

**TESTIMONY OF MICHAEL R. DIMINO, SR.  
PROFESSOR OF LAW  
WIDENER COMMONWEALTH LAW SCHOOL**

Hearing Room 1, North Office Building  
June 6, 2017

Senator Folmer, Senator Williams, and Members of the Committee:

Thank you for giving me the opportunity to testify this morning. It is both a pleasure and an honor to be asked to aid the Committee in evaluating the Commonwealth's election laws.

I have taught Constitutional Law, Election Law, and related subjects since 2004, and, in addition to writing several articles and essays on constitutional topics, I have co-written a casebook and a treatise on Voting Rights and Election Law. Although I am a Professor of Law at the Widener Commonwealth Law School, I come before you today not on behalf of my law school or my university. Rather, the opinions I shall offer this morning are mine alone.

This session's overview of election law is valuable because it can provide a structure within which to consider the more specific issues that will be discussed in future hearings. It is too tempting to deal with election-related crises as they occur, with the result that election law becomes a patchwork of provisions that lack coherence. And although it is natural to deal with minor matters piece by piece – (including some of the matters such as funding, poll workers, and voter registration discussed by my fellow panelists) – I commend you for attempting to undertake a more universal examination of election law as well.

In looking at ways to improve the Commonwealth's election law, it is important to reflect on one fundamental question that sounds so simple that it is rarely considered explicitly: What is the purpose of our system of democratic representation? In other words, what goals do we want to achieve through our political system?

The answer matters a great deal, and even though we have heard the same platitudes many times, it is important to appreciate that some of the most common goals we have for politics are contradictory. For example, we might want politics to provide a forum for an exchange of views. We might also want our political system to embody equality. We might want our political system to promote thoughtful, intelligent deliberation by the citizens. Or we might want to promote as much political participation by the people as possible. We might want elections to serve as a way of selecting good men and women, or we might want elections to be a way to ascertain voters' ideological attitudes. We might want to support the two-party

system, or we might want to create legislatures that reflect the attitudes of the people in microcosm.

Consider, however, that concrete policies may favor some of those goals only at the expense of others. For example, permitting corporate speech in campaigns (as *Citizens United v. FEC* did<sup>1</sup>) promotes the exchange of views and may help educate citizens, but arguably at the expense of equality. Laws making it easier to vote and register may promote the goal of involving as much of the public as possible, but at the cost of making it more likely that elections will be decided by people who do not care enough about the elections to invest much time or effort. And districting is fraught with hidden choices both about the ways that the people's votes should be translated into legislative representation and the proper kind of representation that should be provided by elected officials.

Our choices about the goals of democratic representation have practical consequences in literally every area of election law, from determining which offices should be elected, and by whom; choosing between at-large and single-member districts; deciding between drawing "safe" districts and more competitive ones; adopting procedures for voter registration; setting polling locations and hours; drawing district lines; and, as *Bush v. Gore* illustrated, determining methods for counting votes.<sup>2</sup>

Because this hearing is designed to tee up future ones, allow me to suggest one animating principle for the General Assembly to consider in evaluating the laws and constitutional provisions governing elections in this Commonwealth: Our election laws should be designed to promote the representation of the diverse interests and ideologies of the people of Pennsylvania.

Our current electoral system fails to accomplish that goal. For example, by pushing voters into supporting one of two major parties, the Commonwealth's electoral system guarantees that voters will be dissatisfied with the choices they face, leading to apathy and low participation – not to mention the choice of leaders (and the passage of laws) that do not reflect what the citizens really want.

Perhaps the time has not yet arrived to consider a move to a system of proportional representation, and the state constitution unfortunately requires that the legislature be elected from single-member districts. Nevertheless, there are smaller measures that could be taken to permit representation for diverse interests. The state could, for example, consider reducing the favoritism shown to the two major parties in the funding of primary elections and in the automatic ballot access that their nominees receive. And we might not print party affiliation on general-election ballots.

---

<sup>1</sup> 558 U.S. 310 (2010).

<sup>2</sup> 531 U.S. 98 (2000).

There has also been much discussion about altering the Commonwealth's primary system to encourage participation by voters who are not affiliated with the two major parties. If we were to change the Commonwealth's closed-primary to a so-called top-two system, elections could be made more representative without causing the First Amendment problems that would be produced by a blanket primary or open primary.<sup>3</sup>

At its heart, representative government is about representing the desires of the people. Elections by themselves are insufficient to accomplish that crucial role. As the Committee considers the many proposals that will be brought before it throughout the next few years, it is vital that the fundamental goal of representative government be kept in mind, so that Pennsylvania can benefit from hearing and taking into account the diverse ideologies of all the Commonwealth's citizens. Doing so may well lead to an electorate that is more involved; politicians who have even more incentive to connect with their constituents; and elections that are more responsive to – and representative of – citizens' interests and attitudes.

---

<sup>3</sup> *See, e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567 (2000). The First Amendment problem is that blanket primaries and open primaries involve the state controlling the means by which the party selects its nominee. But in a top-two primary, the primary election does not select the party's nominee. Rather, it selects the two candidates who will appear on the general-election ballot and the party may endorse whomever it wishes. Sometimes the candidates on the general-election ballot are members of the same party, and sometimes one of them will be an independent or a member of a minor party.