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Introduction: Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, Redistricting, and Campaign Finance

Richard L. Hasen*

On September 14, 2012, the University of California, Irvine School of Law, the *UC Irvine Law Review*, and the University of California, Irvine Center for the Study of Democracy sponsored a symposium, “Foxes, Henhouses, and Commissions: Assessing the Nonpartisan Model in Election Administration, Redistricting, and Campaign Finance,” featuring many of the nation’s leading election law scholars. This issue of the *UC Irvine Law Review* contains scholarship presented at that symposium.

The 2000 Florida debacle marked the first time in which the public focused its attention intensely—albeit briefly—on the partisan administration of U.S. elections. During the thirty-six days of dispute over who would get Florida’s electoral votes and therefore the presidency, it became clear that those running key aspects of the election had partisan ties and potentially partisan conflicts of interest.¹

Democrats criticized the actions of Florida Secretary of State Katherine Harris, the chief election officer of the state, who was not only an elected Republican official, but also the honorary cochair of George W. Bush’s presidential election committee in Florida. Harris made a number of decisions—on issues related to timing of the election contest, recount standards, and other issues—all of which tended to benefit Republicans. Her decisions cannot be

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1. For a detailed narrative of the events surrounding the 2000 Florida controversy, see RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 11–40 (2012). The next paragraphs draw from that account.

understood as a neutral election official simply applying a strict interpretation of Florida's murky election rules. For example, she adopted a very lax standard for acceptance of late-arriving military and overseas ballots, a decision that once again benefitted Republicans.

But while Harris was rightly the focus of Democrats' ire, she was hardly the only partisan involved in the process. Consider Florida Attorney General Bob Butterworth, who issued a legal opinion on the timing of Gore's election protest at odds with Harris's application. Never mind that Butterworth was one of the honorary chairs of Gore's campaign in Florida, and that he had no jurisdiction under Florida law over these election matters.

Then there were local election officials and local canvassing boards. Harris's office had ordered a private company to produce a list of potential felons to be removed from voter rolls. Local Republican administrators were much more likely than Democrats to use the list to remove felons. Democrats focused on the fact that the purge list had many false positives and led to the removal of eligible voters who were mistaken for ineligible felons. Republicans noted that many ineligible felons ended up voting in Florida's election—election officials, especially Democrats, did not remove them. When it came to recounting ballots, Democratic county canvassing boards adopted forgiving and shifting standards for recounting punch card ballots—decisions that helped Gore significantly narrow his vote gap with Bush.

All of this brought Florida disputes to the courts, where six Democrats and one independent justice on Florida's Supreme Court issued rulings that helped Gore continue his struggle to catch up to Bush, and then to the U.S. Supreme Court, dividing five to four along conservative/liberal lines with the Court ultimately ending the election contest with Bush ahead and Democrats fuming.²

In the nearly twelve years since the Florida debacle, states have done little to remove partisan election officials from running our elections. A now familiar divide between Republican administrators favoring integrity and Democratic administrators favoring access quickly emerged.

Florida did make a change, but arguably to a model that makes the position *more*, rather than *less*, partisan: the secretary of state now is an appointee of the governor rather than an elected official.³ During the 2012 election season, Republican Kurt Browning left his position as Florida's appointed secretary of state, and rumor has it he did so because he was not willing to go along with a new controversial purge of potential noncitizen voters.⁴ No problem: Florida governor

2. *Bush v. Gore*, 531 U.S. 98, 111 (2000).

3. John M. Glionna, *Key States' Ballot Officials Feel Glare of Critical Eyes*, L.A. TIMES, Oct. 22, 2004, at A1.

4. Marc Caputo, *Florida's Noncitizen Voter Purge Grew from Five-Minute Conversation*, MIAMI HERALD (Jun. 13, 2012), <http://www.miamiherald.com/2012/06/13/2847062/floridas-noncitizen-voter-purge.html>.

Rick Scott appointed a new Republican secretary of state who did not have such worries.

In Ohio, one of the most contested of battleground states, the last two secretaries of state, Republican Ken Blackwell and Democrat Jennifer Brunner, have made controversial decisions that seem to benefit their respective political parties.⁵ Current Secretary of State Jon Husted at first appeared to try to move above the partisan fray,⁶ but Democrats later accused him of favoring his party's positions in elections.⁷ We went into yet another election season concerned that the referees are not neutral.

While there has been virtually no movement toward nonpartisan or bipartisan models when it comes to election administration, things are different on the redistricting front. Most prominently, California recently completed its first round in process of redistricting done by a citizen commission whose members were chosen through a Rube Goldberg-esque process set forth in a California initiative.⁸ Ironically, Republicans touted the model as a way to take redistricting decisions away from the Democratic-led partisan legislature. Republicans joined with good government groups, including Common Cause, to bypass the Democratic legislature and get the measure approved as a voter initiative. But after the first round of redistricting, Republicans blasted the results in California as being manipulated by Democrats on the Commission.⁹ Republicans ultimately abandoned court challenges and a referendum, and California recently conducted its first elections using the new maps.

Partisan fights over citizen redistricting were even worse in Arizona, where the Republican governor sought to remove the head of the independent redistricting commission as being biased toward Democrats, only to have the state Supreme Court block the removal.¹⁰

Meanwhile, in the campaign finance arena, the Federal Election Commission's (FEC's) bipartisan model of governance—no more than three

5. See HASEN, *supra* note 1, at 105–30.

6. *Id.* at 122–23.

7. Edward B. Foley, *Virtue over Party: Samuel Randall's Electoral Heroism and Its Continuing Importance*, 3 U.C. IRVINE L. REV. 475, 476 n.6 (2013); *Voting Upgrades Needed: This Year's Election Was Marred by Challenges, Confusion and Occasional Long Lines of People Waiting to Exercise their American Duty. Let's Fix the Problems, Now*, CLEVELAND PLAIN DEALER, Nov. 17, 2012, at G1.

8. CAL. GOV'T CODE § 8251–53 (West 2013).

9. John Myers, *The Frenzy Over ProPublica's Redistricting Reports*, KQED (Dec. 21, 2011, 10:30 PM), <http://blogs.kqed.org/capitalnotes/2011/12/21/the-frenzy-over-propublicas-redistricting-report>; Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, PROPUBLICA (Dec. 21, 2011, 3:38 PM), <http://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission>.

10. For the history of these commissions, see Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012); Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. IRVINE L. REV. 637 (2013); see also *Ariz. Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1268–70 (Ariz. 2012).

members from one party may serve on the Commission,¹¹ with the practical effect being three Democrats and three Republicans serving on the Commission—seemed to work reasonably well for many years but in more recent years has led to party stalemates on important issues. The three-to-three deadlocks have rendered the FEC much less powerful than it was before the rise of deadlocks, leading reformers to call for a change from the bipartisan model. This movement appears to have support from neither Republicans nor Democrats in Congress, and President Obama has not followed through on his calls to reform the FEC.¹²

As the live symposium began in September, I raised a cluster of unanswered questions about bipartisan and nonpartisan models:

1. Is nonpartisanship in administering elections possible? What do we mean by nonpartisanship? Are there different models of nonpartisanship to choose from?

2. Is nonpartisanship desirable? How does it compare to bipartisan and partisan models on questions of accountability, accuracy, and public acceptance?

3. What can we learn from the experiences of individual states and of other countries, and how much does our historical experience of hyperfederalized administration block change? Are there cultural issues that differentiate us from other mature democracies using nonpartisan models?

4. Are there differences in opinion as to whether nonpartisanship is a desirable and/or achievable model when comparing election administration, redistricting, and campaign finance?

5. What explains whether commissions are successes or failures? How did the FEC move from bipartisan cooperation to confrontation?

6. What role do courts play in these disputes? Do courts count as nonpartisan institutions? Should there be specially constituted courts to adjudicate election-related disputes?

The articles in this symposium take us in the right direction to begin addressing these crucial yet difficult issues. The articles cover three areas: election administration, redistricting, and campaign finance.

In his symposium keynote address,¹³ Professor Ned Foley considered whether a move to nonpartisan election administration is enough to solve the problem of partisanship in elections, given the continued control over portions of the electoral process by partisan legislative and executive branches.¹⁴ In his article, Foley argues that, in some circumstances, fairness in dealing with election controversies requires that partisan decision makers act with virtue, putting the

11. 2 U.S.C. § 437c (2012).

12. Kim Geiger, *Obama Is Urged to Take Action on Moribund FEC*, L.A. TIMES, Mar. 16, 2011, at A16.

13. Foley, *supra* note 7.

14. *Id.* at 477–81.

interests of the nation (and fairness in election administration) over self-interest and party interests.¹⁵ He explains the virtue concept through an examination of the role Speaker of the House Samuel Randall played during the disputed Hayes-Tilden presidential election of 1876. Foley characterizes Randall as a hero.

Other symposium articles delve into different aspects of measuring fairness and partisanship in election administration. Chris Elmendorf and Doug Spencer examine whether the California attorney general, who is responsible for drafting the ballot title and summary for statewide ballot measures, drafts ballot language in an impartial or biased way.¹⁶ Using experiments with students, the authors find little evidence to support the idea that attorneys general manipulate the complexity of ballot measure language for strategic benefit. The authors leave open the possibility that attorneys general are biased in other ways, particularly on a very small number of extremely controversial measures.

David Kimball, Martha Kropf, Donald Moynihan, Carol Silva, and Brady Baybeck examine the views of local election administrators toward election administration issues.¹⁷ Using survey data, the authors find that partisan differences in election administration (such as attitudes about the desirability of strict voter identification laws for voting) occur mainly in large electoral jurisdictions but not in smaller jurisdictions. However, the authors find that local election administrators' evaluations of state and local election administration are influenced more by outside forces than by the party affiliation of election officials. They are pessimistic that these outside forces in the voting wars will subside any time soon.

Bringing this first section on nonpartisan election administration to a close, Dan Tokaji examines the workings of the Wisconsin Government Accountability Board (GAB), the only statewide nonpartisan election administration body in the United States.¹⁸ After explaining the origins of the GAB, Tokaji concludes that the body has been successful in administering elections fairly in its first five years, and that it serves as a worthy model for other states considering an alternative to partisan administration of elections. The GAB's performance is especially noteworthy, Tokaji argues, given the intense partisan atmosphere of Wisconsin politics in the last few years.

Symposium participants also considered the role of redistricting commissions. Karin Mac Donald and Bruce Cain look in depth at California's new independent redistricting commission, and particularly consider how the new

15. *Id.*

16. Christopher S. Elmendorf & Douglas M. Spencer, *Are Ballot Titles Biased? Partisanship in California's Supervision of Direct Democracy*, 3 U.C. IRVINE L. REV. 511 (2013).

17. David C. Kimball et al., *The Policy Views of Partisan Election Officials*, 3 U.C. IRVINE L. REV. 551 (2013).

18. Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 575 (2013).

commission worked with public testimony and other data to craft new legislative districts.¹⁹ The authors consider the importance of qualitative data on communities of interest, rejecting a wholly objective approach to this issue. They conclude with an examination of the tradeoffs that redistricting officials must make between the goal of preserving communities of interest and achieving other goals, such as the creation of competitive districts.

Although Mac Donald and Cain focus exclusively on California, Peter Miller and Bernie Grofman look more broadly at redistricting commissions in the western United States.²⁰ The authors find that redistricting commissions are more common in the West, in part thanks to the availability of direct democracy to implement the organizational form. Perhaps surprisingly, Miller and Grofman find only very limited evidence that commissions are better able than legislatures to produce compact, competitive districts that respect the boundaries of counties and places in the states. They also find considerable variation across states and across types of commissions.

Nicholas Stephanopoulos also looks at redistricting criteria and institutional design through an even broader comparative lens that includes parts of Australia along with certain U.S. states.²¹ Stephanopoulos concludes that jurisdictions that have adopted consequentialist criteria for districting—in particular aiming for district plans that promote partisan fairness or maximize competitiveness of elections—do not do a good job in achieving those goals. However, independent commissions have done a better job in assuring partisan fairness and competitiveness of district elections. He concludes that “[i]ronically . . . consequentialist criteria cannot achieve their own desired consequences—but that non-consequentialist approaches can.”²²

Symposium participants also considered the role of partisanship in institutions charged with administering or policing compliance with campaign finance laws. Kayla Crider and Jeffrey Milyo examine whether state ethics commissions reduce political corruption.²³ Using statistical analysis, the authors find no strong or consistent support for the claim that state ethics commissions reduce political corruption. Nor do the authors find any evidence that the form of the commission—partisan, bipartisan, or nonpartisan—makes any difference in the efficacy of the commissions. On the whole, Crider and Milyo are skeptical about the entire ethics commission enterprise.

19. Karin Mac Donald & Bruce E. Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. IRVINE L. REV. 609 (2013).

20. Miller & Grofman, *supra* note 10.

21. Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 U.C. IRVINE L. REV. 669 (2013).

22. *Id.* at 708.

23. Kayla Crider & Jeffrey Milyo, *Do State Ethics Commissions Reduce Political Corruption? An Exploratory Investigation*, 3 U.C. IRVINE L. REV. 717 (2013).

In the final symposium article, Michael Franz examines the role of the Federal Election Commission, a six-member commission that has been comprised with equal numbers of Democratic and Republican commissioners since its inception.²⁴ Franz examines the set of advisory opinion requests submitted to the FEC from 1977 to 2012. He finds that, for a number of decades, the FEC Commissioners commonly came to consensus when they interpreted the law. In recent years, however, deadlock has become more common, and as a consequence, the FEC has more frequently been unable to offer clear advice to those requesting advisory opinions.

Together, these nine articles advance our understanding of the promises, pitfalls, and remaining questions about the use of nonpartisan and bipartisan institutions to regulate different aspects of the political process. The articles show that nonpartisanship is no panacea to many of the problems plaguing our political system. Still, there is hope that new and reimagined institutions can improve the electoral process, governance, and ultimately the integrity of the political system and the responsiveness of elected officials to the voters and the people. The work in this area has just begun.

24. Michael M. Franz, *The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions*, 3 U.C. IRVINE L. REV. 735, 739 n.19 (2013).