Election Law in an Era of Hyperpartisanship: Fundamentals, Recent Developments and Best Practices

Topics included in Benjamin E. Griffith's presentation, with links to primary source, case or article:

1. Use of Secure Drop Boxes for return of absentee ballots

Priorities USA v. Wisconsin Elections Commission (Drop Box ban invalidated) 2024 Wi. 32, __ NW3d ___(July 5, 2024) https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=822752 (Wis. Sup. Ct. July 5, 2024).

In a 4-3 decision handed down on July 5, 2024, the Wisconsin Supreme Court in *Priorities USA v. Wisconsin Elections Commission*, held that drop boxes are permissible under state law. At issue were challenges to several voting requirements on statutory and constitutional grounds. Among these was the state law requirement that absentee ballots be returned only by mail or in person to the clerk's office and not to a secure drop box. The single issue decided by the Wisconsin Supreme Court was whether to overrule the Court's holding in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519 (2022) that Wis. Stat. §6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.

Concluding that the cited statute allowed the use of ballot drop boxes, the Court determined that the Court's contrary conclusion in *Teigen* was unsound in principle and was overruled. The Court held that while its decision does not force or require that any municipal clerks use drop boxes, clerks may lawfully utilize secure drop boxes in an exercise of their statutorily-conferred discretion.

The Court further held that *stare decisis* did not require it to uphold *Teigen*, which was neither a straight-jacket, an immutable rule, nor an inexorable command, reasoning that "we do more damage to the rule of

law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision."

2. Address of absentee ballot witness

Rise v. Wisc. Elections Comm'n, 2024 Wisc. App. LEXIS 575, 2024 WL 3373576 (Wis. Ct. App. July 11, 2024)

On July 11, 2024, the Wisconsin Supreme Court in *Rise v. Wisc. Elections Commission*, affirmed a lower court order that defined an absentee ballot witness's "address" as a place where the witness may be communicated with, and further concluded that the standard for applying that definition to a witness's address was whether the face of the absentee ballot witness certificate contained sufficient information to enable a municipal clerk to reasonably identify a place where the witness may be communicated with.

3. Private Right of Action to enforce Section 2 of VRA

Arkansas State Conf NAACP v. Arkansas Board of Apportionment (private Plaintiffs' right to sue under Section 2 of VRA)
See https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR_22-1395_1-30-24a.pdf (8th Cir. Jan. 30, 2024)

The Eighth Circuit held in *Arkansas State Conf. NAACP v. Arkansas Board of Apportionment* that the Voting Rights Act of 1965 does not contain a private right of action to enforce Section 2, reserving its enforcement for the Attorney General of the United States. While this holding precludes private parties from bringing a Section 2 claim in this circuit, private plaintiffs may still use 42 U.S.C. §1983 to enforce the voting rights guaranteed under Section 2 even when the Attorney General declines to do to.

Robinson v. Landry/Nairne v. Landry/Calais v. Landry (individual suits under Section 2 of VRA) See https://redistricting.lls.edu/wp-content/uploads/LA-robinson-20240425-dismiss.pdf (M.D. La. April 25, 2024); https://www.supremecourt.gov/opinions/23pdf/23a994_7mip.pdf

(U.S. May 15, 2024); https://redistricting.lls.edu/wp-content/uploads/LA-callais-20240430-opinion.pdf (W.D.La. Monroe Div. April 30, 2024)

4. Factfinding in racial gerrymandering decisions

Alexander v. South Carolina State Conf of NAACP (racial gerrymandering factfinding) See https://www.supremecourt.gov/opinions/23pdf/22-807_3e04.pdf (U.S. May 23, 2024)

In *Alexander v. South Carolina State Conf of NAACP*, the Supreme Court, speaking through Justice Samuel Alito in a 6-3 ruling, reversed a racial gerrymandering redistricting decision by the three-judge lower court purportedly under the clear error standard. This cleared the way for the state to use the challenged map going forward.
Speaking for the majority, Justice Alito rejected the lower court's conclusion that the state's Republican-controlled legislature had improperly relied too heavily on race in drawing the challenged congressional district.

Justice Alito waded into the lower court's "mistaken impression of legal principles" and reasoned that the Court was not bound by the clearly erroneous standard, from expert reports to inferences drawn from the racial makeup of the new districts to similar inferences drawn from the racial makeup of the precincts moved around during the redistricting.

The Alito majority determined that because another "reasonable" explanation was available for each in isolation, it was somehow "clearly erroneous" for the lower court to reach a different conclusion.
The majority reversed a credibility finding of the lower court on appellate review, and arguably moved the goalposts for what is required of plaintiffs bringing racial gerrymandering claims, a departure from run-of-the-mill and highly deferential standard for clear error review.

For the dissenting three justices, Justice Elana Kagan attacked the majority as going seriously wrong in reviewing the lower court's conclusions, despite the fact that decades of precedent had made it clear

that factfinding about electoral districting is reversible "only for clear error." Justice Kagan emphasized that the majority's attempt to explain its contrary result fell at every turn, that its ignored or minimized less convenient proof, disdained the lower court's judgments about witness credibility and made a series of mistakes about expert opinions, displaying its distance from, and lack of familiarity with, the events and evidence central to this case. According to Justice Kagan, the majority effectively inverted the clear error standard

5. State legislative redistricting: creation of majority-minority districts

Mississippi Conf of NAACP v. State Board of Election Commrs (State legislative redistricting) See https://assets.aclu.org/live/uploads/2024/02/MS-NAACP-v.-SBEC-Three-Judge-Panel-Op.pdf (5th Cir. July 2, 2024)

A panel of the Fifth Circuit ruled that new Black-majority districts should have been created, at least two in the state senate and one in the state house, in a challenge leveled against the state's 2022 redistricting maps for electing members of the state legislature. The panel held that the plaintiffs' had satisfied their burden under *Thornburg v. Gingles*, 478 U.S.30 (1986), but did not establish the redistricting maps were unconstitutional racial gerrymanders. With respect to a remedy, the panel provided the state legislature an opportunity to enact revised maps.

6. Independent State Legislature Theory as modified

This congressional redistricting case from North Carolina arose from a ruling by the North Carolina Supreme Court that invalidated an aggressively gerrymandered congressional map that had been created by the Republican legislature, which the North Carolina Supreme Court found violative of the state constitution.

In a nutshell, a majority of the U.S. Supreme Court held that state courts may exercise "ordinary judicial review" of state rules governing congressional elections, rejecting the maximalist ISLT, preserving state courts' power to strike down election laws, such as partisan gerrymanders or schemes to skew ballot counting, if they violate the state's constitution.

This case presented the question of whether a state's judicial branch may nullify the regulations governing the "manner of holding elections for Senators and Representatives" prescribed by the state legislature, U.S. Const. art 1, §4, cl. 1, and replace them with regulations of the state court's own devising, based on state constitutional provisions that purport to vest the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a fair and free election.

The ISL theory was invoked by the *Moore* challengers to argue that the North Carolina Supreme Court improperly imposed state-constitutional limits on the state legislature's authority over congressional redistricting, their core position being that "the U.S. Constitution's Elections Clause assigns to state legislatures alone the authority to regulate the times, places and manner of congressional elections" and for this reason state courts cannot determine if the rules and maps that a state legislature sets for federal elections comply with the state constitution.

The *Moore* challengers asserted that when a state legislature makes rules for congressional elections, it is performing a federal function, namely, exercising federal power delegated by the federal constitution, rather than state power conferred by the state constitution.
On the contrary, state courts do not exercise federal judicial power. Article I's Legislative Vesting Clause in Article I, Section 1, provides that "all legislative powers herein granted shall be vested in a Congress of the United States."

Thus, if the federal Constitution vests "all legislative powers" in Congress, then the Elections Clause which is part of Article I cannot vest any legislative power in state legislatures. In other words, when state legislatures regulate federal elections under the Elections Clause,

they exercise state legislative powers, vested by their state constitution, in service of the federal constitution.

Addressing the *Moore* challenger's core argument that under the ISL theory the state court lacked the authority to involve itself in the state legislature's work, and their extreme position that state courts cannot impose any substantive limits on state federal election statutes, a majority of the U.S. Supreme Court concluded that

1. the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, and that state courts do not have free rein. "State courts are the appropriate tribunals ... for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock v. Memphis*, 20 Wall. 590, 626, 22 L.Ed. 429 (1875).
2. At the same time, the Elections Clause expressly vests power to carry out its provisions in "the Legislature" of each State, a deliberate choice that this Court must respect. As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law.
3. We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.

Justice Kavanaugh in a concurring opinion agreed that "state laws governing federal elections are subject to ordinary state court review" and that "a state court's interpretation of state law in a case implicating the Elections Clause is in turn subject to federal court review."

Moore v. Harper (ISLT theory as modified) See https://www.supremecourt.gov/opinions/22pdf/21-1271_3f14.pdf (U.S. June 27, 2023)

7. Election-related disinformation

In a case that provided SCOTUS with the opportunity to shape how government officials interact with social media companies and communicate with the public online, the Court had before it Republican-backed claims that social media companies were working with Democratic allies to silence conservative voices.

Broadly speaking, a First Amendment "right to listen" and to receive information and ideas does not exist without a cognizable injury where the listener has a concrete, specific connection to the speaker. The Plaintiffs' core claim was that the federal government through the White House and Surgeon General coerced and significantly encouraged the social media platforms to moderate content by removing, deleting, suppressing, and reducing social media content containing protected free speech.

The Court addressed election-related misinformation and Covid-19 misinformation, holding that the Plaintiffs lacked standing to challenge the alleged pressuring of social media platforms about election-related misinformation in advance of the 2020 Presidential election and the 2022 midterm election.

Plaintiffs did not seek to enjoin the platforms (FaceBook, Twitter, YouTube and LinkedIn) from any posts or accounts, but sought to enjoin the Federal Government agencies, including the FBI, the CDC and CISA, and officials that included that Surgeon General, from pressuring or encouraging the platforms to suppress protected speech in the future. Their alleged injuries were one-step removed and anticipatory, resulting from the independent action of a third party not before the Court, and there was no real and immediate threat of repeated injury that was the target of the Plaintiffs' request for forward looking relief.

The Court rejected the Plaintiffs' "direct censorship injuries" theory pf standing and pointed to the absence of any showing of substantial risk that in the near future at least one platform will restrict the speech of at least one plaintiff in response to the actions of at least one governmental defendant.

The Court concluded that Plaintiffs failed to make a threshold showing that a particular defendant pressured a particular platform to censor a particular topic before that platform suppressed a particular plaintiff's speech on that topic. On the contrary, the platforms began to suppress the Plaintiffs' Covid-19 content before the defendants' challenged communications started. This was conjecture to say that the plaintiff doctors (Hines et al) would be subject to government induced content moderation.

Regardless of Plaintiffs' claim that hearing "unfettered speech" on social media is "critical to their work as scientists, pundits and activists," they made no showing of any specific instance of content moderation that caused them identifiable harm, and thus failed to establish an injury that was sufficiently concrete and particularized, and this was despite Plaintiffs' assertion that they had a "sovereign interest" in hearing from their citizens on social media. Citizens who have faced social media restrictions are not entitled to have their interests pursued and protected by states who do not have standing as *parens patriae* to bring actions like this against the federal government.

The platform moderation decisions and content-moderation policies by X and Meta (formerly Twitter and FaceBook) involved suppression of certain categories of speech:

1. Fact checking and demoting posts containing misleading claims about elections.
2. Removal of health-related misinformation including false claims about a measles outbreak in Somoa and polio vaccines in Pakistan.
3. Enforcement against user who post false or misleading content about the pandemic.
4. Deletion of posts deemed false regarding cures, treatments and the effect of physical distancing.
5. Deletion of posts containing conspiracy theories about the origin of the virus.
6. The removal of posts or reduction of posts questioning the efficacy and safety of mask-wearing and the Covid-19 vaccine.

Misinformation policies were also applied during the 2020 Presidential Election season, including:

1. Measures to counter foreign interference campaigns and voter suppression efforts.
2. Suppression of a report about Hunter Biden's laptop, apparently originating from a Russian Hack-and-Leak operation.
3. Action taken by platforms against users or posts that questions the integrity of the election results.
4. FaceBook's role as a top driver of vaccine hesitancy due to the spread of false or misleading claims on the platform, prompting one government official, the Director of Digital Strategy, to complain about FaceBook's failure to remove a particular post, saying that "last time we did this dance, its ended in an insurrection."

The Surgeon General pushed social media platforms on their Covid-19 misinformation policies, urging them to redesign recommendation algorithms to avoid amplifying misinformation, and provide information from trusted and credible sources to prevent misconceptions from taking hold.

The FBI and CISA's communications with the social media platforms about election-related misinformation consisted of

1. Alerting platforms to posts containing false information about voting and pernicious foreign influence campaigns that might spread on their sites,
2. Warning platforms about potential for a Russian Hack-and-Leak operation before the 2020 election.
3. Forwarding by CISA of third-party reports of election-related misinformation to the platforms, using its switchboard operations.

Murthy v. Missouri (election-related disinformation) See https://www.supremecourt.gov/opinions/23pdf/23-411_3dq3.pdf (U.S. June 26, 2024)

8. Content Moderation

Laws were enacted by Texas and Florida with the intent of protecting conservative viewpoints on social media. The Fifth Circuit upheld the

Texas law, and the Eleventh Circuit declared the Florida law unconstitutional, leading to this circuit split.

At stake was whether it is unconstitutional for states to pass laws preventing online platforms from moderating their own websites. Much of the attention was focused on how the state laws would affect the content feeds on such apps as FaceBook, Instagram and TikTok, each state arguing that their laws were simply trying to treat social media platforms like utilities, requiring that they carry all content neutrally and without preference to one viewpoint over another. The social media giants for their part argued that the Texas and Florida laws were government interference in decisions by private organizations about what speech to host, and in this context they characterized the social media platforms as akin to newspaper publishers rather than telephone lines.

Writing for the majority, Justice Kagan focused on the Texas law, noting that it profoundly altered the platforms' choices about the views they conveyed by prohibiting them from labeling, demoting or removing content that violated their terms, including election lies, anti-vaccine content, antisemitism, Nazi speech and much more.

Justice Kagan emphasized that the government cannot restrict a private speaker simply because it believes the speaker's speech is biased, nor can the government get its way just by asserting an interest in better balancing the marketplace of ideas. The Fifth Circuit's decision, according to the majority, rested on a serious misunderstanding of First Amendment precedent and principle, in sharp contrast to the Court's consistent holdings that ordering a party to provide a forum for someone else's views implicates the First Amendment if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt."

Speaking for the majority, Justice Kagan backed the First Amendment rights of the social media companies, concluding that "deciding on the third-party speech that will be included or excluded from a compilation, and then organizing and presenting the included items, is expressive activity on its own. And that activity results in a distinctive expressive

conduct. When the government interferes with such editorial choices, say, by ordering the excluded to be included, it alters the content of the compilation. And in so doing, in overriding a private party's expressive choices, the government confronts the First Amendment."
Because neither the Eleventh nor the Fifth Circuits performed the correct facial analysis as laid out by the Court, both decisions were vacated and remanded.

Moody v. NetChoice (content moderation visavis antidistortion rationale) See https://www.supremecourt.gov/opinions/23pdf/22-277_d18f.pdf (U.S. July 1, 2024)

9. Death threats, slurs and extremist attacks on state election officials

Our nation has entered an era in which extraordinary levels of death threats are being leveled against mayors, federal judges, election administrators, public health officials and even school board members. This is not limited to politicians in Washington, DC. As one political historian put it, "American politics has always been violent. The question is how violent." While research suggests that the rising political violence is a reflection of deeper political tensions, it tends to be perpetrated by angry, aggressive people with poor impulse control, with violent threats increasing in those times when the stakes of politics seem especially high and personal.

State election officials – Death threats, slurs and extremist attacks: the dangerous life of a Georgia election official
https://stateline.org/2024/06/24/racist-slurs-and-death-threats-the-dangerous-life-of-a-georgia-elections-official/ (Stateline June 24, 2024); https://stateline.org/2023/11/29/in-face-of-threats-election-workers-say-you-are-not-disrupting-the-democratic-process/ (Stateline November 29, 2023)

For an example of explicit threats of violence arising from the January 6 insurrection and attack on the U.S. Capital, see *United States v. Bauer*

https://scholar.google.com/scholar_case?case=6508953378389920293&q=US+v+Bauer+D.D.C.+2024&hl=en&as_sdt=4,77,130,140 (D.D.C. 2024)
("The Court concludes that Bauer made credible threats of violence when she screamed, "We want Nancy Pelosi, that's who we want" and "Bring them out! You bring them out or we're coming in!" Verdict Tr. at 8. Bauer also explicitly threatened violence when she yelled, "Bring Nancy Pelosi out here now! We want to hang that fucking bitch! Bring her out!" Final Presentence Investigation Report (PSR) ¶ 30, ECF No. 181.")

10. Prosecuting Political Leaders During Election

Among the objective ways to assess the proper timing of criminal trials in relation to political leaders facing criminal prosecution in the context of an approaching election, are such factors as

1. Precedent for prosecuting candidates or political leaders seeking election or re-election,
2. The Law governing the rights of defendants and the public interest in the fair administration of criminal justice, and
3. Prosecutors' adherence to general principles of fair prosecution and avoidance of election interference.

Prosecuting political leaders during election
https://protectdemocracy.org/work/prosecuting-political-leaders-during-election/#:~:text=In%20short%2C%20in%20the%20United,as%20well%20as%20opposition%20parties. (Protect Democracy April 3, 2024)

For a broadside attack on political corruption at the highest level of the Judiciary, see generally Jenelle Carlin, *Correcting a Corrupt Court*, 22 Seattle J. Soc. Just. Issue 3 (2024)("The Supreme Court is digging its own grave. As one of the most important, albeit, often underappreciated, pillars of the Nation's democracy, it is imperative that the other two

governmental branches intervene to prevent further corruption of both the Court and democracy. The unchecked nature of the Supreme Court and the associated unethical behaviors by both Congress members and Justices alike have resulted in the overturning of important historical case precedents, the denigration of the Court's reputation, and the erosion of the Nation's founding principles of democracy.")