covered.



President Lyndon B. Johnson signs the Voting Rights Act on August 6, 1965.

LBJ Library photo by Robert Knudsen

Noncovered jurisdictions found by federal courts to have engaged in unconstitutional racial discrimination may be “bailed in” under section 3(c) of the VRA; covered jurisdictions that satisfy the standards in section 4(a) of the VRA may be “bailed out” by federal court order.

Thousands of voting changes are submitted for preclearance each year and the vast majority of changes have always been precleared. Although there were hundreds of objections after 1982, in recent years the number of objections has been low by historical standards—viewed by some as evidence that jurisdictions are effectively deterred from adopting discriminatory voting changes, and by others as proof of our arrival at a “post-racial society.”

Why Section 5?

In March 1965, the nearly hundred-year effort by Southern states to evade and undermine the post-Civil War enfranchisement of racial minorities was being challenged as never before, and the nation watched in horror as African-American protesters were set upon by state troopers and brutally beaten as they attempted to begin a march from Selma to Montgomery, Alabama, to protest the denial of their voting rights. President Lyndon Johnson went before the nation and, after noting that “[e]very device of which human ingenuity is capable has been used to deny” the right to vote for African Americans, declared that he would send a law to Congress with the goal of eliminating barriers to the vote. In August of that year, after a vigorous debate in Congress, he signed into law the Voting Rights Act of 1965.

The new section 5 preclearance procedure received less attention in 1965 than the suspension of “tests and devices” (such as literacy tests) within the covered jurisdictions, and the provisions for federal examiners to directly conduct voter registration and bypass recalcitrant local officials. Nonetheless, section 5 was not well-

received by the newly covered jurisdictions. Section 5 faced an immediate facial challenge in *South Carolina v. Katzenbach* (383 U.S. 301 (1966)), a landmark case invoking the Supreme Court’s original jurisdiction, in which the Supreme Court rejected a federalism-based constitutional challenge to several portions of the recently enacted law, including section 5. The Court found that the preclearance remedy was not an undue intrusion on federalism principles, inasmuch as the Fifteenth Amendment explicitly gave Congress enforcement powers against the states to prevent racial voting discrimination. The *Katzenbach* Court upheld this “uncommon exercise of congressional power” as rational and appropriate, noting that some states “had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.” The Court also upheld the section 4(b) coverage formula, finding that it rationally targeted states with histories of voting discrimination, and that its provisions to add and remove covered jurisdictions, along with its sunset requirement, addressed concerns about overbreadth and/or underbreadth.

Section 5 originally was set to expire in five years. However, because of persistent discrimination in voting, including the adoption of at-large elections, gerrymandered election districts, and other tactics designed to submerge and waste newly enfranchised minority votes, Congress decided that it was necessary to reauthorize section 5 in 1970 for five years, and again in 1975 for seven years. The 1975 reauthorization added provisions prohibiting language-based discrimination against citizens of three racial and ethnic groups who had suffered a history of official voting discrimination (Hispanics, Asian Americans, and Native Americans). The Supreme Court reaffirmed the constitutionality of Congress’s 1975 reauthorization of section 5 in *City of Rome v.*

United States (446 U.S. 156 (1980)). Congress reauthorized section 5 in 1982 for twenty-five years; most attention and debate in 1982 actually concerned the addition of a “results” standard to section 2 of the VRA, which is nationwide in scope and does not expire. The Supreme Court reaffirmed the constitutionality of Congress’s 1982 reauthorization with only a brief discussion in *Lopez v. Monterey County* (519 U.S. 9 (1996)).

Why Did Congress Need to Reauthorize Section 5 in 2006?

As the expiration of section 5 approached, the civil rights community was concerned that any reauthorization would be confronted by constitutional challenges, making it critical for Congress to act on the basis of a thoroughly documented record. In previous reauthorizations, the DOJ and the U.S. Commission on Civil Rights had assisted in building the record, but this appeared to be unlikely to happen again. Stepping into the breach, the Lawyers’ Committee for Civil Rights Under Law and other members of the civil rights community organized the National Commission on the Voting Rights Act (NCVRA). The eight-member bipartisan Commission, which consisted of government and policy officials, academics, and civil right practitioners, documented voting discrimination following the 1982 reauthorization.

Over seven months of ten hearings conducted across the country, the NCVRA heard from over 100 witnesses consisting of voting rights practitioners, community activists, academics, and politicians and developed a record showing widespread and persistent voting discrimination in the covered jurisdictions. In February 2006, the NCVRA issued a report authored by Commission member and prominent social scientist Dr. Chandler Davidson, concluding that “the evidence presented at the hearings strongly suggests that the two major problems which have been the

focus of the Act—restricted ballot access and minority vote dilution—continue in twenty-first century America.”

In October 2005, at the time the NCVRA was concluding its hearings, the then-chair of the Committee on the Judiciary of the House of Representatives, F. James Sensenbrenner of Wisconsin, began congressional hearings to examine the impact of the temporary provisions of the VRA and to consider whether they were still needed. Sensenbrenner had worked on the reauthorization of section 5 in 1982 and wanted to continue that legacy by leading the effort in 2006. In February 2006, Sensenbrenner formally requested the NCVRA report and its supporting documents, and the Commission’s work became part of the official record. The civil rights community submitted extensive additional state-specific reports on the record of compliance of most of the covered jurisdictions, including all of the fully covered states. Overall, the House conducted ten hearings to consider what would eventually be called the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006.

There was some opposition to section 5 reauthorization submitted by ideological opponents of race-conscious civil rights remedies, but on the whole the evidence and testimony were substantially pro-reauthorization. Much of the reauthorization debate centered upon whether the Supreme Court’s decisions in *Georgia v. Ashcroft* (539 U.S. 461 (2003)) and *Reno v. Bossier Parrish II* (528 U.S. 320 (2000)) had misinterpreted Congress’s intended reading of the section’s effect and purpose tests, respectively; the final bill restored the law in effect before those decisions. In addition to section 5 (and its coverage formula in section 4(b), the bill also extended the language minority protections in section 203 of the VRA for twenty-five years.

On April 27, 2006, the ranking

member of the House Committee of the Judiciary, John Conyers, joined Sensenbrenner in the first reauthorization hearing before the Senate Judiciary Committee. At Sensenbrenner’s request, the Senate incorporated the hearing record compiled by the House into the record of the Senate, which Sensenbrenner noted was “perhaps the most voluminous unanimous consent request in the history of the Committee.” The Senate went on to have four more hearings during May 2006. The House voted on the reauthorization of section 5 on July 13, 2006, when it passed 390–33. A week later, on July 20, in a speech before the ninety-seventh Annual Convention of the NAACP, President George W. Bush thanked the House of Representatives for reauthorizing the VRA and called on the Senate to act promptly to pass the bill without amendment. That same day, the Senate reauthorized the VRA by a vote of 98–0.

Constitutional Challenges to the Section 5 Reauthorization

Eight days after the July 27, 2006, White House ceremony in which President Bush signed the bill into law, a Texas utility district filed a constitutional challenge to the 2006 reauthorization. A three-judge district court unanimously upheld its constitutionality in an extensive and detailed opinion; the appeal in *Northwest Austin Municipal Utility District No. 1 v. Holder* (NAMUDNO) (557 U.S. 193 (2009)) reached the Supreme Court in 2009. The constitutional arguments were fully briefed and argued, but the Court’s decision, citing the constitutional avoidance doctrine, did not reach the issue of constitutionality.

The Court instead reinterpreted section 4(a) of the VRA to permit any covered jurisdiction to seek “bailout” from coverage under section 4(a) on its own, which vastly increased the number of jurisdictions that potentially could seek bailout because many counties contain multiple towns, school districts, utility districts, and other political

bodies that conduct elections. The Supreme Court set the stage for the subsequent constitutional litigation by cautioning that the burdens imposed by section 5 may no longer be justified by current needs and that its geographic coverage may no longer sufficiently relate to the problem it targets to be an appropriate exercise of Congress enforcement powers.

The legal claim against the 2006 reauthorization in the *NAMUDNO* case and subsequent cases was framed primarily in terms of the *City of Boerne v. Flores* (521 U.S. 507 (1997)) doctrine: that sections 5 and 4(b) are no longer congruent and proportional remedies to a record of unconstitutional discrimination and therefore are not “appropriate” remedial legislation for either the Fourteenth or Fifteenth Amendment. These challenges do not contend that section 5 was unconstitutional when adopted; they grant that it was a constitutional response to a widespread pattern of intentional voting discrimination when it first was enacted.

The principal arguments instead are, first, that “things have changed in the South” and that the “federalism costs” of section 5 now outweigh the prospect of intentional racial voting discrimination. The rates at which minority citizens register and vote, and the number of minority candidates elected to public office, have increased dramatically since 1965, due in part to section 5. There have been few federal court judgments finding intentional voting discrimination in the covered jurisdictions since 1982. Because things have changed, the argument goes, there is no longer a pattern of unconstitutional voting discrimination, and the permanent nationwide provisions of the VRA (such as section 2) provide adequate protections against voting discrimination where it does occur. The other main argument against the 2006 reauthorization is that section 5 coverage continues to be determined by section 4(b) of the VRA, which refers to “tests and devices” and voter participation levels in elections between 1964 and 1972,

and that these no longer can rationally identify jurisdictions that require the preclearance remedy.

A decision finding section 5 unconstitutional would shock many people, especially those minority citizens who have benefitted so greatly from its protections. But the Supreme Court's cautionary language in *NAMUDNO* has led many to believe that the Court may be prepared to do just that.

Today, one covered county (Shelby County, Alabama), two fully covered states (Texas and South Carolina), and one partially covered state (Florida) have pending constitutional challenges to the 2006 reauthorization. The *Shelby County* case is the most immediate candidate for Supreme Court review. It was filed in 2010, stating only a constitutional challenge to the 2006 reauthorization; the complaint specifically pled that the county was ineligible for section 4(a) bailout due to section 5 objections to voting changes by municipalities within the county during the past ten years. Because there was no statutory claim, the plaintiff's motion to empanel a three-judge court was denied and the case was heard by a single judge, District Judge John D. Bates, who decided the case as a purely facial challenge based on the legislative record before Congress.

Judge Bates conducted a painstaking review of the voluminous legislative record, including thousands of pages of testimony, reports, and data regarding racial disparities in voter registration, voter turnout, and minority electoral success; the nature and number of section 5 objections; the record of judicial preclearance suits and section 5 enforcement actions; the incidence of section 2 litigation; the use of "more information requests" and federal election observers; the evidence of racially polarized voting; and evidence of section 5's deterrent effect.

Judge Bates' legal analysis differed somewhat from that of the *NAMUDNO* three-judge court, holding that the *Boerne* line of cases represented an evolutionary devel-

opment of the *Katzenbach* "rationality" review and that a "congruence and proportionality" analysis of the 2006 reauthorization was required. But, because Congress was enforcing fundamental constitutional rights—the right to vote and the equal protection right against governmental racial discrimination—its judgments as to the appropriate statutory remedies were entitled to substantial deference. Judge Bates found that Congress legitimately looked to a broad range of evidence in arriving at its conclusions and that it was not limited to considering only adjudicated constitutional violations or any other specific class of evidence. Finding that Congress acted constitutionally, Judge Bates dismissed the case on cross-motions for summary judgment by the United States and the defendant-intervenors.

The appeal in *Shelby County v. Holder* was heard on an expedited timetable by the D.C. Circuit, which ruled in the defendants' favor on May 18, 2012. Judges David Tatel and Thomas Griffith affirmed the district court decision in all respects. The panel upheld Judge Bates' conclusions that section 5 remains a congruent and proportional remedy to the twenty-first century problem of voting discrimination in covered jurisdictions and that the record evidence of contemporary discrimination in covered jurisdictions was "plainly adequate to justify section 5's strong remedial and preventative measures," and to support Congress's predictive judgment that failure to reauthorize section 5 "would leave minority citizens with the inadequate remedy of a Section 2 action."

Addressing the claim that the section 4(b) formula improperly relies upon old data, the panel held that the legislative record shows that section 4(b), which together with the provisions for bail-in and bailout forms an integral coverage mechanism, continues to single out the jurisdictions in which discrimination is concentrated, and that section 4(b) is sufficiently related to the problem

that it targets. Judge Steven Williams dissented in part, on the ground that the section 4(b) coverage formula was outdated and failed to constitutionally distinguish between the covered and noncovered jurisdictions. Judge Williams also expressed concerns about race-conscious decision making, but those had not been raised by the plaintiff, or argued to the court. Many observers expect the Supreme Court to grant *certiorari*.

The three other cases are section 5 declaratory judgment actions being heard on expedited schedules by three-judge district courts, with appeals of right directly to the Supreme Court; however, the district courts will reach the constitutional issues in those cases only if preclearance is denied on the statutory claims. Two of these cases concern photo ID requirements enacted by Texas and South Carolina, while the third concerns Florida's changes to third-party voter registration rules, early voting periods, and election-day updates for registration. The Supreme Court would retain the option to deny plenary review in all three cases, but it is generally considered likely that the constitutional question will be argued and decided by the Supreme Court in at least one of them if it has not already done so in the *Shelby County* case. The State of Arizona's constitutional challenge quoted earlier was voluntarily dismissed but may also be refiled at a later date.

The forthcoming appeals may succeed if the Supreme Court is willing to supplant Congress's judgments about the threat of voting discrimination. However, the gravity of the issues, the powerful decisions by the lower courts that have parsed the record, and the unique level of deference due to Congress when it acts to prevent racial voting discrimination all provide compelling reasons for the Supreme Court to approach these cases with restraint.

Robert A. Kengle and Marcia Johnson-Blanco are co-directors of the Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, in Washington, D.C.

Redistricting in the Post-2010 Cycle

Lessons Learned?

By J. Gerald Hebert and Megan P. McAllen

After each decennial federal census, state and local governments across the country begin the process of redrawing their congressional districts, state legislative seats, and local governing bodies to accommodate population shifts. All state and local redistricting plans must comport with federal limitations, most notably constitutional equal population requirements and the Voting Rights Acts (VRA) of 1965, as amended. Unless constrained by state constitutional or statutory requirements, state and local governments have wide latitude to develop and apply their own redistricting criteria. In practice, however, few state laws set more rigorous standards than those already required under federal law.

Because redistricting is an inherently political act, redistricting authority commonly resides with state legislatures—a venerable, if deeply flawed, practice. Legislative redistricting entrusts political line-drawing decisions to those who most stand to gain, or lose, from the process. The practice ensures that voters cannot choose their own representatives; instead, their representatives choose them.

While the U.S. Supreme Court has observed that it is theoretically possible for a partisan gerrymander to go “too far” because it impermissibly “degrade[s] a voter’s or a group of voters’ influence on the political process as a whole,” see *Davis v. Bandemer*, 478 U.S. 109, 132 (1986), no partisan gerrymander has yet been found unconstitutional by the high court. Getting a majority of justices on the Supreme Court to agree on a judicially manageable standard has proven an elusive goal for opponents of egregious political gerrymanders. Moreover, the Court



Several proposed legislative district maps are displayed at the Indiana State House in Indianapolis.

has thus far been reluctant to regulate partisan gerrymandering “because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance.” See *LULAC v. Perry*, 548 U.S. 399, 416 (2006).

Extreme partisan gerrymandering turns democracy on its head by allowing politicians to choose their voters, rather than the other way around; therefore, one would think that the Court would craft a judicially manageable standard for assessing such claims. In *Vieth v. Jubilerer*, 541 U.S. 267 (2004), the Court had the opportunity to do just that but was unable to agree on a legal standard for adjudicating partisan gerrymandering claims even though several workable standards were proposed. While five justices in *Vieth* made clear that a constitutional claim of partisan gerrymandering may still be brought in the courts, courts in the post-2010 round of redistricting have dismissed these claims because no judicially manageable standard has emerged. See, e.g., *Perez v. Perry* and

Quesada v. Perry, No. 5:11-cv-00360-OLG-JES-XR (Order of September 2, 2011). Issuance of such orders, of course, is tantamount to deciding that political gerrymandering cases may not be brought in federal courts.

For those frustrated by decades of incumbent protectionism, there may be reason to hope. In recent years, a handful of states have instituted reforms designed to curb the undemocratic effects of extreme partisan gerrymandering. Although recent reforms vary widely in substantive approach, they generally seek to prevent legislators from drawing lines that benefit their self-interest. Instead, the reforms aim to effectuate the interests of voters—interests that are overlooked in many cases and trampled in others. If successful, these new restraints can counteract the self-serving incentives that incumbents bring to bear in drawing political maps. More than that, state-level reforms can restore legitimacy and political accountability to a process too long dominated by entrenched partisan interests.

Voter-initiated redistricting reforms in Florida and California aptly illustrate the potential value of reforms generated at the grassroots level. Although the process is still far from perfect in either state, the changes represent a considerable improvement in our democracy and an astounding achievement for those who were able to bring about these reforms. Would-be reformers in other states would do well to study and learn from these incipient programs.

Fair Districts for Florida Voters

In a landmark opinion construing two recent voter-enacted constitutional amendments, the Florida Supreme Court made clear that it is voters—not incumbent politicians—who “have the rights in the process by which their representatives are elected.” *In re Senate Joint Resolution of Legislative Apportionment No. 1176 (In re SJR)*, 2012 WL 753122, slip op. at 142 (Fla. Mar. 9, 2012). Prior to 2010, Florida redistricting plans were effectively unconstrained by anything but the U.S. Constitution and the VRA; any additional standards imposed by state law were so vague as to be meaningless. Partisan gerrymandering by Democrats and Republicans alike ran rampant. That landscape changed significantly in 2010 when Florida voters adopted by a supermajority the Fair Districts Amendments to the Florida Constitution. The amendments, by seeking to eliminate the favoritism and discrimination common to legislative redistricting, developed more stringent redistricting standards and provided for a robust judicial review process to ensure compliance with those standards.

Article III, section 21 of the Florida Constitution now sets forth two tiers of redistricting standards that the legislature must follow when drawing districts. The first set of standards, codified at section 21(a), identifies three requirements with which any plan must comply. First, plans cannot evince any intent to favor or disfavor an incumbent or political party. Second, they cannot

have the intent or result of denying or abridging the equal opportunity of race or language minority groups to participate in the political process, or diminish minorities’ ability to elect their representatives of choice. Third, districts must consist of contiguous territory. Section 21(b) contains three additional standards to guide the redistricting process. As far as practicable, districts should have equal populations; they should be compact; and they should incorporate existing political and geographical boundaries. These guidelines are specifically designated as lower priority than those provided in subsection (a). Together, these new standards “act as a restraint on legislative discretion” insofar as they prohibit legislative redistricting practices that were formerly acceptable and widespread.

The Florida Supreme Court’s recent opinion highlights the potential—and potential limitations—of the new redistricting regime. Observing that both plans (senate and state house) submitted by the legislature would have passed constitutional muster before the amendments, the court upheld the house maps but invalidated the senate’s plan for violating “the will of the voters” as expressed in the amendments. *In re SJR*, slip op. at 185. Critically, the senate plan’s entire numbering scheme was held unconstitutional because it was not incumbent-neutral; districts had been renumbered to benefit otherwise term-limited state senators. In addition, senate districts inadequately protected minorities and violated principles of compactness and contiguity. As required by law, a revised senate plan was later submitted for, and received, the court’s approval.

The court’s earlier decision suggests that the new standards have some teeth. However, it is far from clear that the legislature will adhere to the constraints absent strong judicial enforcement. While the house’s first plan apparently avoided improper favoritism, the senate map was every bit

as gerrymandered as pre-amendment maps. Indeed, term-limited representatives may have had a more limited stake in the redistricting than their senate counterparts, so it is difficult to draw definitive conclusions about the house plan’s lack of partisan favoritism. Nevertheless, the new standards—when combined with a court willing to enforce them—signify a significant improvement and protection for Florida voters.

We Draw the Lines! Citizen Redistricting in California

California’s fraught redistricting history further demonstrates the potential benefits, and inherent limitations, of redistricting reform. Until recently, California left map drawing to the state legislature; in the event of a veto from the governor, the California Supreme Court would appoint “Special Masters” to draw new electoral boundaries. It is noteworthy that the resulting maps in pre-2010 California redistricting cycles, whether drawn legislatively or by Special Masters, tended to reflect the political inclinations of those who drew them. For instance, quantitative analysis of plans created by Special Masters (in 1971 and 1991) indicates a slight advantage for whichever party claimed a majority of California Supreme Court justices at that time. Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plan*, 4 CAL. J. POL. & POL’Y 1 (Feb. 2012), available at <http://polisci2.ucsd.edu/vkogan/research/redistricting.pdf>.

Direct democracy was an additional complicating factor in this heated context. Citizen groups, often organized by the “losing” political party, could challenge new maps by public referendum. To avoid that potentiality, the legislature agreed to a bipartisan gerrymander during the 2001 redistricting cycle that would protect incumbents on both sides of the aisle. Because these plans passed by a two-thirds vote, the 2001 maps were not subject to referendum

Demystifying Redistricting Through Community Engagement

By Donita Judge

In states throughout the country, citizens are demanding more accountability in redistricting and citizen redistricting commissions are replacing state legislatures in drawing congressional and state districts. Local community members are also demanding a more open and transparent redistricting process and are drawing and submitting maps to their redistricting bodies for consideration.

Community engagement in the redistricting process is rapidly becoming the trend in communities throughout the country. This movement has been growing since the 1990s when community organizers and community residents in Mississippi engaged in the redistricting process saw a significant increase in the numbers of African Americans elected to state, county, and city offices. This success led to more redistricting training throughout the South in communities of color and increased minority representation. Enhanced technology and accessible data provide even greater opportunities for meaningful participation among community members in the current redistricting cycle.

The decennial census and congressional redistricting are interconnected and required by the U.S. Constitution. The data collected during the decennial census are used in redistricting. Redistricting affects every political office from the House of Representatives to state legislatures, county commissions, city councils, and school boards. Because the census requires the counting of all persons residing in the United States, districts will contain citizens and noncitizens, voters and nonvoters. When drawing districts, most jurisdictions use the total population rather than the smaller citizen population to prevent giving preference to one class of persons over another class, which may be unconstitutional—it also guarantees equal voting weight among voters. The

use of voting-age population data is an important consideration to prevent diluting the minority vote while ensuring that redrawn districts do not minimize the voting strength of minority voters.

The terms “redistricting” and “reapportionment” are often used interchangeably in redistricting, but they are not one and the same. Reapportionment is the process used to determine how many of the 435 congressional seats should be apportioned to each state, depending on the state’s population. Once seats are apportioned, traditional redistricting principles are used to guide the process:

- **“One person one vote”** is one of the most basic redistricting principles. This guarantees that each vote has equal power and does not violate equal protection under the law. In practice, this means that each district drawn must be nearly equal with the same number of voters.
- **The Voting Rights Act of 1965**, sections 2 and 5 provide critical protections for minority groups during the redistricting process. Section 2 prevents diluting the minority vote during redistricting and applies to all states. Section 5 provides minority voters with an important protection to prevent covered jurisdictions from adopting election systems that have a discriminatory effect or make minority voters worse off. Covered jurisdictions are required to submit any election systems changes to the Department of Justice or to the District Court of the District of Columbia for pre-clearance before implementing the change to guarantee that the change does not have a discriminatory purpose and/or is not retrogressive.
- **Contiguity** requires that boundaries be connected unless the districts are separated by water.
- **Protecting existing boundaries**

and geographical features prevents splitting counties, voting precincts, and other geographical boundaries.

- **Compactness** can be measured in different ways and has garnered a good deal of research and debate among scholars, especially when measuring districts where the minority population is widely dispersed or districts where boundaries are distorted.
- **Respecting communities of interest** allows a group of people with a common or shared interest to be grouped together in a district.
- **Protecting incumbents** is not required under federal law when drawing districts. Some states such as Florida expressly prohibit the favoring or disfavoring of political parties and/or incumbents when redistricting, and protecting incumbents may not always be in the best interest of minority voters.

In most instances, it is still too early to determine whether community engagement in this redistricting cycle will yield the substantial benefits achieved in the 1990s by the Mississippi community. The ultimate measure of success is whether communities will realize more opportunities to elect representatives of their choice. At a minimum, redistricting, a process of redrawing boundaries throughout the country once shrouded in mystery and completed behind closed doors, is becoming demystified through increased community participation.

Donita Judge is a staff attorney and director of the Advancement Project’s Redistricting for an Inclusive Democracy Project. She spent the 2011 redistricting cycle training local communities on legal redistricting principles and provided assistance on redrawing boundaries and submitting plans to redistricting bodies.

challenge. The public outcry was immediate and intense and fueled two initiatives aimed at reforming the redistricting process.

Propositions 11 and 20, which passed in 2008 and 2010, respectively, transferred line-drawing power from the legislature to a Citizens' Redistricting Commission (CRC) and established new constitutional redistricting standards designed to maximize nonpartisan interests. Fourteen citizen commissioners are selected by a complex process set forth in Article XXI, section 2 of the California Constitution. The selection process aims to eliminate partisan bias by appointing commissioners without ties to elected officials or political parties. Notably, there must be five Democratic, five Republican, and four third-party or decline-to-state commissioners, and some members of each partisan bloc must vote to approve each map. The conflict-of-interest rules are particularly robust; following their appointment to the CRC, individuals are ineligible to hold elective office for a period of ten years, and ineligible to hold appointed office, serve as a paid legislative staffer, or register as lobbyists for a period of five years. CAL. CONST. art. XXI, § 2(c).

The official redistricting criteria adopted by voters through Prop. 11, in order of priority, are (1) equal population; (2) compliance with the VRA; (3) geographical contiguity; (4) "[t]o the extent possible," respecting the geographic integrity of any city, county, neighborhood, or community of interest; (5) geographical compactness; and (6) "[t]o the extent practicable," "nested" districts, meaning each senate district would be composed of two whole Assembly districts, and each Board of Equalization district would contain ten senate districts. While none of these standards was foreign to California redistricting law (except arguably the protection for communities of interest), ranking them in order of priority was new. Language in the proposition also prohibited drawing maps "for the purpose of favoring or discriminating

against an incumbent." Perhaps most notably, the new system provides for substantial public input throughout the process (*see generally* <http://wedrawthelines.ca.gov>).

Because they expanded opportunities for minority representation, kept more communities intact, and produced comparatively compact districts, the CRC maps are a real improvement on the legislatively drawn 2001 maps. The new districts are also slightly more competitive overall, making elections more likely to reflect the electorate's political will. If they withstand forthcoming legal and referendum challenges, they have the potential to seriously reshape California's political landscape.

California's experience also serves as a reminder that any political map will have winners and losers. Making the redistricting process more transparent and participatory, while a laudable innovation, will not "eliminate the zero-sum nature of electoral competition." Kogan & McGhee, *supra*, at 36. One way or another, organized interests will try to shape future redistricting plans. At least the new system ensures that ordinary citizens are also able to play an important role in shaping new plans.

Redistricting reform is most achievable in direct democracy states where voters can reform the process notwithstanding the opposition of incumbent officeholders; state legislators are understandably hostile to legislation that could put their positions at risk. However enacted, though, state-level reforms represent the best, and most immediate, way to restore democracy to representative government. Hopefully, we will see additional states institute redistricting reforms over the course of this decade. That would be a good dose of medicine for our ailing democracy.

Texas's Post-2010 Redistricting Cycle

Perhaps the other new development in the post-2010 redistricting cycle is best illustrated by the experience in Texas. The Texas legislature enacted redistricting plans for its congress-

sional districts, state senate seats, and state legislative seats in the 2011 legislation session. Texas is one of sixteen states that must obtain federal approval (a process known as preclearance) of their redistricting plans under the VRA. Rather than choose the speedier and less costly alternative of obtaining approval from the U.S. Department of Justice (DOJ), Texas instead sought approval from a special three-judge court in Washington, D.C. (In the interest of full disclosure, Gerald Hebert represents the interveners in the D.C. case opposed to the Texas senate plan and to the Texas congressional plan.)

Other states subject to these special preclearance provisions of the act also sought VRA approval in the D.C. court this cycle, more states than any previous cycle. What drove Texas and these other states to follow this course? All but one have a Republican attorney general or governor who had expressed mistrust over the review of their plan by "the Obama Justice Department." Except for the State of Texas, these other states simultaneously sought approval in the D.C. court and from the DOJ, which they are entitled to do. The DOJ approved all of the plans submitted to them, but because Texas did not seek administrative approval, the case went to the D.C. court.

The Texas lawsuit proved to be a great teaching tool for those who want to know what not to do in a redistricting case. First, even though Texas could have sought administrative approval from the DOJ, it did not do so. Private parties opposed to all three of Texas's statewide plans quickly intervened. Eventually the DOJ filed an answer in the case saying it did not oppose the senate plan, but because private parties had intervened in the suit and were opposed to the senate plan, the senate plan remained at issue in the case, notwithstanding the DOJ's failure to oppose it. If Texas had simultaneously sought administrative approval of all three plans from the DOJ (as other states had done), the senate redistricting plan would have

been administratively approved under the VRA. Because Texas did not do so, the senate plan went to trial along with the house and congressional plans and all three are awaiting a decision from the D.C. court.

The fact that Texas chose the slowest VRA approval route had other consequences. Because Texas did not have its statewide redistricting plans approved under the VRA, and because population shifts over the course of the decade had rendered their pre-2010 plans violative of one-person, one-vote requirements, Texas was left with no legally enforceable plans in place and a looming election schedule. Accordingly, a three-judge federal court in Texas imposed court-drawn plans so the election schedule could proceed.

Texas took an emergency appeal to the U.S. Supreme Court, which initially stayed, and then reversed, the decision imposing new interim plans. In doing so, the Court deviated from settled law. Previously, plans that had not received substantive approval under the VRA were legally unenforceable and federal courts had not shown much deference to them. In January 2012, however, the Court reversed the Texas court's order imposing new plans, saying the lower court should have deferred to the state's unapproved plans to a far greater degree. *Perry v. Perez*, 565 U.S. ___, Case No. 11-713, slip op. at 4 (Jan. 20, 2012). Importantly, the Court also noted that because the plan had not been

approved under the VRA, the Texas court was obliged to make a determination as to whether the issues raised in the pending D.C. court action were "not insubstantial." If they were "not insubstantial," the Texas court would be obligated to take those into account in crafting an interim plan. The Supreme Court was also clear that the Texas court may not usurp the D.C. court's preclearance role. In February, with no decision from the D.C. court, the Texas court drew new interim plans in accordance with the decision in *Perry v. Perez* and imposed those plans for the 2012 elections. Meanwhile, as noted above, no decision has yet been rendered by the D.C. court.

The high court's Texas ruling will be interesting to watch throughout the rest of this decade and in the next redistricting cycle, assuming that the preclearance requirements withstand the constitutional challenges that are now pending against them. (Several lawsuits are now working their way through the trial and appellate courts challenging the constitutionality of the VRA's special provisions on a number of grounds.) The Supreme Court's decision in *Perry v. Perez* certainly will constrain lower courts as they impose interim plans. On the other hand, the decision will give leeway to trial courts that, based on evidence, find a "not insubstantial" VRA problem with a proposed plan and seek to fix it in a temporary map. Indeed, that is precisely what the Texas court found on remand in imposing new interim plans.

Conclusion

The redistricting process remains a major blemish on our democracy, fueling the public's mistrust of government. Voters know that legislators have an inherent conflict of interest when they get to pick and choose which voters they want in or out of their districts. But the process is so "inside baseball" and cyclical that getting meaningful reforms through the legislature is a virtual impossibility. Real redistricting reforms are achievable in states that allow voters to correct the process by public referendum.

Redistricting reform measures, such as those recently adopted in California and Florida, helped to curb the most egregious gerrymandering by self-interested politicians. If we don't see widespread reforms or national standards for congressional redistricting, then it seems certain we can look forward to more cases like Texas, where unelected federal judges get to choose voters for elected politicians. That's no better than letting legislators choose their own constituents. We can, and should, do better.

J. Gerald Hebert is the executive director and director of litigation at the Campaign Legal Center in Washington, D.C. From 1973 to 1994, he served in the Department of Justice, where he held many supervisory roles in the Voting Section of the Civil Rights Division.

Megan P. McAllen is an attorney at the Campaign Legal Center in Washington, D.C., where she focuses on election and campaign finance law.

Ballot Box Barriers

continued from page 5

disenfranchisement lasted for decades until the civil rights laws began to dismantle this structure. Systemic disenfranchisement is long-lasting and will not be abated by the courts or DOJ alone. We are at a pivotal crossroads in American election law, and "the ability to shape our law re-

mains in the hands of the American people," said Attorney General Eric Holder at a historic speech on voting rights. "For all Americans, protecting this right, ensuring meaningful access, and combating discrimination must be viewed not only as a legal issue but as a moral imperative."

The new laws stand to relegate millions of eligible voters to second-class citizenship and undermine the fabric of our democracy by limiting partici-

pation. It is imperative we understand the implications of these proposals or we are bound to repeat history.

Denise Lieberman is senior attorney in the Voter Protection Program for Advancement Project, a national civil rights organization that works to eliminate structural barriers to voting. She is also an adjunct professor of law and political science at Washington University in St. Louis, MO.

Democracy at Stake

Political Equality in the Super PAC Era

By Adam Lioz and Liz Kennedy

David Gregory of NBC's *Meet the Press* recently asked Newt Gingrich if he had any advice for a future presidential candidate. Without missing a beat, the former Speaker of the House answered in five words: "Raise a lot of money."

Although Gingrich likely lost the Republican presidential primary for myriad other reasons, he could be forgiven for concluding that money was all that mattered in the end. His campaign was on its last legs and mired in debt when one wealthy donor extended him a critical lifeline. Casino magnate Sheldon Adelson pumped \$5 million into a pro-Gingrich Super PAC called Winning Our Future, single-handedly keeping Gingrich competitive. Adelson and his wife would ultimately contribute \$20 million to help Gingrich before finally pulling the plug. But even this generosity couldn't keep pace with Mitt Romney's prodigious fundraising. Romney's campaign and pro-Romney Super PAC raised a combined \$154 million through April 2012, overwhelming the competition with a constant barrage of ads.

It's no secret that money has dominated American politics for decades or more—and that its grip on our democratic process has never been tighter. In the article below, we discuss why the above story is so troubling, the extent of the problem, how we got here (from a legal perspective), and what we can do to create a democracy in which the strength of a citizen's voice does not depend on the size of her wallet.

What's at Stake?

As a threshold matter, why should lawyers and citizens generally care



Sen. Charles Schumer and Sen. Al Franken speak during a news conference on Capitol Hill in Washington, February 1, 2012, regarding the disclosure of Super PAC donors to the Republican presidential candidates.

AP Photo/J. Scott Applewhite

about the role of money in American politics? The role of money matters because it determines how we balance two core political and constitutional values—liberty and equality—and how we negotiate the boundaries between two critical spheres of our lives—political and economic.

Liberty, specifically protecting individuals from an oppressive state, was a central concern of the founders, enshrined most concretely in the Bill of Rights. Equality makes an initial appearance in the Declaration of Independence, but our modern understanding of the concept was not a parallel concern for the Founders. Their declaration that "all men are created equal" was progressive for its age, but only included white men with property. But American history changed both our written Constitution and our collective political values.

Many of the seventeen constitutional amendments following the Bill of Rights furthered political equality by expanding the franchise; this

value was expressed most directly through the Reconstruction Amendments and the Supreme Court's one-person, one-vote, poll tax, property requirement, and candidate filing fee cases. The initial restrictions on political participation based on wealth and other factors have proven incompatible with our democratic ideals; they have given way to a widespread understanding that a true representative democracy requires all citizens to have a substantially equal voice in making the decisions that govern their lives.

Liberty and political equality are not zero-sum concepts—but they are in tension at the intersection of money and politics, requiring a careful balance. And the only way to maintain this balance is to make sure that democracy writes the rules for capitalism, not the other way around.

In the United States, we've chosen representative democracy as our political system and (moderated) capitalism as our economic system. Critically, we hold different values

dear in each of these two arenas. In the political sphere, equality is a paramount value, on par with liberty as discussed above. Regardless of our partisan affiliations, we all subscribe to the concept of one person, one vote, a vision in which we come to the political table as equals.

Not so in the economic sphere. We disagree over how to divide the economic pie, but few (if any) prominent voices argue for complete equality. We have decided to accept a certain amount of economic inequality in service of competing values such as efficiency and proper incentives.

In sum, our twin commitments to democracy and capitalism leave most of us with the general sense that every citizen has an equal right to participate in political life, but not necessarily the right to possess an equal number of widgets or dollars. But to maintain equality in the political arena, we cannot allow that space to be defined by economic arrangements.

Without proper protections, economic power can be translated directly into political power and government can be largely (or completely) captured by powerful economic interests. Ultimately, the popular democracy the Founders fought to create degenerates into plutocracy, where the privileged use their power to entrench their status and government serves the already powerful instead of serving as a tool for collective action on behalf of the public.

This is why for-profit corporations should not be permitted to spend money earned by making widgets or selling financial services to influence political outcomes. And it's why individuals who were successful (through industry) or lucky (through inheritance) economically should not have untrammelled ability to translate that economic power into a stronger political voice.

Allowing corporations or wealthy individuals to purchase political outcomes makes a mockery of the principle behind one person, one vote. And it sets off a vicious cycle that undermines the moral legitimacy

of both politics and economics in our society. Giving the wealthy a greater voice than average citizens corrupts the process of political decision making. This, in turn, calls into question the legitimacy of our economic arrangements, because economic conditions are set or sanctioned in the political arena (where we decide tax policy, regulations, and so forth). This, finally, makes the influence of economics on politics all the worse—completing the cycle.

The bottom line is that laws that regulate the role of money in politics are the firewalls that prevent the perhaps warranted inequalities in the economic sphere from becoming unwarranted disparities in the political arena. They are our strongest tool for protecting democratic political equality in a capitalist society and maintaining the critical balance between the fundamental values of liberty and equality.

Big Money's Grip on American Politics

How well are we striking this balance in the United States in 2012? As the introductory story implies, not very well at all. Recent Supreme Court decisions have made a bad situation worse.

People often express shock at the sheer (and escalating) amount of money spent on elections year after year. Candidates, parties, and outside groups spent \$5.3 billion in 2008. That looks quaint this year, as the presidential candidates seek to approach \$1 billion each, outside groups step up their fund-raising, and congressional candidates build bigger war chests to ward off outside attacks. Super PACs are political committees, created in 2010 in the wake of *Citizens United* and a lower-court ruling, that are permitted to raise unlimited funds from virtually any source because they do not contribute to candidates or parties, but rather spend money “independently.” These groups—including both issue-based organizations and those supporting President Barack Obama, the cluster of Republican

presidential primary candidates, and various congressional candidates—raised a combined \$200 million through the first quarter of 2012. Just one cluster of outside groups—led by former Bush aide Karl Rove—announced plans to spend roughly \$1 billion on November's elections.

The most important problem is not the total amount of money spent to influence elections and policy, but rather its sources.

The vast majority of the money flowing to candidates, parties, Super PACs, and other outside groups is coming from a tiny number of wealthy donors. This has long been the case, and Super PACs—with no contribution limits—have made a bad problem worse. In 2011, 93 percent of Super PAC funds raised from individuals came in contributions of at least \$10,000—from just 726 Americans. Fifteen donors, each giving at least \$1 million, accounted for more than a third of the money.

In addition to wealthy individuals, for-profit businesses are increasingly “investing” in control over our democracy. Seventeen percent of 2011 Super PAC money came from business interests. This doesn't sound like much, but the figure greatly underestimates the amount of business money in politics now and in future election cycles. Super PACs are required to disclose all of their direct donors, so most public companies with reputations to protect and an aversion to such disclosure are choosing to give in other ways.

And, in fact, much of the money streaming into the political process is flowing through 501(c)(4) nonprofit organizations or 501(c)(6) trade associations that are not required to disclose their donors. Section 501(c)(4) nonprofits alone outspent Super PACs in the 2010 cycle, and much of the billions of dollars in outside funds spent in 2012 will flow through these two types of organizations. The Chamber of Commerce, for example, changed its spending patterns specifically to avoid newly enforced

disclosure requirements. These companies seek to influence voters—and ultimately the composition of our government—yet avoid democratic accountability by keeping their political spending in the dark.

This big-money system skews public policy on issues that affect our lives. Candidates who raise or spend the most money (or have the most raised or spent on their behalf) win the vast majority of the time. Winning candidates are accountable to the small minority of wealthy contributors who finance their campaigns (a 2005 study by a Princeton political scientist determined, for example, that low-income constituents have zero impact on U.S. senators' voting records). And a growing body of research shows that these big donors look different (more white and male) and have different priorities and opinions (care more about the deficit than unemployment, for example) than average-earning citizens. It's getting harder for the working and middle class to get ahead because our national priorities are being set by and for the 1 percent, a direct result of economic power being translated into political power.

How Did We Get Here?

The single biggest reason for big money's current stranglehold on U.S. elections is that the Supreme Court has severely constrained possible solutions to the difficult problem of balancing liberty and equality.

The modern era in campaign finance regulation began in the wake of the Watergate scandals. The Federal Election Campaign Act (FECA) established a comprehensive set of rules for the use of money in politics, with contribution and spending limits for campaigns. This regulatory framework, however, was hobbled right out of the gate by the Supreme Court's 1976 *Buckley v. Valeo* decision (424 U.S. 1 (1976)).

The *Buckley* Court held that spending money on politics was a form of speech and therefore subject to strict scrutiny. While recognizing that the government had a compelling interest in regulating money in

politics to prevent government corruption or the appearance of corruption, the Court specifically rejected promoting political equality as a justification for campaign finance rules. Based on this framework, the Court upheld limits on the size of contributions (attenuated speech, which presents the risk of corruption) but struck down similar limits on expenditures (direct speech, which does not).

This seminal case created a suspect divide between contributions and expenditures, and it opened the

The modern era in campaign finance regulation began in the wake of the Watergate scandals.

door for wealthy candidates and donors to dominate the political process. *Buckley* is what allowed Michael Bloomberg to spend as much of his billions as he desired to become mayor of New York city. *Buckley* is what protects Adelson's "right" to spend unlimited sums on "independent expenditures" (though before Super PACs he would have had to spend his money directly). *Buckley* is what prevents Congress and the states from limiting total campaign spending and, in more recent applications, from enforcing contribution limits set at levels that average Americans can afford to give.

But the case left Congress, states, and future justices with some flexibility to regulate the role and impact of money in politics. The *Buckley* decision embraced rules on disclosure; left undisturbed the longstanding ban on corporate treasury spending in elections; did not definitively close the door on rationales other than corruption; did not conclusively shut down the notion that so-called independent spending could

lead to corruption or its appearance; and did not impose a final and narrow definition of corruption.

Congress embraced this flexibility in passing the Bipartisan Campaign Reform Act of 2002, known as McCain-Feingold, and the Supreme Court upheld its major provisions—including its ban on a particular type of electoral spending by corporations—in *McConnell v. FEC* (540 U.S. 93 (2003)).

Critically, the *McConnell* Court took a broad view of corruption, writing that it is "not confined to bribery of public officials but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors"; the possibility that legislators will "decide issues not on the merits of the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder" is a more subtle but "equally disturbing" form of corruption than straight quid pro quo; preventing the appearance of corruption is "of almost equal concern" and is "critical . . . if confidence in the system of representative [g]overnment is not to be eroded to a disastrous extent"; and government must be empowered to regulate money in politics or else "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."

The Roberts Court, however, has replaced the flawed but flexible *Buckley* regime with a rigid anti-regulatory orthodoxy. In 2007's *Wisconsin Right to Life* (546 U.S. 410 (2007)), and again in 2008's *Davis v. FEC* (554 U.S. 724 (2008)), the Court overruled parts of *McConnell* and overturned parts of *McCain-Feingold*, second-guessing Congress's considered judgment and constraining its ability to legislate in this complex field. Then, on January 21, 2010 (barely six years after *McConnell*), the Roberts Court issued the infamous *Citizens United v. FEC* ruling (558 U.S. 50 (2010)).

Citizens United explicitly rejected virtually every conceivable rationale for limiting the role of money in politics other than fighting corruption or its ap-

Judicial Elections Justice for Sale?

By Bert Brandenburg

For more than a decade, America's courts have come under unprecedented attack in states that hold judicial elections. Partisans and special interests have organized aggressive efforts to use elections to tilt the scales of justice in their favor. As a result, many Americans fear that justice is for sale.

Here is a summary of the most worrisome trends.

Special-Interest Money

Judicial campaign fund-raising has soared, from \$83.3 million in 1990–99 to \$206.9 million in 2000–09. JAMES SAMPLE, ADAM SKAGGS, JONATHAN BLITZER & LINDA CASEY, NEW POLITICS OF JUDICIAL ELECTIONS, 2000–2009: DECADE OF CHANGE (Charles Hall, ed. 2010), http://www.justiceatstake.org/media/cms/JASN PJEDecadeONLINE_8E7FD3FE B83E3.pdf [hereinafter DECADE OF CHANGE]. Judicial candidates raised money extensively from parties who may appear before them.

Special-interest “super-spenders”

played a central role in the decade's surge. In twenty-nine contested elections, the top five super-spenders invested an average of \$473,000 each, compared to an average of \$850 given by all other contributors. *Id.*

By the 2009–10 election cycle, non-candidate groups poured in nearly 30 percent of all money spent to elect high court justices, far greater than the 18 percent of total spending by outside groups four years earlier.

ADAM SKAGGS, MARIA DA SILVA, LINDA CASEY & CHARLES HALL, NEW POLITICS OF JUDICIAL ELECTIONS, 2009–10 (Charles Hall, ed. 2011), http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf [hereinafter NEW POLITICS OF JUDICIAL ELECTIONS].

TV Advertising

Parallel to the money explosion, the airing of ugly, costly TV ads became a prerequisite to winning a state supreme court seat. From 2000–09, \$93.6 million was spent on air time in high court contests. DECADE OF

CHANGE, *supra*. The subsequent 2009–10 biennium saw the costliest nonpresidential election cycle for TV spending in history, at \$16.8 million.

The role of advertising by non-candidate groups accounted for 42 percent of all TV ad spending between 2000 and 2009—and for most of the negative advertising. *Id.*

In 2008, for example, a Michigan Democratic Party ad questionably portrayed Chief Justice Cliff Taylor as sleeping on the bench. In 2010, a pro-business coalition seeking to oust Illinois Justice Thomas Kilbride aired an ad in which actors posed as convicted thugs, recounting their grisly crimes and portraying Kilbride as taking their side. NEW POLITICS OF JUDICIAL ELECTIONS, *supra*.

Retention Elections

Justice Kilbride raised \$2.8 million to keep his seat in a retention election, illustrating another worrisome trend. *Id.* Throughout the 2000–09 decade, retention elections, in which

pearance. It explicitly overruled an important 1990 case, *Austin v. Michigan Chamber of Commerce* (494 U.S. 652 (1990)), that sanctioned limits on corporate independent expenditures due to the government's compelling interest in protecting our democracy from “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.”

Next, it defined corruption in an extremely limited and unrealistic way, taking the teeth out of the surviving state interest. “The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt,” Justice Kennedy wrote for the

majority. “Ingratiation and access, in any event, are not corruption.” Justice Anthony Kennedy continued with an unsubstantiated factual assertion: “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in democracy.”

The *Citizens United* Court then took aim at a sixty-three-year-old law prohibiting corporations and unions from spending Treasury money directly on elections, overturning *McCormell* in the process. Many people are familiar with the Court's infamous conclusion that corporations have essentially the same political speech rights as natural persons. Not everyone understands the Court's formalistic logic. Continuing with the theme

of turning unsupported empirical claims into immutable statements of law, Justice Kennedy wrote that “independent expenditures, including those made by corporations, do not give rise to corruption, or the appearance of corruption.” In other words, spending conducted without consulting a candidate can't corrupt that candidate—and so it doesn't matter who/what does the spending. This logic both sanctioned unlimited corporate political spending and opened the door to Super PACs.

Citizens United, though, was built upon a foundation of false assumptions.

Polling has consistently shown that that big money in elections reduces Americans' trust in government. Sixty-eight percent of respondents agreed that a company

voters choose “yes” or “no” to keep an incumbent in office, had escaped the overall spending surge. That changed abruptly in 2010.

The \$3.48 million Illinois race was the second costliest retention election ever, and the costliest in a generation. A total of nearly \$4.9 million was spent in four states: Illinois, Iowa, Alaska, and Colorado. That more than doubled the \$2.2 million spent in all high court retention elections nationally for the entire previous decade.

Iowa’s retention elections sent shockwaves around the nation. Three state justices were swept from office by voters angry over a decision permitting same-sex marriage. National anti-gay groups provided most of the ouster campaign’s nearly \$1 million in financing. Social conservatives hoped the election would deliver a chilling message to judges in all states, not just Iowa.

Growing awareness of the threat to fair courts also brought positives.

In 2009, the U.S. Supreme Court intervened when runaway spending on a West Virginia judicial election spun out of control. In *Caperton v. Massey*, 129 S.Ct. 2252 (2009), the Court disqualified a justice from a case involving a coal company

whose chief executive had spent millions to help elect him. The Court said there was a “serious risk of actual bias.” *DECADE OF CHANGE, supra*.

Caperton moved the issue of recusal to the national stage and created incentives for states to make sure their recusal procedures addressed the new politics of judicial elections. Since *Caperton*, however, progress on recusal reform has been slow.

Moreover, the public, the media, and the legal community have taken note and demanded reforms to restore trust in the courts. Since 2001, nationwide polls have shown that three in four Americans believe campaign contributions influence courtroom decisions. *Resource Overview, JUSTICE AT STAKE CAMPAIGN*, <http://www.justiceatstake.org/resources/polls/cfm>. Even 46 percent of state judges believe election spending affects judges’ rulings.

In a 2011 poll commissioned by Justice at Stake, 93 percent of voters said judges should not hear cases involving major financial supporters, and 84 percent said they believe all contributions to judicial candidates should be “quickly disclosed and posted to a website.” 20/20 Insight LLC, *National Reg-*

istered Voters Frequency Questionnaire (Oct. 10–11, 2011), http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf. Americans support the Constitution’s vision of courts free from outside influence.

But a continued challenge by special interests threatens to destabilize fair and impartial courts.

“The crisis of confidence in the impartiality of the judiciary is real and growing,” Justice Sandra Day O’Connor wrote in 2010. Sandra Day O’Connor, *Forward, in DECADE OF CHANGE, supra*. “Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold.”

In 2011, Iowa Chief Justice Mark Cady delivered his own grim warning. He addressed legislators on the State of Iowa’s courts, but his message was intended for courts across America. “This branch of government,” Chief Justice Cady said, “is under attack.” *NEW POLITICS OF JUDICIAL ELECTIONS, supra*.

Bert Brandenburg is executive director of Justice at Stake, a nonpartisan campaign to protect courts from political and special-interest influence.

that spent \$100,000 to help elect a member of Congress would be able to later influence that member to change a vote; and more than a quarter of eligible Americans say they are less likely to vote because big money has a greater influence on elected representatives than average Americans. This “independent” spending is at minimum creating an appearance of corruption that is leading to voter disengagement.

Next, the Court assumed that “independent expenditures” would be truly independent—not coordinated in any way with candidates or parties. But weak regulations allow candidates to raise money for supportive Super PACs, which are usually run by longtime employees or associates. It stretches credulity to say that Re-

store Our Future is truly independent from Mitt Romney and that a gift to the former generates no appreciation from the latter.

In addition, the Court counted on full disclosure of contributions and spending to “permit[] citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” But, as discussed above, a significant amount of campaign money cannot be traced to its original source.

Finally, the Court thought that procedures of shareholder democracy would prevent corporate managers from squandering shareholder money on questionable political expenditures.

Instead, shareholders rarely know what a corporation is spending in politics and lack the right to vote to approve or disapprove of such spending.

Solutions

How do we create the kind of balance that respects liberty while safeguarding political equality?

Ultimately, the simplistic (and hence impoverished) anti-regulatory view of the Constitution embodied in *Buckley* and *Citizens United* must give way to a holistic vision that recognizes the competing values at stake at the intersection of money and politics. There has been a lot of talk lately about overturning *Citizens United*, rolling back the notions that corporations have free speech rights and that independent expenditures (as a matter of law) cannot

corrupt democratic government. This is necessary, but not sufficient. It returns us to the halcyon days of 2009, which is to say, it won't solve the whole problem. It's easy to forget that Sheldon Adelson could have spent every dime of the \$20 million he shelled out for Newt Gingrich pre-*Citizens United*. He just would have had to cut his checks directly to consultants or TV stations rather than filtering them through a Super PAC.

This is because *Buckley* explicitly rejected political equality as a legitimate rationale for regulating money in politics. To restore balance we must move beyond the corruption rationale and elevate political equality to its proper place in our constitutional tradition.

There are two ways to do this. First, we can select a new generation of justices and judges who understand that liberty and equality must be constantly balanced and who view the First Amendment as most Americans do—as an essential safeguard to promote political accountability and robust democratic participation, not a tool for wealthy individuals and institutions to use to dominate the political process. The replacement of just one justice in the *Citizens United* majority could result in that decision being overturned. It might take a few more replacements to reach back to correct *Buckley* and firmly establish that Congress and the states may control the role of money in politics to protect political equality and strengthen their democratic governments.

The other way to take back control of our Constitution is to explicitly amend it. This, of course, is difficult—requiring two-thirds of each house of Congress to refer an amendment that must then be ratified by three-quarters of the states (in absence of a convention). At least twelve such amendments have been introduced in Congress, and there is a growing citizen movement to demand action.

Short of constitutional change, there are several ways that Congress, federal agencies, and state legislatures can act to restore balance.

First, Congress and state legislatures can provide public funding for candi-

dates to help ordinary citizens run competitive campaigns without depending on well-heeled donors. One popular way to do this is to match small contributions from individuals. New York City's system, for example, provides a six-to-one match (turning a \$20 check into \$140), which has proven to engage more small donors, diversify the donor pool, and make candidates less dependent on a narrow slice of wealthy donors. Another strategy that has been used in the states (and at the federal level in the past) is to provide vouchers, refunds, or tax credits for small political contributions.

Next, Congress and states should protect shareholders whose funds may currently be used for political purposes without their knowledge or approval. Congress and state legislatures should require for-profit corporations to obtain the approval of their shareholders before making any electoral expenditures and to publicly disclose any contributions to groups that make political contributions or expenditures. In the 1988 case *Communications Workers v. Beck* (487 U.S. 735 (1988)), the Supreme Court proclaimed that union members have the right to a refund for that portion of their dues used for political advocacy. Congress and states should provide shareholders with the same right.

The Securities and Exchange Commission (SEC) has the authority to require all publicly traded companies to disclose their political spending. There is currently a petition before the agency to do just that—and this petition broke the SEC record for public comments this spring, with more than 250,000 Americans urging the Commission to improve disclosure of corporate political spending.

Congress, the states, and the Federal Election Commission (FEC) also should improve disclosure by closing loopholes that currently allow 501(c)(4) nonprofit organizations and 501(c)(6) trade associations to make political expenditures or contributions without disclosing their donors. Also, the Internal Revenue Service should enforce its rules to stop clearly political groups from abusing their

status as nonprofit 501(c)(4) social welfare organizations.

Finally, Congress and states should tighten rules on coordination between candidates and outside groups such as Super PACs that are permitted to raise unlimited funds because their political activity is supposed to be “independent” of candidate campaigns. Current rules are riddled with loopholes—allowing candidates to raise money for Super PACs and appear in their ads, for example. The FEC can tighten coordination rules without congressional action.

Conclusion

Abraham Lincoln recognized the American democratic experiment as preserving government “of the people, by the people, for the people.” Super PACs, and the big-money system they represent, are the latest threat to that experiment.

But these dark clouds hovering over our democracy may have a silver lining. The manifest disregard for basic principles of political equality inherent in the explosion of Super PAC spending makes perfectly clear what has long been true: Largely because of misguided rulings by the Supreme Court, we currently live in a country where the strength of a citizen's voice depends on the size of her wallet.

Now, thanks to widespread reporting, sublimely absurd exchanges about Super PACs in the Republican primary debates, and Stephen Colbert's spot-on satire, the rules governing money in politics have become a national joke.

Yet, we can seize this moment to transform this farce by putting real solutions onto our national agenda. Now is the time to push our leaders to enact the range of solutions listed above.

The good news is that people are mobilizing across the country to fight back against our money-driven system. There are opportunities for action at the national, state, and local levels, and perhaps more energy directed to fixing our democracy than at any time since the aftermath of Watergate, when Congress passed

continued on page 25

Elections Must Be About More Than Winning

By Lillie Coney

Elections are about who wins, but increasingly they also are about how candidates lose. Controversial election outcomes occur if margins of victory are too close for the media to declare a definitive winner within hours of polls closing.

The 2000 presidential election's balloting debacle in Florida has become symbolic of the ways that a candidate wins and loses: systemic problems with election management results in a frustrated ballot-counting process, voting machine failures, central physical ballot count errors, flawed felon voter roll purges, poor ballot design, and partisan politics infecting election administration. The 2000 Florida election brought these problems to national attention—Congress responded with the Help America Vote Act (HAVA). The law establishes a federal agency to assist states with federal election administration, provided a one-time grant to states to purchase new voting machines, and created independent voting rights for persons with disabilities. Unfortunately, HAVA did not end the controversies associated with close elections.

Election management for many jurisdictions is too complicated to manage—outsourcing administration of election technology is common. New electronic voting system problems raise questions about who won or lost an election. In 2004, a Broward, Florida, vote counting error turned a losing gambling measure—to legalize gambling—into a winner by adding thousands of erroneous absentee ballot votes, which were later discovered and corrected.

The Ways a Candidate Can Lose an Election

Although money helps, candidates must outperform their opponents in persuading contributors, volunteers, and voters to support a campaign. A candidate can lose an election by not having the right message or strategy, by not enough or inefficient use of resources, or through

events that are outside the control of the candidate or campaign.

A candidate also can lose an election through system failures: eligible voters prevented from voting, cast votes not counted as having been cast, voting technology failures, human error, or people in official election duties creating an advantage for one candidate over another. Government employees are not above acting under official authority to influence elections such as reports of police hindering access to polling locations by minority voters. Voting system technicians' intentional or unintentional actions can preference one candidate over another. In 2006, there were 18,000 more votes cast on other ballot items in one county within Florida's Thirteenth Congressional District than in that congressional race with a 369 margin of victory. After investigation, the problem was a flaw in the electronic ballot design that placed part of the race for the Florida's Thirteenth Congressional District description on one screen and the candidate names on the next screen.

Election administration responsibilities can be political parties or city, county, or state governments. Election administrators often have little political power over government resources to address known weaknesses in election administration. They are also the people who are most likely to receive blame should something go wrong. Despite technological advances, elections still are human-centric: human error—whether caused by administrators, poll workers, or voters—can happen at any stage of the election process.

Why Is Electronic Voting System Transparency Critical to Election Integrity?

Candidates have sued over close election results of local and state elections in order to gain access to the software and firmware used in voting machines, with no success. Courts are reluctant

to challenge the determinations of election administrators. For example, a 2004 contested election in New Mexico resulted in a very close election between two candidates vying for the same seat. *Patricia Rosas Lopategui v. Rebecca Vigil-Giron* sought a “meaningful inspection of their electronic voting machines” to verify that the reported results for the race were correct. In that election, voters reported seeing on the ballot screen their vote switch from the candidate they supported to another candidate.

Recommendations for Election 2012

Suggestions on ways to improve elections and confidence in their outcome might include

- Depoliticize election administration—arbitrators cannot routinely engage in conduct that might call their judgment into doubt.
- Create a set of election auditing best practices and laws to protect the integrity of digital and physical ballots. Financial systems auditing may hold lessons for methods of developing better auditing mechanisms for public elections.
- Adopt software independence protocols, which means that election outcomes do not rely on the accuracy of voting system software or firmware.
- Promote poll worker volunteers—the nation requires 1.2 million poll workers for November 6, 2012.
- Deal effectively with the media's demands for early election results—it may take two to three days for election technology glitches or problems to surface.

Lillie Coney is associate director of the Electronic Privacy Information Center (EPIC) in Washington, D.C. She has also served on the Election Assistance Commission Board of Advisors (2010–11).

Interview with Lawrence Baca

Thurgood Marshall Award Winner

By Wilson Adam Schooley

Doing what he has always done, instinctively and well—battling stereotypes—Lawrence Baca is the Lone Ranger, not Tonto. The self-described “beach Indian” is far from laid-back when it comes to pursuing justice, never shying from a fight for what is right and often standing alone at the leading edge of crusades for change—from challenging racialized mascots in high school, to founding his college Indian organization, to becoming the first American Indian ever hired through the Department of Justice Honor Program, to filing more cases on behalf of American Indians than any other attorney in the history of the Civil Rights Division. His cases include several of great import for Indian voting rights and the “Brown v. Board of Indian Country.” He literally changed the face of the Justice Department, both by his example and recruiting efforts, and he is a charming fellow and gifted photographer to boot. It’s our pleasure to both celebrate and introduce you to Lawrence Baca.

The full version of this interview can be found online at http://www.americanbar.org/publications/human_rights_magazine_home.html.

WAS: Let’s start with your formative years through college at Santa Barbara.

LB: I was born in Colorado in 1950 and my father was a farmer/rancher there with his dad and brothers. In 1953 he moved to California and I grew up in San Diego County, a thousand miles away from my tribe and 2,000 miles away from my family, so I was as much a beach Indian as anything else. But my mother is not Indian, and my father is a full-blooded Pawnee Indian, and they met at a time when it was against the law in half the states for an Indian to marry a white person. I often joke about being a member of the Virginia Bar Association where it was against the law in Virginia for Indians to marry whites, and when you read the famous *Loving v. Virginia* case, there is a footnote where they specifically talk about the Indians and whites being in an illegal marriage, except for what is referred to in the literature as “the Pocahontas footnote” because it says that if you are less than one-sixteenth American

Indian that an Indian can marry a white person because he might be a descendant of John Rolfe and Pocahontas. My wife and I met in high school although we didn’t start dating until I was in college, but at the time we first saw each other, it was against the law in Virginia for us to marry.

WAS: Tell me about your experience growing up as a transplanted Pawnee in California.

LB: There is a racialized history to California most people are unaware of that included a form of segregation in schools; segregation throughout the country was at the time either mandatory in some states or in allowance in some states. California was an allowance state, and basically it meant that if you wanted to, you could have three separate schools, like a school for Indian kids, a school for black kids, and a school for white kids.

WAS: And this was, of course, over ten years past *Brown v. Board*.

LB: Yes, by the time I started school we were at or beyond the *Brown v. Board* cases. I went to a school where 99 percent of the kids were non-Indian. We were in a part of the county that was considered to be on the other side of the tracks and so there were a few Hispanic kids, and

my brother and I were the only Indian kids at El Cajon Valley High School. When you go farther out, there were about fifteen Indian Reservations in San Diego County; the racial restrictions in the county for Indian people were out there in Santee and those areas where there were certain parks, restaurants, movie houses that had signs up saying “no Indians allowed” or “no Indians served” and I have a very strong and vivid memory of those signs.

WAS: Did your father counsel you about dealing with discrimination of that kind?

LB: My father, being an Indian, had a fairly easy attitude about it all. His response was, “Well, if it’s a place they don’t want me, I probably don’t want to eat with them anyway.” Later in life, I discovered that when he was twenty-one, he made the mistake of walking into a white family establishment in rural Colorado. His truck had broken down and he was looking for help to get back into town, and six white men jumped him, stabbed him twenty-seven times, and then shoved him back out the door bleeding to walk back to the farm. So, I always guessed from his perspective, having a sign that says don’t come in here and you walk away is better than going in and being stabbed. Obviously, of course, he survived the event and went on to live many years after that.

WAS: El Cajon Valley High, ironically, had the “Braves” as its name and an Indian caricature as a mascot?

LB: Right. One of the things I did later in my career that I didn’t know I would be doing then was fight against the use of racialized mascots in high schools, elementary schools, colleges, and professional sporting teams. It’s offensive and it’s an of-

fense that we don't do with respect to other racial or ethnic groups. We were the El Cajon Braves. In the middle of the school is this twenty-foot-tall carved wooden Indian. The freshman project every year is to sand it down and revarnish it. But then, for all of the school materials was the actual mascot character, which is a caricature . . . it's this big pot-bellied guy, with a big belly, short, big hooked nose, with a headband with an eagle feather, and it's a broken eagle feather. In the Indian community, you would never have a broken feather. There is a ceremony

also went out for the cross-country team but got told by the school that his long hair didn't meet the school's dress code and he was kicked off the team. I protested and the school administration guy says, "Well, I'm not saying he can't practice his religion; we're just telling him he can't participate in extracurricular activities." My brother really wants to participate in school extracurricular activities and notices that the El Cajon Braves have a kid in a leather buckskin outfit marching in front of the band with a headdress and face paint. So he says, "I'm an Indian

place to go. He helps me fill out applications, makes sure everything is done right, and then we hop in a hot rod and go from El Cajon to UCSD at twice the speed limit and I stick my application in the door one minute before the deadline. I have never forgotten that I went to college in great measure due to a very good friend who helped me through the process. He has no memory of having done it, and I told him it doesn't matter if you remember. I remember.

WAS: After you got to UCSD, you transferred?

LB: There were a couple of other Indian kids on campus and we formed an Indian student organization that continues to exist today. I, however, fall in with a couple of roommates into drinking and partying. By the end of my freshman year I am on academic probation. So I made the decision to transfer to Santa Barbara.

WAS: Why did you choose UCSB?

LB: As you know, what a wonderful place to be! I got an alumni award and the chancellor said she found it difficult to explain what a wonderful campus it was. So when I gave my speech, I said, "Well, let me help you out. They are doing a retranslation of the Dead Sea Scrolls and they've discovered Adam and Eve were actually students at UCSB." UCSB for me made many, many changes. First off, I arrive on campus and see signs for an organization called Native American Awareness, basically a group of non-Indian kids who were raising money to bring water to the Santa Ynez Indian Reservation, which at the time had no running water. They raised several million dollars to get water to the reservation and, I discovered forty years later, it's a great joke on the cycle of life as the tribe now sells bottled water as one of their enterprises. Now that there was a Native student on campus, it was

Then the letter from Harvard comes.

All of the major characters from literature and film with the possible exception of Atticus Finch went to Harvard. So if you can afford it or not, you're gonna go.

that you use to send the feather on, and eagles were sacred animals that carry out prayers and our messages to the Creator. So all of the antics that went on at that high school were so offensive on so many levels that it would be difficult without a sociologist to explain it all.

WAS: How did you at the time, undoubtedly lacking at eighteen the services of a sociologist, handle it?

LB: I got through it fine. I was a fairly well-accepted kid on campus, student government, cross-country, and all that good stuff. My younger brother comes along, in '68 or '69, when racial and ethnic groups in America were starting to come into our own, saying, you know, we want equality. I was in college and my younger brother sees me as this radical young Indian. So he grows his hair out, to establish being Pawnee—so many in our tribe wear their hair uncut for religious reasons. He

and I'm the only Indian kid here. I'll go out to be the band mascot." He gets told again by the administration that because of his hair he can't participate as the band mascot. The irony was an Indian kid with long hair can't be the band mascot, so that a non-Indian kid has to put on a long wig and face paint to look dark-skinned, wear the headdress, and be the band's "Indian mascot." For the record, the school still, all these years later, has the same mascot.

WAS: With this background, how did you go about choosing a college and end up in Santa Barbara?

LB: I am the first member of my family to go to college, so I had absolutely no idea how you even apply. I always assumed I would go to college. My buddy Jack Phelps worked in student government. His family is big into education. He knows how to fill out the applications. He gives a sales pitch to me that UCSD is the

decided I should probably lead a Native American Awareness Group, so we took this body of energetic young kids and started a tutorial program on the reservation at Santa Ynez. That morphed itself into a tutorial program in Santa Barbara where we studied with Native kids and discovered very quickly that the needs also included Hispanic, black, and white kids. At one point we had forty college students visiting elementary and secondary students and helping them do their work. After my graduation, that organization went on for at least a decade.

WAS: You also started a program, didn't you, of outreach to prisoners at Lompoc Federal Prison?

LB: Even though I was the only Indian student on campus, the great joke was I started an Indian organization and elected myself president with a unanimous vote. I became very well known for my outreach work trying to get other students there so when a letter came in from Lompoc addressed to any Indian at UCSB, it was put in my box. The letter was from a group of Indian inmates. Because of the effect of federal laws on Indian reservations, many crimes that wouldn't be federal in any other area are when committed on an Indian reservation by an Indian against the personal property of another Indian.

WAS: Had the Indian prisoners at Lompoc created their own organization, prior to contacting you?

LB: The prisoners were creating an organization called The Tribe of Five Feathers and looking to meet people from outside. I went up to the prison the first time and said, "What is it that you need?" The guy said, "We need to meet people who didn't commit crimes. All of us inmates have committed crimes and we would like to help prepare ourselves to go back into the world by having conversations on a regular basis with people who didn't commit crimes." This meant these guys were smart enough

to understand the need for the integrative process back into society. So probably twice a month we would go up to the prison and just spend a couple of hours talking with folks.

WAS: You ended up teaching classes, didn't you, particularly helping inmates learn how to have successful parole hearings?

LB: The inmates, like the other racial and ethnic groups in the prison, had classes. I said, "What can I teach you? I'm twenty years old." They said teach us what you know. I discovered that the parole rates for Indians were much lower than the parole rates for non-Indians. I believed that was primarily because in the Native community we are taught that when an Indian confronts someone of authority, you look at your feet. Take a humble position. I know the parole boards were largely non-Indians and in the Anglo community folks like you to look them in the eye and tell them your life plan. The majority of these folks are from reservations that have weak educational backgrounds, and we taught them basic English, speech, and how to make a presentation to the parole board about your life plan. When you tell the parole board who knows it's costing \$2,000 a day to keep you in prison, you have a life plan, they're going to let you go. If you're standing in front of them looking at your feet, they are going to send you back in.

The parole rate for Indians increased to the best in the prison. The two or three years we were there, no Native inmates who were released on parole came back. The real power of all of that came home to me a few years ago when my supervisor at the Office of Tribal Justice was giving a speech about my work and he talked about the prison work and he said, "I don't know what you did in college, but Lawrence's work was setting men free."

WAS: You also essentially created your own major at UCSB, in Indian Studies, didn't you?

LB: The university provided me first with the opportunity to do my own individual major, American Indian History and Culture. One of the other great things for me at UCSB is that in my last quarter, two quarters into a fifth year, I taught a seminar. The university had a rule that you can teach if you had the highest degree attainable in your field. No one in America offered a master's or PhD in Indian history at the time, so I actually taught while I was still a student. A professor signed all of my grade cards, but it was my class and, again, a wonderful experience; I don't know if you can get that at a lot of other universities.

WAS: Let's talk about the journey from your studies and activism at UCSB to Harvard Law.

LB: I actually had a recommendation from the UCSB chancellor and was highly honored that he would even know my name, but to put a pen on paper and recommend me. I applied to a bunch of law schools. Then I started getting the letters back. I don't get into Yale, don't get into New Mexico—a marvelous story because they let me teach there a few years later and I tell them, "It's great you wouldn't educate me, but you let me educate your kids." Then the letter from Harvard comes. You look at films—when people mention a law school, all of the major characters from literature with the possible exception of Atticus Finch went to Harvard. So if you can afford it or not, you're gonna go. It turns out I'm the ninth Indian to graduate from the school.

Wilson Adam Schooley is a certified appellate specialist and trial lawyer with Sullivan Hill Lewin Rez & Engel in San Diego. He has been active in bar leadership locally and with the ABA, in various divisions and sections including IRR, for many years, and is also a professional actor, adjunct law professor, and published photographer.

Democracy at Stake

continued from page 20

the campaign finance law that the Supreme Court gutted in *Buckley*.

The rise of Super PACs and the

dark money pouring into our elections have laid bare the broken, unfair system the Supreme Court has left us. Now is our best chance in more than a generation to lift the dark clouds and secure a brighter future for American democracy by empowering ordinary citizens and truly honoring the principle of political equality.

Adam Lioz is counsel at Demos, a national nonpartisan research and advocacy organization, where he conducts litigation and policy analysis.

Liz Kennedy is also counsel at Demos and focuses on money in politics to increase transparency and accountability and to fight corruption of democratic government.

Introduction

continued from inside front cover

Less well known than the Voting Rights Act is the National Voter Registration Act of 1993 (NVRA), which was passed in response to a very low-turnout election in 1992 and the recognition by some members of Congress that voter registration had become a major barrier to electoral participation. The NVRA had been underappreciated and little litigated since the early years after its implementation, when a number of states challenged Congress's authority to intrude upon the states' traditional province of regulating registration, even for federal elections. These challenges were consistently and unceremoniously rejected.

New life was breathed into the NVRA in 2012 by an en banc Ninth Circuit decision in *Gonzales v. Arizona*, a case challenging Arizona's proof of citizenship requirement for voter registration. By a large majority, the court held that requiring additional documentation beyond the federal voter registration form itself was a violation of the NVRA. (The issue of whether the state could require proof of citizenship to accompany the *state* registration form was not presented.)

The NVRA has also been invoked by the Department of Justice (and private parties) in a 2012 challenge to a purge of the voter rolls in Florida designed to get rid of supposed "noncitizens." This process has already been found to be riddled with errors and brings back memories of the notorious "felon purge" in Florida in 2004, in which the state used a list that included thousands of citizens with no criminal record whatsoever.

In addition, the NVRA is an effective, affirmative tool to enforce voter registration at public assistance and disability agencies, a requirement of the law that has been as widely ignored as its companion provision, "motor voter"—registration at motor vehicle agencies—has been enforced. Restrictions on community-based voter registration drives also have been struck down under the NVRA, as recently exemplified by an injunction issued against many provisions of a Florida law imposing new recordkeeping requirements and a forty-eight-hour deadline for the submission of voter registration applications.

Clearly, the federal voting laws are powerful weapons to combat many of the state laws that have proven so popular with regressive legislators (some armed with model bills written by the American Legislative Exchange Council, better known as ALEC). But federal statutes are particularly potent in the hands of the Department of Justice, which is charged with enforcing them and which is not encumbered by the necessity of finding individual or organizational plaintiffs who have been injured by the state statutes. Unlike private litigants, the Department sues on behalf of the United States. Aside from this procedural advantage accorded the Justice Department, states often find it more persuasive to settle a lawsuit brought by the Department than to face the might of "The United States" in court.

Some state laws and constitutions also provide an effective foil for regressive laws. In Wisconsin, for example, two different state courts enjoined implementation of a particularly onerous photo ID law, citing a

state constitutional provision enunciating an explicit right to vote.

The job of fighting back against the proliferation of laws constricting voting rights has fallen largely to public interest lawyers and their organizations at every stage. Lawyers write ameliorating amendments, talking points, and testimony while the bills are pending, advocate for gubernatorial vetoes when they pass, and go to court when they are signed. When we are lucky, we work in tandem with the Department of Justice. When we are extremely lucky, we have the assistance of law firms contributing their time and talent, as well as many other resources that only law firms have.

What the current period has shown us, once again, is that when faced with a crisis, the American people respond, taking action to rescue their rights. The increased public awareness of the far right's concerted attack on voting, awareness due in no small part to the increased media attention to it, gives me hope that what we are seeing is merely another cycle in American political history, and it too shall pass. True, votes—and voters—will be lost, and we should not trivialize this loss. But the more we push back, and the more America's lawyers join the fray, the more hope I have.

Estelle H. Rogers is legislative director of Project Vote, a national nonpartisan advocacy organization devoted to increasing political participation in traditionally disenfranchised communities. She has been a voting rights lawyer since 2004. She is also one of the Section of Individual Rights and Responsibilities' delegates to the ABA House of Delegates.



Section of
**Individual Rights
and Responsibilities**

AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654-7598

NONPROFIT
ORGANIZATION
U.S. POSTAGE
PAID
AMERICAN BAR
ASSOCIATION

Heroes of the Struggle for Voting Rights

By Stephen J. Wermiel

The right to vote is a fundamental pillar of our democratic system. But it is worth remembering that giving meaning to the right to vote has been a long, hard struggle to which many people have devoted their lives and for which some have lost their lives throughout our history.

For much of our history, the right to vote was limited to property-owning and/or taxpaying white men. Women, African Americans, American Indians, and immigrants were shut out in most parts of the country and in the Constitution, which largely left voting rights to the states.

Hard-fought constitutional amendments provided a framework for change but were not always entirely successful. The Fifteenth Amendment was added to the Constitution in 1870, prohibiting the denial of the right to vote to citizens on the basis of their race. But ninety-five years later, Congress passed the Voting Rights Act of 1965 to deal with, among other things, state interference with the right to vote on the basis of race.

The struggle to eliminate race discrimination in voting involved the lives of many people. John Lewis, now a member of Congress from Georgia, helped lead the “Freedom Summer” efforts in 1964 to register African-American voters in the South, along with Rev. Martin Luther King Jr. Many others joined in that struggle, risking life and limb. One participant, John Doar, received the Presidential Medal of Freedom from President Barack Obama in May. Head of the Justice Department Civil Rights Division for much of the 1960s, Doar also played a key role in promoting voting rights. In 1964, Doar helped investigate and prosecuted crimes related to the killings of James Chaney, Michael Schwerner, and Andrew Goodman, three civil rights volunteers who were killed while participating in a voter registration drive in Meridian, Mississippi. Doar also represented the Justice Department’s effort to protect



Associated Press, AP

marchers for voting rights from Selma to Montgomery, Alabama, in 1965.

Another important figure, Nicholas deBelleville Katzenbach, who died in May, was deputy attorney general from 1962 to 1965 and became attorney general in 1965. He is widely credited with helping to write the Voting Rights Act of 1965 and then leading the Justice Department in its enforcement.

The battle for suffrage for women was also a prolonged struggle that culminated in approval of the Nineteenth Amendment in 1920, prohibiting denial of the right to vote based on sex. The fight saw many suffragist leaders devote significant portions of their lives to the cause. From the convening of a now-famous rights convention in 1848 in Seneca Falls, New York, by Elizabeth Cady Stanton and Lucretia Mott to the final push for the Nineteenth Amendment seventy years later by Alice Paul and Carrie Chapman Catt, leaders sacrificed to win the right to vote for women.

There are heroes in other constituent groups as well who have fought to secure the right to vote for successive populations of immigrants and for American Indians. Even 225 years after the Constitution was written, the struggle is not over and new heroes for voting rights are needed and are emerging in each generation.

Stephen J. Wermiel, who teaches constitutional law at American University Washington College of Law, is chair of the ABA Section of Individual Rights and Responsibilities.