



# CONSTITUTIONAL LAW AND ELECTIONS



BY SARAH LINDEMANN BUTHE

This spring, we find ourselves in the midst of a contentious election season. The last half year of Republican primaries and the upcoming presidential election have highlighted, in various ways, the intersection of constitutional law and elections. For example, the Republican candidates' Super PACs, which have bombarded the airwaves with advertisements, Stephen Colbert, and others regularly remind us of the Supreme Court's *Citizens United* decision and the real impact that the courts and their interpretation of the U.S. Constitution have on our lives and our elections.

It therefore seemed fitting to focus this year's constitutional law issue on elections. We are grateful to have several experts in the area enlighten us with their insights. The lead feature article comes from Professor Richard Hasen, a prolific expert in election law. In his article, "What to Expect When You're Electing: Federal Courts and the Political Thicket in 2012," Hasen canvasses the nature of the election disputes likely to be filed with federal courts this election season, focusing on constitutional questions arising from the interaction of state and federal courts. Hasen discusses timing strategies that federal courts can and should use to avoid conflicts with state courts and to avoid becoming enmeshed in politics. In addition, Hasen suggests that federal courts should be aware of—and should try to protect against—the potential for subconscious bias in such disputes.

James Kahl, another expert in election law, examines campaign finance in our second feature article, "*Citizens United*, Super PACs and Corporate Spending on Political Campaigns: How Did We Get Here and Where Are We Going?" Kahl, formerly the deputy general counsel for the Federal Election Commission and currently a lawyer in private practice, examines the Supreme Court's *Citizens United* decision and the ensuing legal developments that led to the entry of Super PACs into our elections. Kahl addresses the impact of Super PACs thus far in the 2012 election cycle as well as some of the potential misconceptions about *Citizens United* and Super PACs. Kahl also considers what, if anything, could or should be done regarding Super PACs and

the fallout from the *Citizens United* ruling.

In our third feature article, Professor Franita Tolson, whose scholarship focuses on, among other things, constitutional and election law, considers how the Supreme Court's opinion in the *Texas Redistricting Cases* affects challenges that are brought under the Voting Rights Act. In her article, "Litigating Under the Voting Rights Act After the *Texas Redistricting Cases*," Tolson argues that, with the *Texas Redistricting Cases* handed down earlier this year, the Supreme Court adopted a new standard of review to determine how much deference a district court must give to a state's redistricting maps when drawing interim electoral maps, even when the state maps have not yet been pre-cleared with the federal government, as required by the Voting Rights Act. Tolson posits that this new standard undermines the Voting Rights Act's pre-clearance regime and explores the implications of the rulings in the *Texas Redistricting Cases* and what the new standard means for litigants going forward.

Finally, in "Is This the Beginning of the End of the Second Reconstruction?" Professor Luis Fuentes-Rohwer examines the history and trajectory of the Supreme Court's treatment of the Voting Rights Act. Fuentes-Rohwer, whose scholarship focuses on the intersection of race and democratic theory, as reflected in the law and particularly in the Voting Rights Act, posits that the Voting Rights Act has been the most important and effective civil rights statute in U.S. history. Fuentes-Rohwer notes that case law suggests that the constitutionality of the Voting Rights Act hangs in the balance and that the law may soon be struck down at the hands of an assertive conservative Supreme Court. Instead, Fuentes-Rohwer argues, the Supreme Court should defer to Congress and check its own power. **TFL**

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