



Some Recent Currents

BY BRADLEY S. SCHRAGER, ESQ.

In moments of change and instability, like that in which we find ourselves, rules of political participation come under pressure.

The stress of increasing polarization magnifies questions of who can and cannot vote: the processes by which voters' rights are established and vindicated; the ways in which states and the federal government each deal with nominations, sanction major and minor political parties, permit unaffiliated or nonpartisan voters to participate; and how election officials manage errors or problems in the voting process or confront contested elections.

Essentially, the law of democracy answers a basic, overarching question. Through what legal and practical machinery do we, collectively, express democratic decisions at the polls?

Under Article I, Section 4 of the U.S. Constitution, states administer elections on the ground. That is why, for example, every four years you will hear about the widely varying procedures for presidential candidates getting on the ballot across the 50 states or why some states have a month's worth of early voting while others

have none at all. We are a patchwork of jurisdictions, each with its own rules and customs for elections.

The Constitution does, however, give Congress the power to regulate federal elections, and since most general elections in Nevada and elsewhere have federal offices—U.S. representatives, senators, or a president—on the ballot, Congress can and does enact laws that form part of the structure of all elections in Nevada other than off-year municipal races.

What we experience as our election procedures, such as deadlines for registration, closed primaries, occasional purges of inactive voters from the rolls, and accommodations for military and overseas voters, is a mix of state and local decision-making and federal law. For example, the deadlines for registering to vote in Nevada are set by the legislature, but the printing of ballots must occur by a certain date, because Congress has determined that military and overseas voters must have absentee ballots mailed to them 45 days before election day.

Nevadan voters and elections officials, therefore, must pay particular attention to trends in federal elections law, because matters of national concern will always affect how this state may or may not structure its own elections.

Trends at the State and Federal Levels

Nevada has long been ahead of the national-level curve when it comes to elections. If recently proposed federal legislation is any guide, it remains so.

Upon taking the majority in the U.S. House of Representatives at the 2018 general election, congressional Democrats made an overhaul of voting rights and access their initial priority, as H.R. 1. Among the bill's provisions are mandates for online voter registration; automatic voter registration; same-day registration of voters or changes and updates to registration directly at the polls; streamlined procedures for restoration of voting rights after convicted felons have completed their sentences; expanded early voting opportunities; more accurate maintenance of registration rolls; and provisions related to campaign finance, addressing the one issue that seems most concerning to many Americans: the overweening influence of money in our electoral processes.

Nevada, for its part, has either anticipated or led the way already in many of these changes to election law, so much so that some may wonder why the rest of the country has not caught up

yet. We have had online registration for some time now, and a popular initiative enacting automatic voter registration here passed easily in 2018 and will be in force in plenty of time for the next presidential balloting in 2020. The 2017 legislative session saw the governor sign important legislation, making it easier and more predictable to restore felon voting rights.

Even some county registrars have done their part to expand voter access to the polls, moving from the old and obsolete precinct-based voting system on election day to a series of voting centers to which any Clark or Washoe voter can go and cast the proper ballot for the district in which they are registered. Technology has made those changes possible, and state and local officials are correct to free voters from their local precinct so that they may cast ballots near work or family, or just while out shopping. Legal voting should be easy.

Suppression and Fraud

I say “legal voting” because, as any reader knows, the specter of improper voting haunts any discussion

such as this one. We are very unlikely to see any nationwide identification or demonstration of citizenship requirement at the polls, but states, including Nevada, should and do vet proposals regarding changes in their elections procedures for their impact on election security. One can argue with the level or lack of actual voter fraud in this country, but no one should doubt that public confidence in the election system is necessary for a healthy political system.

But if election security must be taken seriously as a concern of fellow citizens, so must suppression. The active legislative attempts to narrow electorates in many other states is something Nevada has largely resisted, and it should continue to do so. Still, Congress has both the authority and the responsibility to address the repercussions for our democracy of judicial decisions weakening enforcement of the Voting Rights Act (*Shelby County*), and the campaign finance regime (*Citizens United*), which in tandem make it far easier than at any time in more than half a century to frustrate the abilities of minorities or the poor to participate,

largely on the basis of their perceived political allegiances.

Partisan Gerrymandering

Since federal law plays such a large role in Nevada elections, it is unsurprising that the courts have an equal part in the law of democracy. All rules of political participation, from how a party wins or loses a ballot line and nominates its candidates to how votes are counted or recounted after election day, must obviously conform to constitutional requirements. Each term, the U.S. Supreme Court hears a number of election-related matters, and this cycle some long-pending questions will be answered.

The adage goes that nothing is more political than redistricting: the process of redrawing the lines comprising congressional and legislative districts. After 2019, this saying may become more or less true, depending on the outcome of two cases before the high court, *Lamone v. Benisek* and *Rucho v. Common Cause*, both to be heard in late March. Each

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concerns an aspect of the legality of the tradition of drawing lines favoring the party in power, not on racial or ethnic bases, but to skew results towards a particular party. Furthermore, one of the two cases challenges the conduct of Republicans and the other challenges Democrats, so there is some hope for broad legal answers. For many years, the U.S. Supreme Court has sidestepped the issue, but these two matters ask, squarely, whether partisan redistricting can violate the associational rights of political parties and, consequently, the representational rights of voters.

The cases have some impact on Nevada, which saw legislative deadlock in 2011 followed by court involvement in its decennial redistricting. Should the U.S. Supreme Court hold that drawing lines to favor one's political party is impermissible, Nevada—like other recent converts to the practice—may consider independent panels for redistricting. It is not clear that such panels are necessarily better, and some studies suggest that they are a factor in creating *less* rather than *more* political stability, much in the same way term limits have meant greater turnover at the cost of institutional uncertainty.

In sum, Nevada recently has been at the forefront of expanding voting rights, and we should be proud of those efforts. But Nevada operates within a vast federal elections framework, and given our diverse electorate and reputation for well-run balloting, we should continue to be leaders in that national conversation. **NL**

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