

INTRODUCTION

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Voting is the lifeblood of democracy, and few issues in public law are as important as government regulation of the political process. The existence of our nation's elaborate, complex and highly technical "law of democracy" might seem at first glance to be a contradiction. Democracy, one might think, is prior to law, and it might seem that incumbent government officials cannot be trusted to regulate fairly the very means by which representatives are selected.

On closer reflection, however, it becomes clear that regulation of elections is inevitable in a constitutional democracy. In any democracy, the stakes in election law are high because the danger is always present that the "ins" will try to keep the "ins" in and the "outs" out, as the late, great constitutional scholar, and former Dean of Stanford Law School, John Hart Ely used to say. Regulation to ensure access to the voting booth and the integrity of electoral outcomes is thus an inevitable concomitant of having elections at all.

In a constitutional democracy, the difficulties are compounded by the guarantees of equal protection and freedom of speech. Current debates over the justiciability of partisan redistricting and the renewal of the Voting Rights Act¹ illustrate how lively controversy remains over how to ensure that voting power is distributed equally, without systematic entrenchment of some voters or effective disenfranchisement of others. Current debates over campaign finance regulation illustrate how lively controversy remains over how to ensure that candidates and their supporters can get out their messages and appeal to voters while maintaining a system of one person one vote rather than one dollar one vote.

This issue of the *Stanford Law and Policy Review* makes a significant and welcome contribution to these debates by exploring current issues in campaign finance regulation, voting rights and citizen participation. The articles in this issue exemplify the increasing sophistication of election law scholarship. While it has long been commonplace in private law scholarship to ask how well economic markets function and whether legal intervention is necessary to correct market failures (e.g., negative externalities, free rider problems, races to

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1. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

the bottom) or to encourage competition (e.g., by limiting monopoly power), legal literature that asks similar questions in the context of political markets is relatively new. True to the mission of this journal, the articles here ask these questions from an interdisciplinary perspective, combining empirical observations about policy with normative insights about law.

Three of these articles make significant contributions to the debate over ongoing restrictions on campaign finance in the wake of the 2002 Bipartisan Campaign Reform Act,² more commonly known as the “McCain-Feingold” legislation after its principal sponsors in the Senate, and new initiatives at the state level to limit campaign spending in state elections.

McCain-Feingold is the latest in a series of efforts to regulate campaign finance in the wake of the Watergate scandal in the 1970s. These efforts have proved to follow only one law: the law of unintended consequences. Congress’s 1974 amendments to the Federal Election Campaign Act placed ceilings on both political contributions and political expenditures. In *Buckley v. Valeo*,³ the U.S. Supreme Court held that the First Amendment barred the expenditure limits but permitted the contribution limits. The effect of this ruling was to leave demand for political money unlimited while restricting its supply. Today, *Buckley*’s compromise makes almost no one happy. Some would reverse the decision for upholding contribution limits, arguing that the supply of political money may no more be constitutionally regulated than the demand. Others would reverse the decision for striking down expenditure limits, advocating latitude for Congress to regulate all aspects of the political money economy. But neither of these positions has been able to command five votes on the U.S. Supreme Court.

Inevitably after *Buckley*, demand for political money found other outlets, as financial expression of political support moved away from candidates to parties and political action committees (PACs), and then away from such secondary organizations to tertiary organizations such as issue advocacy groups. McCain-Feingold represented an effort to close down such substitutes as “loopholes.” In *McConnell v. Federal Election Commission*,⁴ the Court, by a 5-4 vote, upheld against facial First Amendment challenge McCain-Feingold’s limits on “soft money” contributions to parties and on “electioneering communications” through pre-election broadcast ads.

In *Boundary-Based Restrictions in Boundless Broadcast Media Markets: McConnell v. FEC’s Underinclusive Overbreadth Analysis*,⁵ Bradley A. Smith

2. Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 and 36 U.S.C. (Supp. II 2002)).

3. 424 U.S. 1 (1976).

4. 540 U.S. 93 (2003).

5. Bradley A. Smith & Jason Robert Owen, *Boundary-Based Restrictions in Boundless Broadcast Media Markets: McConnell v. FEC’s Underinclusive Overbreadth Analysis*, 18 STAN. L. & POL’Y REV. 239 (2007).

and Jason Robert Owen illuminate a previously unnoticed aspect of the “electioneering communications” ban in Section 203 of McCain-Feingold. Advocates of the provision have downplayed its adverse effects on grassroots democracy, characterizing it as a mere burden, not ban, that simply displaces political speech referring to candidates into other time periods. Smith and Owen demonstrate that these displacement effects have been underestimated. In fact, they suggest, Section 203 imposes political broadcast blackouts of dizzying temporal and geographic scope. These blackouts span much of the political map during much of the political calendar by virtue of the timing of primary elections in the several states. For example, a primary election may be run in a single state but nonetheless force a blackout on a broadcast media market that overlaps state lines, depriving voters in adjacent states of broadcasts even outside the period preceding their own primary elections. The authors suggest that these effects support the Court’s reconsideration of those portions of *McConnell* that upheld the constitutionality of McCain-Feingold’s “electioneering communications” provisions.

In *So There Are Campaign Contribution Limits That Are Too Low*,⁶ James Bopp, Jr. and Susan Lee review approvingly the Supreme Court 2006 decision in *Randall v. Sorrell*,⁷ which for the first time found the amounts set forth in contribution limits too low to survive First Amendment scrutiny. Along with his co-author, Bopp, a voting rights expert and veteran litigator against campaign finance limits in *McConnell*, *Randall*, and most recently, *Federal Election Commission v. Wisconsin Right to Life*,⁸ explains in this essay why the Court was correct to recognize outer limits on its position that contribution limits help ensure electoral accountability by democratizing the influence of money upon the electoral process. When Vermont set contribution limits at a mere few hundred dollars per person for statewide candidates, the Court at last invalidated them, holding that “contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing electoral accountability.”⁹ The authors suggest that the stringent scrutiny applied in *Randall* holds lessons for other challenges to campaign finance restrictions as well.

Rounding out these discussions of campaign finance regulation, Mark Totten’s essay, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*,¹⁰ argues for revision of the portions of the federal tax

6. James Bopp, Jr. & Susan Lee, *So There are Campaign Contribution Limits that are Too Low?*, 18 STAN. L. & POL’Y REV. 265 (2007).

7. 126 S. Ct. 2479 (2006).

8. No. 06-969 (2007).

9. *Randall*, 126 S. Ct. at 2482.

10. Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, 18 STAN. L. & POL’Y REV. 297 (2007).

code that restrict the speech of religious congregations during election season. He argues that the existing prohibition, exacerbated by recent escalation in government enforcement efforts, reaches too far beyond the use of funds by religious congregations into the very practices of preaching and proselytization that are at the core of religious faith.

While the national debate over campaign finance reform continues, Congress has undertaken another sweeping effort at regulating the political process: the 2006 reauthorization of the Voting Rights Act of 1965—perhaps the most transformative civil rights statute of the modern era. Like McCain-Feingold, this law has elicited political controversy. Section 5 of the Voting Rights Act requires preclearance by the Department of Justice (DOJ) of changes in state or local voting laws in certain parts of the nation. The original purpose of the law was to ensure that gains in the enfranchisement of African Americans and other racial minorities not be reversed or degraded by changes that diminish minority voting power.

As Michael J. Pitts shows in his essay *Defining “Partisan” Law Enforcement*,¹¹ Section 5 has generated charges of partisan abuse. For example, some have objected that a Republican-controlled DOJ has misused the law in reviewing an unusual mid-decade redistricting in Texas, a requirement for voter photo identification at the polls in Georgia, and a congressional redistricting plan ordered into effect by a state trial court in Mississippi. The author, himself a former voting rights lawyer in the DOJ, sets forth a model for distinguishing those election changes properly denominated partisan from those that are not, setting forth a new roadmap for federal officials charged with enforcing federal voting laws.

Finally, the essays in this issue turn to the ultimate issue underlying any regulation of the voting process: measures to enable citizen participation in elections. In *How Hard Can It Be? Do Citizens Really Think It Is Difficult to Register to Vote?*,¹² R. Michael Alvarez, Thad E. Hall, and Morgan Llewellyn explore recent proposals to reform the voter registration process to make it easier for citizens to register to vote. Reporting the results of a nationwide survey providing empirical evidence that some sectors of the population eligible to vote, especially young voters, believe voter registration to be too difficult, the authors suggest that any reforms, in order to be most effective be specifically targeted to these subgroups of potential voters.

As the nation moves on from the haunting spectre of Florida election officials visually inspecting hanging, dimpled and pregnant chads on punch cards during the recount of the contested presidential election of 2000, new technologies are changing the nature of citizen participation in politics and

11. Michael J. Pitts, *Defining “Partisan” Law Enforcement*, 18 STAN. L. & POL’Y REV. 323 (2007).

12. R. Michael Alvarez et al., *How Hard Can it Be? Do Citizens Really Think It Is Difficult to Register to Vote?*, 18 STAN. L. & POL’Y REV. 349 (2007).

political debate. In their essay, *Does Local News Measure Up?*,¹³ Erika Franklin Fowler, Kenneth M. Goldstein, Mathew Hale, and Martin Kaplan explore the poor quality of much of the coverage of politics found in the “old media” of broadcast television news. Noting that voters depend heavily on local television news broadcasts for political news, they report results of a study of local news content during the 2002 and 2004 elections. The study shows, they argue, that local news broadcasts are deficient in coverage and analysis of substantive issues dividing the candidates, focusing instead on the horserace aspects of elections and shifting too much of the burden of substantive political information to private political advertising and political consulting. The authors suggest ways to improve the quality of local news reporting of political contests in the face of the conventional wisdom that public affairs coverage cannot be profitable to private broadcasters.

Will the Internet, with its highly decentralized and ubiquitous access to information, transform political debate, candidate selection, and even the means by which citizens vote? Glenn Reynolds discusses such issues in his book review, *Does Power Grow Out of the Barrel of a Modem? Some Thoughts on Jack Goldsmith and Tim Wu's Who Controls the Internet?*.¹⁴ Early enthusiasts of the Internet predicted that it would diminish the sense of politics as confined to constituencies within defined geographic boundaries. Goldsmith and Wu show how governments and companies have found ways to impose geographic boundaries on some Internet traffic. Reynolds acknowledges that the Internet has not lived up to some initial predictions, but argues that it is nonetheless a powerful tool for empowering individual expression and diminishing government entrenchment.

The student editors of the *Stanford Law and Policy Review* deserve great thanks for assembling such a timely and provocative set of essays on the most constitutive of all questions in public law: how do we establish and maintain our democracy? The essays in this issue demonstrate that the answer rests fundamentally not only in our political culture but in our laws.

13. Erika Franklin Fowler et al., *Does Local News Measure Up?*, 18 STAN. L. & POL'Y REV. 377 (2007).

14. Glenn Reynolds, *Does Power Grow Out of the Barrel of a Modem? Some Thoughts on Jack Goldsmith and Tim Wu's Who Controls the Internet?*, 18 STAN. L. & POL'Y REV. 399 (2007).

