

Judges as Political Regulators: Evidence and Options for Institutional Change

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Abstract:

One of the enduring debates in the field of election law is the extent to which courts should set the rules for political competition. The political markets approach thus far has received a frosty exception at the Supreme Court. Though isolated opinions of Supreme Court Justices sometimes seem to embrace this approach (Randall v. Sorrell, 2006, opinion of Justice Breyer for three Justices; but see Hasen 2007b [noting that the Court plurality was not consistent in its focus on competition even within the Randall case itself]), a Supreme Court majority appeared to reject it in a 2007 case, holding that it is not the Court's job to promote political competition as a constitutional matter. (New York State Board of Elections v. Lopez Torres 2008). Persily (2009) notes that many of the recent Supreme Court cases have given the Court an opportunity to embrace the political markets approach but the Court has not taken the bait.



Rezumat:

Una dintre dezbatările de durată în domeniul legii electorale este măsura în care instanțele ar trebui să stabilească normele de concurență politică. Abordarea piețelor politice de până acum a primit o excepție dirimantă de la Curtea Supremă de Justiție. Deși opiniile izolate ale judecătorilor Curții Supreme de Justiție, par uneori să îmbrățișeze această abordare (Randall v. Sorrell, 2006, opinia Judecătorului Breyer, a se vedea Hasen 2007b [constatând că pluralitatea Curții nu a fost consecventă în abordarea sa asupra concurenței chiar și în cazul Randall propriu-zis]), o majoritate a judecătorilor Curții Supreme pare a respinge abordarea într-un caz din 2007, considerând că nu este atribuția Curții de a promova o concurență politică ca o chestiune constituțională. (New York, Consiliul de Stat al Alegerilor v. Lopez Torres 2008). Persily (2009) constată că multe dintre cazurile recente au dat Curții Supreme ocazia de a îmbrățișa abordarea piețelor politice, dar Curtea nu a preluat constatarea.

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Introduction

A major theme of election law scholarship over the last decade has been that judicial oversight of the devices of democracy is desirable to foster adequate political competition. Under this view, politicians' self-interest should preclude them from deciding the conditions for their own future races, such as the location of legislative districts. Apart from the merits or problems with this approach, the reality is that courts increasingly are called upon to engage in political regulation. Election law litigation has more than doubled in the last decade.

Turning to judges as political regulators can be problematic in two ways. First, judges, like politicians, might act in self-interest to favor their past or present political party or to keep themselves in office. Second, apart from self-interest, judges come to these cases with their own world views and might not apply "neutral" principles in deciding election law cases. If either of these two concerns has merit, then the role of judges as political regulators needs further examination. Under what circumstances should judges decide issues of political regulation? What changes in the structure of adjudication or legislative drafting could be made to minimize the problems with judicial regulation of politics? Are there other institutions that may be designed for the regulation of politics?

This paper does not answer these questions, but sets forth some of the evidence bearing on them as well as an agenda for future research. Part I briefly describes the case for judicial intervention in politics and describes the litigation explosion in the election law area in the last decade. Part II discusses the literature and open questions regarding

how judges decide political regulation cases. It draws upon, among other things, a study on judges and the "single subject rule" applicable to initiatives. Part III considers whether changes in legislative drafting or institutional design could improve the field of political regulation. In particular, it considers whether "New Institutionalism" proposals may be relied upon to lessen the public's dependence upon judges as political regulators.

I. The Normative Argument for, and Positive Evidence Regarding, the Use of Judges as Political Regulators

One of the enduring debates in the field of election law is the extent to which courts should set the rules for political competition. Rick Pildes and Sam Issacharoff put forward the leading argument for the "political markets" approach to election law in a 1998 law review article, *Politics as Markets*. (Issacharoff & Pildes 1998). According to the argument, courts should aggressively police election laws to prevent politicians' self-dealing. The authors see an inherent problem with politicians setting the rules for future political competition, such as through passage of campaign finance rules, redistricting plans, and limits on ballot access for third parties and independent candidates. They suggest an aggressive judicial response. Most provocatively, using an analogy to antitrust and the need to break up "political cartels", Issacharoff has advocated that courts declare all redistricting adopted by partisan elected officials as presumptively unconstitutional (Issacharoff 2002).

Scholars in the political markets camp want courts to focus on the proper functioning of the political market and less on a traditional "balancing" of the rights of those challenging election laws against

It is also possible that *Bush v. Gore* (2000), the Supreme Court's opinion ending the disputed 2000 presidential election, spurred more litigation by creating new equal protection claims

the state's interests purportedly furthered by the challenged election law. The analysis is unmoored to traditional constitutional analysis; these scholars are mostly unconcerned with which provision of the Constitution a court would use to engage in this political regulation.

Against the structuralist approach of the "political markets" school are scholars who assert that judicial modesty is in order in election law cases. According to some in this school, judicial intervention is necessary only to protect "core" equality rights, such as the right to cast a ballot that will be counted. Remaining "contested" questions, such as which factors are appropriate for redistricting, should be left to the political process, not the courts (Hasen 2003). Skeptics of the political markets approach believe that judges do not have a comparative institutional advantage in political regulation compared to politicians themselves (Persily 2002), that there is no widely-accepted normative baseline for courts to use in promoting "appropriate" political competition (Lowenstein 2007), and that aggressive court regulation may have unintended negative consequences.

A third group of election law scholars contends that the rights-structure debate is overblown, and they seek to narrow the differences between the two approaches. They argue that even the rights approach implicitly takes structure into account in

setting forth certain minimum democratic requirements to be enforced by courts and that structuralist approaches are favored, at bottom, to help voters or groups of voters (Charles 2005; Dawood 2007).

However the scholarly debate gets resolved, the political markets approach thus far has received a frosty exception at the Supreme Court. Though isolated opinions of Supreme Court Justices sometimes seem to embrace this approach (*Randall v. Sorrell*, 2006, opinion of Justice Breyer for three Justices; but see Hasen 2007b [noting that the Court plurality was not consistent in its focus on competition even within the *Randall* case itself]), a Supreme Court majority appeared to reject it in a 2007 case, holding that it is not the Court's job to promote political competition as a constitutional matter (*New York State Board of Elections v. Lopez Torres* 2008). Persily (2009) notes that many of the recent Supreme Court cases have given the Court an opportunity to embrace the political markets approach but the Court has not taken the bait.

The academic debate over the proper role of judges in regulating politics remains unsettled, and is likely to remain so going forward. But the facts on the ground show that, for good or bad, judges increasingly are called upon to decide election law disputes. The number of such disputes nationally averaged 96 cases per year in the 1996-1999 period, and they more than doubled to an average of 237 cases per year in the 2001-2008 period (Hasen 2009). See Figure 1 below (from Hasen 2009).

Election law cases in recent years have gone to state court more often than federal court, though the most recent numbers show a move toward parity between state and federal courts. As Figure 2 shows, state court cases have made up a majority of election challenge cases heard in the courts in every year

"Election Challenge" Cases by year, 1996-2008

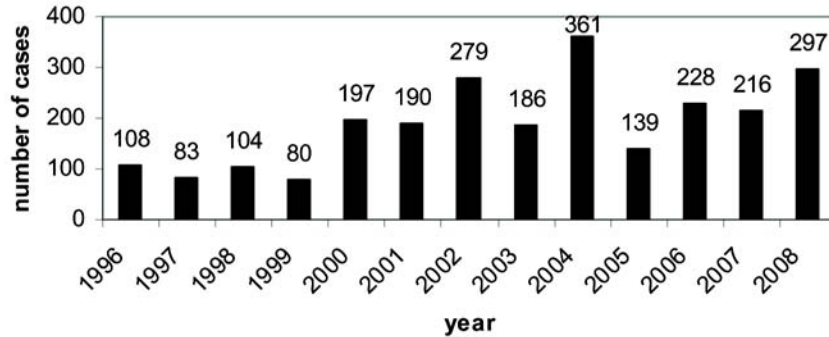


Figure 1

but one in the last 12 years. In the period of the early 2000s, over 80 percent of the election challenge cases were heard in

state courts. The figure has dropped somewhat, standing at 54 percent of cases in 2008. See Figure 2 below.

Percentage of Election Challenge Cases in State Courts, 1996-2008

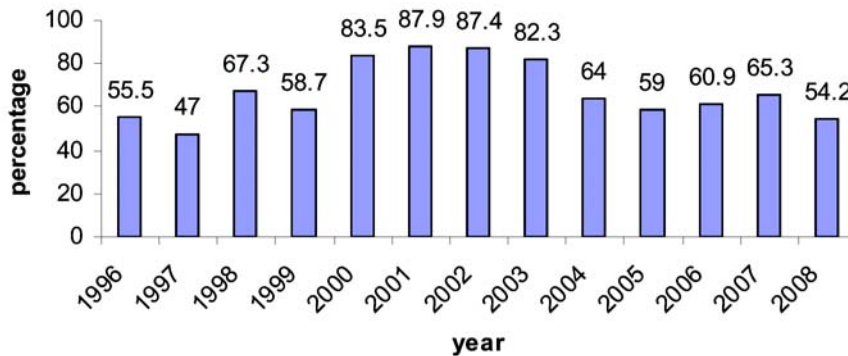


Figure 2

At the Supreme Court level, the amount of election litigation has remained at a high level since the 1960s, when the average number of cases rose six-fold from the pre-1960 period (from an average of 10 to an average of 60 cases per decade). (Hasen 2003). See Figure 3.

The reasons for the explosion in election law litigation across the American legal system since 2000 are uncertain. One theory posits that election law has become part of a "political strategy"

followed by politicians in an effort to manipulate the rules of the game to get elected and to win in the event of an election recount or contest (Hasen 2005). It is also possible that *Bush v. Gore* (2000), the Supreme Court's opinion ending the disputed 2000 presidential election, spurred more litigation by creating new equal protection claims. (But see Smith and Shortell 2007 [noting that rise in litigation related to presidential elections began rising in 2000 before

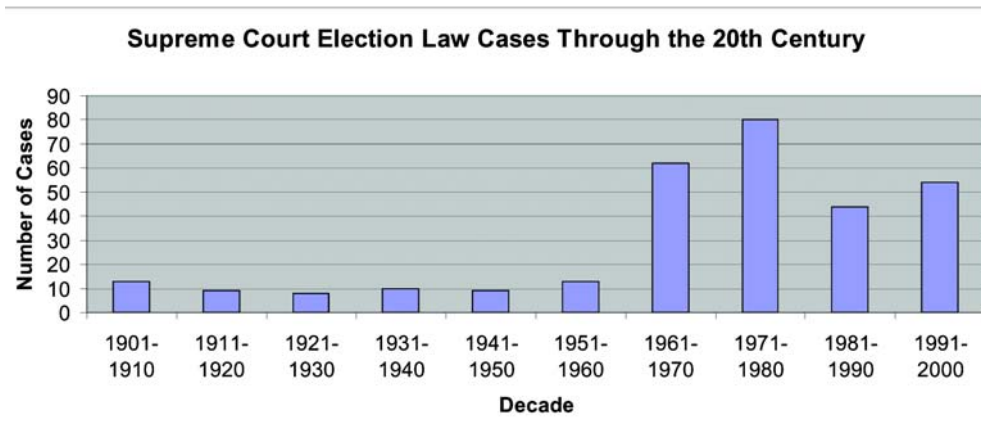


Figure 3

Bush v. Gore]). Other factors may be at work as well; election litigation might be a manifestation of the increased party polarization of American politics. (See Jacobson 2000 [documenting marked rise in polarization in Congress and in American public opinion]). Further research on the causes of the election law litigation explosion is in order.

Thus, regardless of the merits of the debate over rights versus structure, the fact is that courts have become ever more involved in political regulation. The question is whether such a change is positive or negative, and if it is negative, what can be done to lower the amount of political regulation engaged in by courts.

II. Problems and Pitfalls in Using Judges as Political Regulators

To lawyers, legislators, and others, it may seem odd to refer to judges as “political regulators” (Cf. Cain 1999: 1119 [stating field is better defined as “political regulation” rather than “election law”]). After all, judges are not expressly labeled “political regulators” like commissioners of the Federal Election Commission, members of a redistricting commission, or officials at the Department of Justice charged with determining whether voting changes in “covered jurisdictions” should be precleared pursuant to Section 5 of the

Voting Rights Act. Yet judges and not members of these bodies have set the basic rules for political competition in the U.S.; indeed, the latter group of regulators is restrained by, and takes cues from, the Supreme Court’s political regulation decisions. As the FEC crafts rules limiting “coordinated” spending, for example, it must take account of Supreme Court-created First Amendment limits on the ability of government to regulate election-related spending. A redistricting commission drawing new lines for state legislative districts must comply with Supreme Court requirements of equi-populous districts (one person, one vote), constitutional limits on the use of race in redistricting (racial gerrymandering), and the requirements of section 2 of the Voting Rights Act as it has been interpreted in numerous complex opinions of the Supreme Court. DOJ officials ruling on preclearance requests must consider both Congressionally-mandated language in section 5 of the Voting Rights Act and the Supreme Court’s shifting interpretations of section 5.

Courts do more than provide ground rules for election law administrative action. They also directly decide election law disputes across a wide spectrum of cases (including campaign finance, redistricting, voting rights, ballot access,

initiative law, and term limits) and are often the final arbiter in deciding contested elections².

Though courts play a crucial role in these election law cases, some scholars have raised questions about how judges decide such cases. Chief complaints are that judges might decide cases in line with self-interest or be subconsciously biased, or decide cases on ideological grounds³. By “self-interest”, I mean that judges might decide cases to favor their past or present political party or to keep themselves in office. The second problem, that of ideological decisionmaking, recognizes that judges come to these cases with their own world views and might not apply “neutral” principles in deciding election law cases even if they can avoid self-interest problems. Of course, both of these problems inhere in any system of political regulation. My point in this Part is to show that these problems may apply to judges acting as political regulators as well.

In considering the self-interest point, there is a vast political science literature on how judges, especially Supreme Court Justices, decide cases. One of the leading theories is the “attitudinal model,” which posits that Justices decide cases in line with their personal ideologies. (Segal & Spaeth 1993) Some scholars in the positive political theory camp have refined the attitudinal model to argue that Justices seek to put in place their preferred policy positions to the extent they may do so without being reversed by Congress or others (McNollgast 1995). That is, these scholars argue that judges make decisions within the context of institutional

constraints and the possibility of reaction to court decisions by other political actors including legislatures, agencies, and executives.

As applied to Supreme Court Justices, the attitudinal model has been criticized on a number of grounds, including the fact that ideology is not always a reliable predictor of judicial votes (Cross 2009). Others, such as Posner (1993:3) argue that “trying to change the world plays no role in [the judge’s utility] function,” but that judges gain utility from the mere consumption value of voting.

Even if the attitudinal model accurately describes the behavior of United States Supreme Court Justices, who have life tenure and whose decisions are not easily undone, it might not apply (or apply in the same way) to the other judges who decide the vast majority of election law cases. For example, lower court federal judges, who face the possibility of Supreme Court reversal, have different constraints in deciding election law cases. The model is open to even sharper skepticism as applied to state court judges, who not only face the possibility of reversal by the United States Supreme Court. Many also run as candidates in elections, some of them partisan elections. Elected judges may have an incentive, at least in theory, to curry favor with either voters or members of their own political party (Hasen 1997). Incentives may also differ for judges who must face reappointment by a governor, legislature, or judicial commission.

As political scientists debate the question of judicial motivation as a general matter, election law scholars have

² When it comes to federal elections, Congress may exercise authority superior to the courts to determine disputes involving presidential and congressional elections. See U.S. Const. Art I, § 5 (“Each House shall be the judge of the elections, returns and qualifications of its own members”);

Amend XII (setting out rules for counting of Electoral College votes).

³ In addition, judges might lack expertise to decide certain election law issues. I return to this point in Part III below, in discussing potential institutional changes in political regulation.

turned to judicial decisionmaking in election law cases in particular looking for evidence of judges acting in their self-interest or at least appearing to be swayed subconsciously in election law cases by sympathy for particular litigants or positions.

An important recent study by Cox and Miles (2008) examined how federal judges decided cases brought under section 2 of the Voting Rights Act, which was intended to expand political opportunities for minority voters. The authors made three central findings, two of which are relevant to this study⁴. First, judges appointed by Democratic presidents were significantly more likely than judges appointed by Republican presidents to find for minority plaintiffs in section 2 cases. Second, the authors “show that a judge’s race influences her voting pattern even more than her political affiliation. After controlling for other factors, an African-American judge is more than *twice as likely* as a non-African-American judge to vote for section 2 liability.”

Evidence of potential ideological skew in election law cases also comes from state and federal courts deciding challenges to the recent controversial voter identification laws. Hasen (2007a:42) noted that the entire United States Court of Appeals for the Seventh Circuit split almost perfectly along party lines in voting whether to rehear *en banc* a 2-1 decision upholding Indiana’s voter identification law, a law described by the (Democrat-appointed) dissenting judge as “a not-too-thinly-veiled attempt to

discourage election-day turnout by certain folks believed to skew Democratic.” Similarly, on the Michigan Supreme Court, the state justices (who are elected in partisan elections) split 5-2 along party lines over whether the Michigan voter identification law violated the state constitution⁵ (Hasen 2007a: 42 n.201).

Not all the evidence demonstrates a partisan split on courts in election law cases.

Kopko (2008) examined decisions of state courts in 2004 ballot access cases involving Green Party candidate Ralph Nader’s attempts to secure a place on the presidential ballot. Democrats opposed Nader, fearing his presence on the ballot could take votes away from Kerry. Looking at “Nader’s ballot access claims in fifteen states, and accounting for factors that could influence partisanship in the judicial decision-making process, [Kopko found] that a judge’s partisan affiliation is not a statistically significant determinant of a judge’s case vote.” Instead, Kopko found the decision of the state election authority to grant ballot access as a significant determinant of the judge’s ruling (Kopko 2008: 302).

No doubt much more work is necessary to consider the circumstances in which party affiliation is a good predictor of judicial voting in election law cases and, to the extent it is, to consider whether self-interest or more subconscious motivations explains the split.

Matsusaka and Hasen (2010) offer additional findings that shed some additional light on the question of judicial motivation. The research considers the

⁴ The third set of findings relates to the amount of section 2 liability over time and across jurisdictions. These findings are not relevant to the issues discussed in this paper.

⁵ In the United States Supreme Court’s review of the challenge to Indiana’s voter identification law, the Justices split 6-3 on its constitutionality. Six

Justices appointed by Republican presidents voted to uphold the law. Two Justices chosen by a Democratic president and one Justice (Souter) chosen by a Republican president voted to strike down the law as unconstitutional. *Crawford v. Marion County Election Board* (2008).

single-subject rule applicable to voter initiatives. The rule requires that voters not be presented with initiatives embracing more than one “subject.” Judicial application of the single subject rule therefore requires judges to decide whether particular initiatives have more than one “subject,” however the state defines “subject.” Unlike issues such as voter identification, “single subject” challenges present an issue without an obvious partisan valence.

Lowenstein (1983) argued that when judges are forced to make highly subjective decisions, it is hard for their reasoning not to be influenced by their belief systems, values, and ideologies. Matsusaka and Hasen found strong support for this claim. They examined votes of state appellate court judges on single subject cases in five states during the period 1997–2006 (more than 150 cases and more than 700 individual votes). They found that judges are more likely to uphold an initiative against a single subject challenge if their partisan affiliations suggest they would be sympathetic to the policy proposed by the initiative. More important, they found that partisan affiliation was extremely important in states with aggressive enforcement of the single subject rule - the rate of upholding an initiative jumped from 42 percent to 83 percent when a judge agreed with the policy than when he disagreed - but not very important in states with restrained enforcement. This evidence suggests that placing judges in a position with significant discretion could well lead to an increase in arbitrary or political decisions.

These results suggest that whether consciously or subconsciously, judges decide at least some election law cases in systematically different ways depending upon their ideology and background, wholly apart from partisan considerations. For this reason, political

reformers should be cautious before encouraging more political regulation cases into the courts.

Finally, one might consider whether there is more or less judicial partisanship, self-interest, or subconscious bias on state courts or federal courts. Given the track records of both sets of courts in election law cases in recent years, it is not clear that one forum is better from the point of view of fair political regulation rather than the other, despite the fact that rational models of judging suggest that judges with life tenure should behave differently than judges who must run for periodic election (sometimes in partisan contests) or be considered for reappointment. If judges on state and federal courts reach the same results in election law cases, it suggests that the institutional approach of positive political theory may be overstating the extent to which judges worry about responses of other institutional actors to judicial decisions.

III. Minimizing the Need for Judges as Political Regulators

If it is correct that judges cannot be counted upon to decide election law cases in a wholly neutral way, at least some of the time, election law scholars should consider alternative ways of resolving (or better, *ex ante* avoiding) election law disputes. This Part considers whether changes in legislative drafting and institutional design could improve election law dispute resolution and it sets forth an agenda for future research. Improved legislative drafting can clarify the law so that fewer election law disputes arise, and those which do arise are resolved quickly and without controversy. Institutional design changes may be used both to induce legislators to draft clearer election law statutes and, more directly, to avoid self-interested and ideological judicial decisionmaking in election law cases.

A. Reducing Election Law Disputes through Clearer Legislative Drafting

Though election law disputes raise quite a variety of problems, the bulk of such cases involve questions of statutory interpretation. In 2008, for example, 81

percent of state election law cases involved either statutory interpretation questions (70.8%) or a mix of statutory and constitutional issues (10.6%). See Figure 4 (from Hasen 2009).

2008 Election Challenge Cases by Type of Case

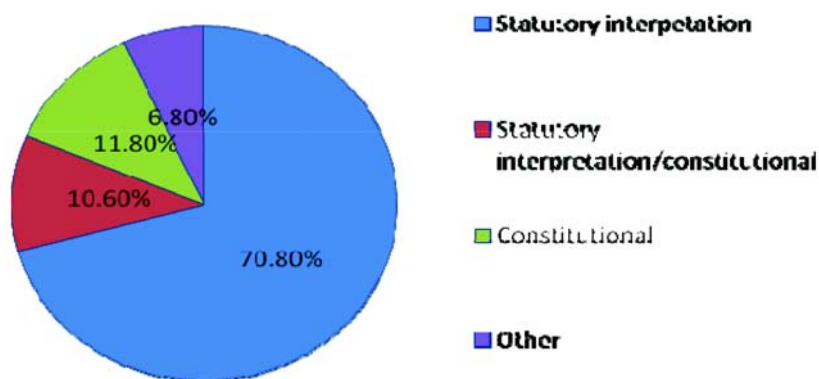


Figure 4

Though statutory interpretation questions can arise regardless of the clarity of the law, there is no doubt that gaps and ambiguities in the law increase both the potential for litigation as well as the variance in how courts decide disputes arising under applicable statutes. Given that point, one way to lessen the public's dependence upon judges as political regulators is for the legislature to draft clearer statutes that fill in gaps and resolve ambiguities.

Ideally, state legislatures and Congress should establish periodic "election law audits" (Hasen 2005; Martinez 2006) to review existing election laws and make suggestions for commonsense improvements in clarity and coverage. For such audits to work, reformers will have to consider appropriate mechanisms for both choosing the personnel to conduct such audits and for having the recommen-

dations from such audits voted upon by state legislative bodies or Congress.

B. Institutional Design Changes

Calling for clearer election law statutes to minimize the frequency of election law litigation raises a classic "Here to There" problem in election law (Gerken 2009; Kang 2009): if those who must enact reform are motivated by self-interest and ideology, how will reform get enacted? Election law audits will not be ordered simply because reformers think they are a good idea. Interest group politics, busy legislative agendas, and forces of inertia work against the establishment of such audits and the adoption of audit recommendations in to law. The best chance for reform may come at times when one party controls the legislative process and believes reform is in the party's interest. It might be that states with unified party control of the legislature and

governor's office would be most likely to agree to proposed election law changes (Palazzolo & Ceaser 2005; Hasen 2010).

Apart from such relying on political self-interest to lead directly to election law reform, some election law scholars have advocated institutional design reform to create the conditions for reform indirectly. If these efforts are successful, they could lower the amount of election law litigation and reliance upon judges as political regulators.

This recent trend in election law scholarship, which I have dubbed "The New Institutionalism" (Hasen 2010), proposes new institutions or mechanisms, such as amicus courts and electoral advisory commissions, to prod existing institutions into election law reform. For example, Heather Gerken (2009) has proposed the formulation of a "Democracy Index," which would rank states upon a series of election administration criteria. Gerken argues that the ranking system will create the right incentives for jurisdictions to move toward professionalized and non-partisan election administration, which in turn can lower the amount of election law litigation.

The key to New Institutionalism proposals like Gerken's is harnessing the power of *embarrassment* to foster election reform. There is certainly something to this idea. Consider, for example, how Florida reacted after the 2000 election debacle in that state. The state legislature, following the controversial decisions of the Florida Supreme Court and machine breakdowns responded by (1) eliminating the "protest" phase for election challenges, (2) changing the conditions for when a manual recount is triggered; (3) requiring recounts to be conducted juris-

diction-wide, with a look at both under-votes and overvotes, (4) and requiring the use of written standards for judging the intent of the voter in ballots examined during an election contest. (Jones 2006). It also eliminated all punch card balloting machines, whose ballots had raised all kinds of judicially- reviewable issues about voter intent⁶.

Embarrassment, however, does not guarantee that states will perform periodic "election law audits". As Hasen (2007a:18) noted, despite the fact that there were over twenty lawsuits brought challenging one or another aspect of California recall law in 2003 (when Governor Gray Davis was recalled and replaced by action hero-movie star Arnold Schwarzenegger), the California legislature has done nothing to fix the obvious contradictions and problems with the California Elections Code. My favorite example is the internal code contradiction on the rules for nominating someone to be a replacement candidate in the event voters choose to recall a sitting governor. The recall rules state that the "usual nomination rules shall apply" to recall elections. And the first of the "usual nomination rules" provides that the rules do not apply to recall elections. The California Secretary of State then applied the rules (which normally apply to primary elections) requiring that candidates wishing to run for governor in the recall provide only 65 signatures and \$3,000, leading to the unwieldy 2003 election and ballot featuring 135 candidates for governor, including the child actor Gary Coleman, watermelon-smashing comedian Gallagher, and a porn star.

The California example suggests that attempts at embarrassment of election

⁶ That did not end the matter. Facing new public lack of confidence in electronic voting machines following a dispute over a close congressional election in Sarasota County, Florida, the state chose to

ban such machines in favor of other systems such as those using optically scanned paper ballots. (Vartabedian 2008.)

administrators or legislators through bad publicity may not always work, even to resolve some high salience disputes. For this reason, it is not clear that legislators would pay attention to blue-ribbon advisory commissions established to recommend changes to election law (Elmendorf 2006). More direct methods of change may be required, such as a “citizens commission” with the power to bypass the legislature and put election reforms directly on the ballot subject to a popular vote (Gerken 2007). The question

then, of course, is how to mandate creation of such a commission.

Further study is necessary to understand when and how embarrassment affects the actions of election administrators and legislators considering election law changes. At this point, the mechanics of embarrassment have been posited but not well tested. Figure 5, from Hasen (2010), illustrates the implicit causal mechanism beneath the Gerken Index.

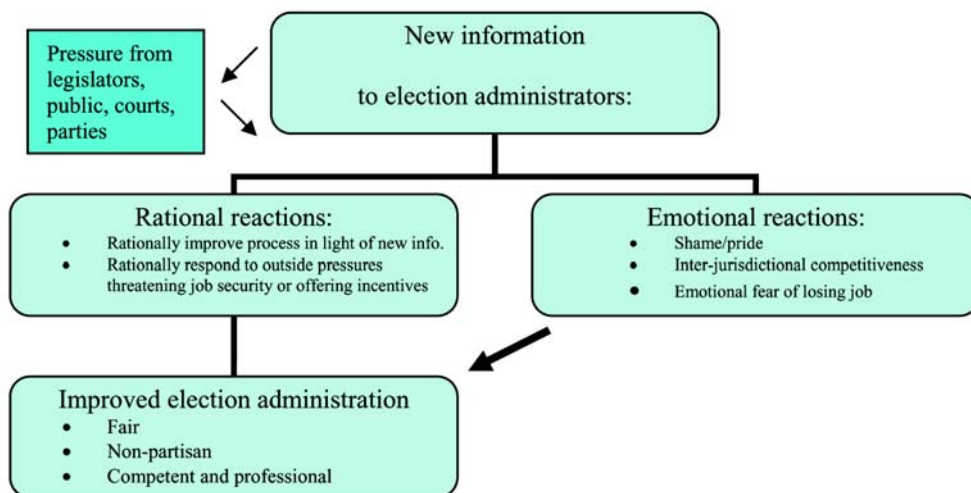


Figure 5. State and Local Election Administrators’ Potential Response to New Information Generated by the Democracy Index

According to the model, new information generated by the Index has both a direct and indirect effect on state and local election administrators. Directly, the Index provides new information that may trigger both rational and emotional responses in the administrators to the new information. Indirectly, the new information may trigger rational and emotional responses in other people and entities who hold influence over election administrators. Thus, legislators, the public, courts, and political parties react to the information contained in the Index and

then may pressure or encourage election administrators to act in certain ways.

Election administrators (as well as outsiders, such as legislators and the public) react rationally to information provided by the Index to improve election administration. Jurisdictions learn of their strengths and deficiencies relative to other jurisdictions, and explore the reasons for relatively low rankings. Some problems will require additional funds, which are easier to justify (and demand) in the presence of comparative data. Other problems will require revamping of

machinery, or organizational management, chains of command or public relations. Election administrators also rationally respond to threats to job security and incentives for better performance from legislators, the public, and others.

Election administrators also respond emotionally to the rankings. They may feel shame in not being highly ranked, or not ranked highly against a relevant peer group. They may feel pride at being ranked highly, and determined to keep a high ranking. Similarly, the rankings may engender inter-jurisdictional competitiveness, just as the *U.S. News* rankings trigger competitive behavior among competing law schools. Finally, election administrators may react emotionally out of fear of losing their jobs because of disapproval of legislators, the public, and others, or, to the extent that the administrators are elected, to competitors who run against them in future elections.

If Gerken is right that an Index may spur the development of nonpartisan election administration (a point about which the evidence is still out), that result may take some of the pressure off judicial political regulation. It may be that courts will defer more to state election officials when those election officials are “nonpartisan” or are perceived to be non-partisan by the public or the courts. It also may be that there is less litigation (or litigation that goes all the way to a judicial opinion) in states with such nonpartisan election officials⁷, perhaps because such legislators are more apt to make neutral and fair decisions. Professionalism plausibly will lessen the chances of administrative errors, them-

selves the source of election law litigation. These hypotheses too must be tested.

Though the Democracy Index focuses on improving election administration at the administrative level, some New Institutionalists seek to harness the potential for embarrassment to improve *judicial* decisionmaking in election law cases more directly. For example, Ned Foley (2008b) would convene an amicus court comprised of equal numbers of retired Democratic judges, Republican judges, and Independents to consider high-profile election cases being considered before real courts. The amicus court would submit its proposed decision in the form of an amicus brief to the actual court.

According to Foley, the amicus court could indirectly influence courts to decide cases fairly:

Unanimity among the amicus judges would show how to resolve the case without partisanship. But even a divided ruling from the Amicus Court, given its independent tiebreaker, would cast a salutary shadow over the actual court’s deliberations. If the actual result differed from the Amicus Court’s, the divergence would be questioned. To avoid such scrutiny, the actual judges might follow the Amicus Court’s outcome and reasoning. In this way, without government power, the Amicus Court could promote fairness — and the perception of fairness — in resolving election disputes.

Over time, if the Amicus Court develops a strong reputation for nonpartisan fairness, candidates might feel compelled to accept its judgment, pledging not to seek a contrary ruling from an actual court. The Amicus Court then would

⁷ Aside from considering whether the method of selecting election officials affects the amount of election law litigation, scholars should examine variations in the way that election officials do their jobs and interpret statutes. In the 2008 election, for example, the Ohio Attorney General sought to me-

diate election law disputes before they had to be resolved through a judicial decision. (Niquette 2008.) Alternative dispute resolution could keep more election law cases out of the courts, or at least resolved before judicial decision.

become a kind of alternative arbitration panel for election litigation, much like labor arbitration developed to settle union-management disputes. This scenario is most likely to occur if the Amicus Court's members, in addition to having blue-ribbon resumé's, display judicious temperament in striving for consensus rulings grounded in the objective requirements of law.

The underpinnings of Foley's arguments are quite similar to Gerken's. The amicus court provides information about "the objective requirements of law". The judges rationally may use this information as an aid to decision. Emotionally, judges may also feel shame if they deviate from the neutral amicus court's requirements and feel pride if they follow the amicus court. The public gains a new tool to evaluate the fairness of judges, an objective baseline, much like how the Index would allow the public and legislators to evaluate the competence and fairness of election administrators.

We have no experience with this type of institutional design, and some judges on the actual courts might not give much credence to such amicus briefs, especially if they are viewed by conservative judges as coming from a project with a liberal agenda. (*Ryan v. Community Futures Trading Comm'n* 1997 [opinion of Posner, J.]; *Jaffee v. Redmond* 1996 [Scalia, J., dissenting]).

Some New Institutionalist proposals to improve judicial decisionmaking in election law cases move beyond embarrassment to propose new judicial bodies. One possibility is the establishment of a special election law court. Other countries, such as Mexico (see Eisenstadt 2004) have dedicated courts,

which can develop expertise on complex aspects of state or federal election laws. The question is whether such courts can overcome some of the conscious or subconscious biases sometimes seen in existing courts that decide election law disputes.

To achieve neutrality, the "election law court" might be comprised of two judges from different partisan backgrounds who pick a third "neutral" judge to sit with them. This approach yielded a unanimous result in the recent *McCain v. Obama* simulation⁸, but it is unclear whether the method would produce such clear and unanimous results if the case involved a real-world dispute. In any case, assuming the outcome of a case before the election law court could still be appealed to the United States Supreme Court, it is not clear that the self-interest and ideology problems could necessarily be solved.

They simply may be shifted to a higher court.

Conclusion

To a great degree, judges remain the "black boxes" of political regulation. We send a great many election law disputes into the box for decision, and decisions emerge at the conclusion of each case. It is time to rethink the paradigm of great reliance on judges in the field of political regulation as we continue to explore how judges decide election law disputes.

The appeal of judges as political regulators is that they are considered to be neutral decisionmakers somehow above politics who can rely upon neutral principles of the law to reach unbiased results. The reality, well understood by lawyers but rarely acknowledged, is that judges sometimes come to cases with

⁸ For details on the simulation and the unanimous court decision, visit <http://moritzlaw.osu.edu/electionlaw/electioncourt/>. The simulation is a

project of Election Law@Moritz, at the Ohio State University College of Law.

their own conscious or subconscious biases favoring or opposing various candidates, parties and interests.

If judges are going to continue playing a major role in political regulation, we should stop pretending that neutral decisions will magically emerge from the judicial black box. Instead, we should consider ways to improve the process so that judges are called upon to make fewer decisions, and the decisions that they

make be mediated through institutions that will cabin both administrative and judicial discretion. Further research is necessary to identify the best ways to accomplish a limitation on discretion and judgment throughout the administrative and judicial systems of political regulation. In the meantime, reformers should think twice before proposing an expansion of the role of the judiciary in deciding election law disputes.

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