

THE APPEARANCE OF ELECTION LAW

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The Supreme Court decided 402 election law cases during the twentieth century. That statistic, and lots of other helpful information, is gleaned from the excellent summary of election law written by Rick Hasen.¹ Professor Hasen is the nation's most prolific election law scholar: co-author of an election law casebook,² host of the leading election law web site,³ and author of numerous law review articles discussing various aspects of election law.⁴ *The Supreme Court and Election Law* represents Professor Hasen's attempt to distill nearly four decades of Supreme Court decisions and academic scholarship regarding election law and to articulate a theory of how and when the Court should apply the Constitution to election law disputes. The book, like all of Professor Hasen's work, is exhaustively researched, clearly written, and animated by a powerful normative view of the proper operation of election law.

But is there such a thing as "election law"? That term was relatively uncommon until the presidential election of 2000, with general considerations of legislation or "the law of democracy" favored in law schools and few attorneys engaged in the practice of "election law." Now, thanks in no small part to Professor Hasen, we describe questions of reapportionment, voting rights, campaign finance, and the counting of votes as belonging to the same category of election law. That category could also include the standards for determining whether to order a new election or instead to prescribe some other relief for a contested election, the role of Congress as the judge of the elections of its members, the use of popular initiatives to enact laws governing the electoral process, and the appropriate structure for the rules of how, where, and when to vote. Professor Hasen's book addresses "an important subset" of election law cases, "those that regulate political equality."⁵ The litigation concerning these issues raises several distinct kinds of issues, including the meaning of the Fourteenth Amendment's Equal Protection Clause, the scope of the First Amendment's protection of the freedom of speech, federalism, separation of powers, and statutory interpretation generally. Even within that subset, though, the search for a unifying principle continues to confound judges and

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1. RICHARD HASEN, *THE SUPREME COURT AND ELECTION LAW* (2003). Appendix 1 contains a list of all 402 Twentieth Century Supreme Court election cases. See *id.* at 166-75.

2. RICHARD HASEN & DANIEL HAYS LOWENSTEIN, *ELECTION LAW – CASES AND MATERIALS* (3d ed. 2004).

3. <http://www.electionlawblog.org>.

4. See, e.g. *Comments on Baker, Clark, and Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 563 (2004); *The Constitutionality of a Soft Money Ban after Colorado Republican II*, 1 ELECTION L.J. 195 (2002); *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815 (2001); *Vote Buying*, 88 CAL. L. REV. 1323 (2000).

5. HASEN, *supra* note 1, at 2.

scholars alike. Indeed, that is a key part of the message of Professor Hasen's work.

My purpose here is to suggest another explanation. The Supreme Court's reapportionment, voting rights, campaign finance, and vote counting cases share an unusual affinity for reliance upon appearances as an operative legal standard. The commonplace maxim that appearances are in the eye of the beholder only begins to suggest how troubling this pattern could be. My suggestion, briefly described in this essay, is to encourage the project of identifying what is at issue in these cases so that we can learn what "election law" is really all about.

I.

Professor Hasen argues against the process theory that has become so popular in election law scholarship and "advocates a substantive theory of political equality" in its place.⁶ He first identifies three reasons why process theory has been problematic: it has failed to limit judicial power, it "masquerades as purely procedural rather than a substantive basis for review of political cases," and it does not say *how* courts should intervene in election issues.⁷ The alternative favored by Professor Hasen is to rely upon the substance of equality rather than the process. He "argues in favor of preserving room for Court intervention in the political process, but for intervention that is (1) tentative and malleable, (2) focused on individual (or sometimes group) rights and not the 'structure' or 'functioning' of the political system, (3) protective of core political equality principles, and (4) deferential to political branches' attempts to promote contested visions of political equality."⁸ The distinction between "core" and "contested" political equality rights is key to this theory of how the Supreme Court should address election cases. Bright-line rules should protect core rights; more flexible standards should govern contested rights. Thus, Professor Hasen writes, "If we may meaningfully distinguish between *core* rights that the Court should protect and *contested* rights that the Court should not constitutionalize, the Court's political equality jurisprudence would markedly improve."⁹

But that is a big "if." Which rights are "core" and which are "contested"? According to Professor Hasen, core rights are the "small universe" of "few basic" political equality rights "that hardly would be controversial" and that "are absolutely essential for any government to function as a democracy," as indicated by constitutional text or history or by basic political theory.¹⁰ Many of the core rights, moreover, are socially constructed, so that it is necessary to identify a social consensus that recognizes them.¹¹ Or, more accurately, it is "really 'social near-consensus'" that determines whether a core political equality right exists, for a complete consensus would be difficult, if not impossible, to achieve in favor of any right.¹²

Professor Hasen seeks to start "a dialogue about which political equality principles

6. *See id.* at 7.

7. *See id.* at 4-6.

8. *Id.* at 10.

9. *Id.* at 78.

10. *Id.* at 79.

11. HASEN, *supra* note 1, at 80.

12. *Id.*

belong in the core.”¹³ He identifies three: an essential rights principle,¹⁴ an antiplutocracy principle,¹⁵ and a collective action principle.¹⁶ Stated abstractly, each principle is unobjectionable, but the consensus begins to collapse with the details. Consider the choice between public and private funding of campaigns. The antiplutocracy principle states that “[t]he government may not condition the ability to participate fundamentally in the electoral process on wealth or the payment of money.”¹⁷ That principle condemns poll taxes, and as Professor Hasen notes, “some scholars have argued that the antiplutocracy principle requires that government publicly finance candidate election expenses.”¹⁸ Professor Hasen is a champion of public campaign financing, too, and he speculates that such funding could become a core political equality right “if enough states enact laws providing for public financing of state campaigns.”¹⁹ Yet Professor Hasen admits that consensus does not yet exist.²⁰ Conversely, Professor Hasen agrees that “there is no consensus (or near-consensus) that private financing of political campaigns is *constitutionally objectionable*.”²¹ In fact, the precise opposite might be true. The essential rights principle—the first of the three that Professor Hasen lists—posits that “[e]ach person has basic formal political rights, including the right to speak on political issues, to organize for political action, and to petition the government.”²² That is precisely the right that opponents of campaign contribution and spending limits insist is violated by many campaign finance regulations. The problem, of course, is that the private campaign activities that appear to some to be a vindication of the essential rights principle appear to others to violate the anti-plutocracy principle.

II.

That is only the beginning of the conflicting appearances that characterize election law. The Court’s election law jurisprudence is preoccupied with appearances. First, *Buckley v. Valeo* held that the “appearance” of corruption provides a sufficient justification—indeed, a “compelling state interest”—for campaign finance regulations that implicate the freedom of speech protected by the first amendment.²³ The Court’s per curiam opinion posited that “the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions” was “[o]f almost equal concern as the danger of actual quid pro quo arrangements.”²⁴ The Court relied upon that concern to uphold the

13. *Id.* at 81.

14. *Id.* at 82.

15. *Id.* at 86.

16. See HASEN, *supra* note 1, at 88.

17. *Id.* at 86.

18. *Id.* at 87.

19. *Id.* at 103.

20. See HASEN, *supra* note 1, at 87 (“Claims that the Constitution should require full public financing of electoral campaigns . . . go too far.”).

21. *Id.* at 87.

22. *Id.* at 82.

23. 424 U.S. 1 (1976).

24. *Id.* at 27.

contribution limits and disclosure provisions contained in the Federal Election Campaign Act (FECA).²⁵ Since *Buckley*, the appearance of corruption rationale has saved numerous campaign regulations.²⁶ Most recently, in upholding the Bipartisan Campaign Reform Act (BCRA) in *McConnell v. Federal Election Commission*,²⁷ the Court repeated that the prevention of the appearance of corruption operates as “a sufficiently important interest to justify political contribution limits.”²⁸ As Justices Stevens and O’Connor explained, “Take away Congress’ authority to regulate the appearance of undue influence and ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.’”²⁹ The Court thus invoked the concern about the appearance of corruption in upholding the disparate campaign regulations contained in BCRA. Justice Kennedy, by contrast, objected that:

The majority attempts to mask its extension of *Buckley* under claims that BCRA prevents the appearance of corruption, even if it does not prevent actual corruption, since some assert that any donation of money to a political party is suspect. Under *Buckley*’s holding that Congress has a valid “interest in stemming the reality or appearance of corruption,” however, inquiry does not turn on whether some persons assert that an appearance of corruption exists. Rather, the inquiry turns on whether the Legislature has established that the regulated conduct has inherent corruption potential, thus justifying the inference that regulating the conduct will stem the appearance of real corruption. . . . [T]he Court today should not ask, as it does, whether some persons, even Members of Congress, conclusorily assert that the regulated conduct appears corrupt to them. Following *Buckley*, it should instead inquire whether the conduct now prohibited inherently poses a real or substantive *quid pro quo* danger, so that its regulation will stem the appearance of *quid pro quo* corruption.³⁰

Professor Hasen says little about the appearance of corruption rationale in his book or in his subsequent article examining *McConnell v. FEC*.³¹ Instead, he focuses

25. See *id.* at 26 (the appearance of corruption justifies contribution limits); *id.* at 28 (Congress could conclude that contribution limits are necessary to address the “appearance of corruption inherent in a system permitting unlimited financial contributions”); *id.* at 67 (“disclosure requirements . . . avoid the appearance of corruption by exposing large contributions to the light of publicity”).

26. See, e.g., *FEC v. Beaumont*, 539 U.S. 146, 189 (2003) (invoking the appearance of corruption rationale to uphold a federal prohibition upon direct contributions to nonprofit advocacy organizations); *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 388-96 (2000) (citing the appearance of corruption that justifies a state contribution limit); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) (reciting the appearance of corruption justification for a state ban on certain corporate campaign spending).

27. 124 S. Ct. 619 (2003).

28. *Id.* at 660.

29. *Id.* at 660–61 (opinion of Stevens and O’Connor, JJ., for the Court) (quoting *Shrink Missouri*, 528 U.S. at 390).

30. *Id.* at 748–49 (Kennedy, J., concurring in part and dissenting in part).

31. See HASEN, *supra* note 1, at 166 (noting without elaboration the appearance of corruption justification for campaign finance regulations); Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 152 U. PA. L. REV. (forthcoming 2004).

upon the equality argument for campaign finance regulation, a theory that he—joining other scholars—has previously advanced with characteristic force.³² But, as Hasen admits, the Court stuck to the actual or apparent corruption justification in *McConnell* rather than adopting an equality approach.³³ Indeed, Hasen worries that the *McConnell* Court “has left open the ‘appearance of corruption’ as a catch-all for upholding any campaign finance regulation that fails to meet the test for actual corruption whenever the government can point to potential benefits to officeholders.”³⁴

Appearances also play a leading role in the Court’s so-called reverse racial vote dilution cases. Justice O’Connor wrote in *Shaw v. Reno*³⁵ that “reapportionment is one area in which appearances matter.”³⁶ *Shaw* involved a North Carolina congressional district that snaked along the I-85 corridor in a shape that was variously described as “bizarre” and “irregular.” That shape provided prima facie evidence of the legislature’s unconstitutional emphasis upon race in crafting the district. Subsequent cases have clarified that appearance alone does not render a district unconstitutional, but those cases have also confirmed the heightened scrutiny received by districts whose unusual appearance catches the Court’s eyes.

Appearances mattered in *Bush v. Gore*, too. The sight of Florida’s butterfly ballots, hanging chads, and the suddenly famous members of local canvassing boards produced a visceral reaction to the election throughout the nation. But the nearly evenly divided nation saw two different versions of events. They saw: voters who were understandably confused versus simply incompetent; marks on ballots that reflected votes versus mistakes; counting votes versus manufacturing votes; Vice President Gore’s selection of counties where the problems were greatest versus where Gore had the best chance of winning; the members of canvassing boards and state judges who were upholding the law versus making it up as they went along; and finally a United States Supreme Court that saved the nation versus a Supreme Court that stole the election. Such perceptions shaped the popular reaction to the events in Florida as they unfolded. The Court did not explicitly condemn the appearances in that case. But the appearance of what the Florida Supreme Court had done—seemingly dictating the outcome of the election based upon a problematic understanding of state law—appears to have influenced the Court’s visceral reaction to the case. Indeed, that appearance might offer a better explanation of the Court’s decision than its reasoning, for that reasoning has been less than convincing to most legal academics.

The Court, in Laurence Tribe’s evocative phrase, responded to “the irresistible allure of appearances” in *Bush v. Gore*.³⁷ According to Tribe, “*Bush v. Gore* lays great

32. See Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999).

33. Hasen, *Buckley is Dead*, *supra* note 31, at *2 (concluding that “the Court has continued to entertain the fiction that it is adhering to the anti-corruption rationale of *Buckley v. Valeo*, perhaps because one or two members of the five-Justice majority making the shift in *McConnell* may be unwilling (at least for now) to expressly embrace Justice Breyer’s participatory self-government rationale”).

34. Hasen, *supra* note 31, at 28.

35. 509 U.S. 630 (1993).

36. *Id.* at 647.

37. Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors*, 115 HARV. L. REV. 170, 247 (2001).

emphasis on appearances—both of individual ballots and of the vote-counting process as a whole.”³⁸ But Tribe chastised the Court for considering “appearances at the most abstract level of equality imaginable: ‘to sustain the confidence that all citizens must have in the outcome of elections.’”³⁹ And Tribe concludes that “[w]hen the Court permits appearance to become the dominant value even though what is at stake is not just the appearance of justice, but its very essence, it leaves justice undone.”⁴⁰

III.

These three lines of election law cases—involving campaign finance regulation, reapportionment, and vote counting—share a common but odd preoccupation with appearances. To be sure, the law turns upon appearances in other areas as well, including the coercion theory of the establishment clause mentioned by Professor Tribe and numerous property doctrines and environmental statutes that address aesthetics. But the appearances play an especially critical role in the Court’s understanding of the applicable legal principles in election law cases.

First, and most importantly, the references to appearances seem to operate as a proxy for an inability, or an unwillingness, to identify the precise concern raised in each case. Each area has confronted difficult questions about the harm to be redressed by the law. What is the harm resulting from campaign spending? Actual corruption is difficult to prove, and equality remains a controversial goal. The Court has thus invoked the appearance of corruption as the operative concern for much campaign finance legislation. The difficulty in specifying the harm vindicated by the reverse race dilution claim recognized in *Shaw* is legendary, with the “expressive harm” theory advanced by Richard Pildes and Richard Niemi most popular.⁴¹ After *Bush v. Gore*, Professor Tribe chastised the Court for trying “to protect some overarching appearance of partisan neutrality and a decorum that by its very name flourishes in shadow and is upset by daylight.”⁴² Election law appears to address a diverse collection of harms, but it struggles to explain precisely what they are. At the least, the harms are all contested, which would trigger Professor Hasen’s suggestion that the Court tread lightly by establishing more ambiguous constitutional rules that allow the various theories to compete for followers.

That suggestion is complicated, though, by the contrasting purposes for which the Court considers appearances. In three lines of election law cases, the Court judges governmental actions unconstitutional because of their troubling appearance. The reapportionment revolution begun by *Baker v. Carr* holds electoral districts unconstitutional when they fail to satisfy the one person, one vote principle. Those cases exist in part because of the unbalanced appearance of districts containing a widely

38. *Id.* at 251.

39. *Id.* at 253 (quoting *Bush v. Gore*, 531 U.S. 98, 109).

40. *Id.*

41. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

42. Tribe, *supra* note 37, at 253. See also *id.* at 252 (asking “What, then was the matter? No proponent of the Court’s equal protection theory has, of yet, articulated how any appearance of inequality, irregularity, or instability projected by those intrepid ballot readers caused anyone to feel marginalized, diminished, or otherwise reduced to less than full membership and participation in the polity”).

uneven numbers of voters. But the appearance in those cases was easily judged by the reality, as confirmed by the simple exercise of counting the number of voters in each district. The ease of that determination may have seduced the Court into expecting that other appearances would be similarly judged. Subsequent cases posed more difficult problems. Yet the Court has emphasized the important role of appearances in invalidating districts created for a predominant racial motive, and if Professor Tribe is correct, any allure of appearances quickly confronted angry objections from those who perceived the 2000 presidential election quite differently. Meanwhile, appearances play an altogether different role in *Buckley* and its campaign finance progeny. A troubling appearance serves to save a governmental actions regulating campaign finance from unconstitutionality, rather than dooming them.

The diverse roles of appearances and the harms such appearances appear to signify counsel caution in developing a unified theory of election law. The equal protection of the laws demands that like things be treated alike; the negative corollary is that similar treatment is not necessary for things that are not alike. The question thus becomes whether campaign finance, reapportionment, vote counting, and reverse racial vote dilution are sufficiently alike to justify the similar treatment that Professor Hasen prescribes. That question becomes even more complicated once other kinds of election law issues are added to the mix, including the role of Congress in judging the election of its members and the criteria by which state courts decide whether to declare the winner of an election or to order a new election instead.

A unified theory of election law may also encourage the viewing of all legal issues related to elections through the lens of the viewer's particular normative aspiration of elections. Election law, for example, may see campaign finance reform as essential to that aspiration, and thus regard the first amendment as an inconvenient obstacle. The "first amendment hawks" described by Professor Hasen, approach campaign finance reform from the perspective of the need to protect free speech in a host of contexts, rather than simply the funding of speech for electoral matters. They see campaign finance regulation as more akin to the legal regulation of violent entertainment or pornography, both of which face First Amendment obstacles despite the serious societal concerns that they present. In other words, one approach treats campaign finance as a subset of broader questions about elections, while the other approach treats campaign finance as a subset of broader questions about the freedom of speech. Likewise, equal protection jurisprudence encompasses much more than questions of reapportionment, reverse racial vote dilution, and the permissible procedures for recounting votes. The importance of perspective is hardly unique to election law—consider the contrasting perspectives of federal environmental regulation to environmental law and to constitutional law—but the struggle to identify the proper scope of election law may be related to this phenomenon.

IV.

Professor Hasen limits his theory to those election law cases involving equality claims, yet he freely acknowledges his failure to define "equality." Not to worry—the Supreme Court's equal protection jurisprudence struggles with that question in areas far unrelated to election law. And the Court's first amendment jurisprudence fails to align

with any of the multiple theories of free speech. Indeed, most efforts to define the abstract principle animating particular constitutional commands are frustrated by the inability or the unwillingness to apply that principle consistently. My modest suggestion here is that election law might be best served by accepting the possibility that equal protection, freedom of speech, and other relevant constitutional commands may yield an election law jurisprudence that cannot be explained by process, substantive equality, or any other single principle. Instead, the laws governing elections may reflect a patchwork of insights, just like the laws enacted by those who are elected.