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## Garland is no sure bet on overturning *Citizens United*

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Would a U.S. Supreme Court Justice Merrick Garland be the crucial fifth vote to overturn the Supreme Court's controversial 2010 decision in *Citizens United*, the case which led the way to Super PACs and a bigger role for the wealthy in politics? Would he strongly protect voting rights?

My view of Judge Garland's record as a judge on the United States Court of Appeals for the D.C. Circuit is that he would be moderately liberal on many election law issues. The big question, however, is how far he would be willing to go in overturning or greatly extending precedent. On that, the jury is still out.

### Campaign finance

We should not read too much into Garland's vote in the *SpeechNow v. Federal Election Commission* (2010) case, which established Super PACs. That unanimous ruling was essentially compelled by the Supreme Court's *Citizens United* decision. Far more important in this area are *Wagner v. FEC* (2015), a case upholding the ban on government contractors making campaign contributions to federal candidates, and *National Association of Manufacturers v. Taylor* (2009) (*NAM*), a case upholding disclosure provisions relative to lobbyists.

*Wagner* was a majority en banc decision, meaning liberals and conservatives signed on to the opinion, so the result was not all that controversial. But the way that Garland wrote the decision indicates that he accepts Congress' role in crafting reasonable campaign finance regulations aimed at protecting government interests. Garland could have been more reluctant, noting that Supreme Court cases like *Citizens United* and *McCutcheon v. FEC* (2014) may undermine the constitutionality of total bans on contributions by any class of contributors. But he wasn't. Rather, Garland wrote a full-throated endorsement of the ban on contractor contributions. This reads as an opinion of a judge who believes in reasonable regulation. The same is to be said for his *NAM* decision, which is not reluctant to uphold disclosure requirements in the face of unsubstantiated claims of harassment. Garland also signed a 2008 decision, *Shays v. FEC*, which required the FEC to craft tougher regulations to implement the 2002 Bipartisan Campaign Reform Act, commonly known as the "McCain-Feingold" campaign finance law.

The harder question is what Garland would do if faced with the opportunity to overturn *Citizens United*. I have little doubt he would have dissented in *Citizens*

Monday, March 21, 2016

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*United*. But the question is one of stare decisis now. Would he be willing to overturn such a case, just a few years after the controversial ruling? My guess is that this would be a struggle for him, less about the merits of the case and more about the proper role of the justice on a court that is ideologically and politically divided.

### Voting rights

Garland has not decided many voting rights cases, but an important one is *Florida v. U.S.* (2012). The question was whether Florida, which was partially covered by the Voting Rights Act, was entitled to preclearance for its cutbacks in early voting. Garland sat on a three-judge district court that issued a per curiam opinion, so we do not know if he was an author, but I suspect he had a big hand in crafting the opinion. The judges said Florida's cutbacks in early voting violated the Voting Rights Act because Florida could not show that the changes would not make minority voters worse off. The court essentially told Florida it had to keep the same number of hours of early voting as it had offered before to get preclearance. The court approved other changes to Florida election law, finding they would not make minority voters worse off. The Supreme Court eliminated preclearance the next year in the *Shelby County v. Holder* case, so this precise holding no longer has direct relevance. Nonetheless, the tone of this opinion is one who takes seriously the need of courts to protect voting rights.

Garland seems much less likely to go out on a limb, however. He was in a majority in a 2-1 per curiam case, *Adams v. Clinton* (2000), rejecting D.C. residents' attempts to get courts to declare they have the right to representation in Congress. This case left the question of D.C. representation to the political process. The dissenter read the Constitution to require D.C. representation in Congress. (The Supreme Court affirmed Garland's position.)

### Political Parties

Garland does not seem overly protective of third-party voting rights, deciding in *Libertarian Party v. D.C. Board of Elections* (2012) that a third party had no right to have the number of write-ins tallied for its candidates. But the liberal justices on the court have not always been great protectors of third-party rights, and I do not expect that to change on this issue no matter who replaces Antonin Scalia.

Perhaps more interesting is Garland's opinion in *LaRouche v. Fowler* (1998). The case involved various challenges that fringe candidate Lyndon LaRouche brought against the Democratic National Committee for how it conducted its convention. Much of the opinion deals with whether political parties are subject to preclearance under the (now-moribund) Section 5 of the Voting Rights Act. But in the latter part of the opinion, Garland addressed constitutional claims against the Democratic party, and specifically whether the delegate rules at a convention are subject to judicial review. The opinion was careful and thoughtful, balancing the hybrid nature of political parties as state actors and as private actors entitled to First Amendment rights. Ultimately he sided with the party's rights to decide its own nominees.

If confirmed, a Justice Garland could be reviewing Republican candidate Trump's legal claims against the Republican National Committee, and the views Garland expressed in *LaRouche* suggest he would side with the party over the complaints of a candidate about the party's rules.

### Conclusion

Judge Garland, more than anything else, appears to be a thoughtful and scholarly judge who takes serious claims seriously and who shows liberal, but not radically liberal, leanings in election law cases. Whether he would pass a Bernie Sanders or Hillary Clinton litmus test to overturn *Citizens United* is highly doubtful. If faced with the chance, he could well become a bold justice; who knows? His record of caution and incrementalism says that would be no sure bet.

**Richard L. Hasen** is Chancellor's Professor of Law and Political Science at UC Irvine School of Law. An earlier version of this article appeared on *Election Law Blog*.

### Constitutional Law

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