

GOVERNMENT AND ELECTION LAW

Expert Analysis

2013's Top 10: From Voting Rights Act to Moreland Commission

We would be remiss if we did not partake in the time-honored tradition of year-end Top 10 lists. So here is our election law top 10. As with lists naming the best songs or movies, our “honors” go to a mix of important and head-scratching events.

1. Evisceration of the Voting Rights Act? Since 1965, minority voters have been protected in various parts of the country by the Voting Rights Act against proposed changes to election laws that are discriminatory. Voters in the South, three counties in New York City, and a host of other areas throughout the country could rely on Section 5 of the Voting Rights Act, the “preclearance” provision, to monitor, evaluate, and, if need be, block discriminatory changes before they took effect.

In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the Supreme Court struck down the formula Congress used to designate which states or counties had to comply with the preclearance procedures, rendering the preclearance law inoperative. While awaiting congressional action to resuscitate this important protection, the Department of Justice is attempting to use another of the act’s provisions to bridge the gap.¹

2 and 3. Back to the 1890s? ‘McCutcheon v. Federal Election Commission’ and



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‘New York Progress and Protection PAC v. Walsh.’ The U.S. Supreme Court’s *Citizens United* decision in 2010 ruled that corporations and unions could spend unlimited sums on behalf of or against a candidate, as long as it was independent of that candidate’s campaign. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). This, in part, led to our \$6 billion presidential campaign last year, and the first time “outside money” dominated many of New York’s municipal races last month. The McCutcheon and New York Progress cases were brought with the express purpose of further deregulation of money in politics. *McCutcheon v. Federal Elections Commission*, 133 S.Ct. 1242 (2013); *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483 (2d Cir. 2013).

Although one person is limited to giving \$2,600 to a federal candidate per election, he or she is also barred from contributing more than \$48,600, in the aggregate, to all federal candidates—thus limiting how many candidates can benefit from a contributor’s largesse. The McCutcheon plaintiffs challenged this cap (and others) before the U.S. Supreme Court, arguing in October that the aggregate limit does not impact upon

potential corruption or appearance of corruption—the rationale of campaign regulations. Similarly, *New York Progress* challenged New York’s aggregate contribution limit, prohibiting an individual from giving more than \$150,000 in political donations in any calendar year. Here, too, the issue is whether an overall limit has any relation to forestalling corruption. Neither this case, nor *McCutcheon*, attacks contribution limits to candidates—just the aggregate ban. Although the court has yet to hear the merits, the U.S. Court of Appeals for the Second Circuit enjoined enforcement of this law.

A decision on behalf of plaintiffs in either case is sure to trigger additional challenges to federal and state campaign finance regulations.

4. I won! I won! Kudos to the Oneida County Board of Elections. The bipartisan board, comprised of one Republican and one Democratic commissioner, mistakenly executed a Certificate of Election this month, naming Peter Rich the Town Supervisor of Vienna, New York. The problem? He had fewer votes than his opponent. Query: assuming Rich were interested (he is not), could he assume office now that he has been certified as the winner by the legally authorized body? If he did so, could the real winner challenge his usurpation in court?

This imbroglio reminds us of the question posed often in 2000: If Al Gore had prematurely conceded on election night, would he have waived his right to challenge the vote count in court?

5. The New York City Runoff for Mayor That Didn’t Happen. There were a few days after the mayoral primary in September when it was uncertain whether Bill de Blasio

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had received 40 percent of the vote in the Democratic Party—the threshold by which he could avoid a runoff. Prior to the New York City Board of Elections' final count of the absentee and other paper ballots some 10 days after the primary, runner-up Bill Thompson was not sure whether he was going to concede—even if de Blasio was slightly under the 40 percent. Thompson bowed out, and ultimately de Blasio actually did pass the threshold, mooting the issue. This scenario also occurred in 2005: Anthony Weiner faced the same situation as the runner-up to Freddy Ferrer; Weiner conceded, but Ferrer eventually garnered a tad over 40 percent.

New Yorkers should consider alternatives to the runoff. After all, there are only three primaries in all of New York State in which the top vote-getter does not win nomination outright—mayor, comptroller and public advocate of the City of New York. For the thousands of other city, state, village, town and county public officials, this law does not apply. Moreover, runoffs cost the city an extra \$15-20 million, and generally have no impact on the outcome. Only twice in the last 40 years has a second-place finisher gone on to win the nomination in the runoff—Carol Bellamy beat incumbent Paul O'Dwyer for City Council president in 1977, and Mark Green beat Ferrer for the mayoral nomination in 2001.

6. Show Me the Money! 'McDonald v. New York City Campaign Finance Board.' George McDonald, erstwhile candidate for the Republican nomination for New York City mayor this year, challenged the law that limited contributions to city candidates irrespective of their agreeing to take public matching funds for their campaigns. Our law matches contributions to candidates at the rate of \$6 for every dollar raised (within certain parameters), and, in return, they agree to cap their spending and accept capped contributions. The law also provides a limit on the campaign contributions to candidates who do not voluntarily accept matching dollars from the city. It was this last provision that McDonald challenged. He lost in New York's Supreme Court. McDonald has filed a notice of appeal, but has yet to perfect it.

7. You Gotta Be in It to Win It! New York State just passed a constitutional amendment expanding casino gaming. Polling indicated that the vote would have failed

but for the wording of the proposition that touted casinos as a boon to the state's economy. Wording of such amendments are crafted by the Attorney General, and are usually dry renditions with no editorializing. The Attorney General's work in this case was polished by the Board of Elections to sound attractive.

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Prior to the vote, the board's revised language was challenged on the ground that the proposal was misleading, and that the board should not have modified the original language to facilitate passage. The case, *Snyder v. Walsh*, 41 Misc.3d 1213(A) (Sup. Ct. Albany Co. 2013), was dismissed as both untimely and lacking legal merit. No appeal was taken.

8. You Call That Turnout? Voter turnout in 2013 was abysmally low. In New York City, turnout was a measly 24 percent, perhaps an historic low. And this was higher than the turnout rates in several other major cities. Turnout for the New Jersey gubernatorial race, 37.6 percent, was 10 percent less than it was four years ago.²

9. The Wire: Not the HBO Version. In 2009, newly elected Bronx Assembly member Nelson Castro was secretly indicted for perjury in connection with a challenge to his nominating petitions from the previous year. Wired up by U.S. Attorney for the Southern District Preet Bharara, Castro became a cooperating witness in a corruption investigation. His services seemingly were deemed so potentially valuable that the U.S. Attorney allowed him to run for re-election while wired. The recorded conversations led to the arrest of fellow Bronx Assemblyman Eric Stevenson for accepting bribes.

Over in the Eastern District, State Senator Shirley Huntley was caught on an incriminating wiretap that ultimately led to a guilty plea to "falsifying evidence in an attempt to cover up theft of taxpayer money from a

nonprofit agency that she founded"³—but not before she also allowed herself to be wired by the FBI. She then invited various state legislators and political operatives to her home, ostensibly for iced tea and chit-chat, but actually so that she could record their conversations.

And then there were the taps on Senator Malcolm Smith and New York City Council member Dan Halloran, who have been accused of a plot to buy the Republican nomination for mayor. Halloran was recorded saying: "You can't do anything without the [expletive deleted] money.... Money is what greases the wheels—good, bad or indifferent."⁴

10. Moreland Commission. With all of these public officials having been indicted, the governor and Attorney General created a Moreland Act commission to study the causes of corruption and make recommendations.⁵ We assume they read Dean John Feerick's Moreland Commission Report from 25 years ago, which concluded that New York's campaign finance laws were a "disgrace and embarrassment" and the state had "not yet demonstrated a real commitment to ethical reform in government."

The current commission's preliminary report found "deplorable conduct, some of it perfectly legal yet profoundly wrong; some of it potentially illegal...."⁶ Its initial recommendations include comprehensive campaign finance reform for the state, replicating New York City's small donor matching program.

The commission's final report is due in late 2014.

This was some year!

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1. See Jerry H. Goldfeder and Myrna Pérez, "After 'Shelby County' Ruling, Are Voting Rights Endangered?" NYLJ (Sept. 23, 2013).

2. George Packer, "Mixed Results," *The New Yorker* (Nov. 18, 2013).

3. Mosi Secret, "Ex-State Senator Files 2nd Guilty Plea in Fraud," N.Y. Times (Feb. 13, 2013).

4. Jimmy Vielkind, "Complaint: 'Money is what greases the wheels'," Capitol Confidential (April 2, 2013).

5. See Jerry H. Goldfeder and Myrna Pérez, "The Cuomo-Schneiderman Moreland Commission," NYLJ, July 19, 2013.

6. Preliminary Report, "The Commission to Investigate Public Corruption" (Dec. 2, 2013), at 7.