

TEACHING ELECTION LAW TO POLITICAL SCIENTISTS

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INTRODUCTION

The modern incarnation of election law is a cross-pollinated field in several senses. Although there was at least one earlier Election Law casebook¹, the field really blossomed after *Baker v. Carr*.² Because the Court essentially lowered (some might say abandoned) the threshold for judicial involvement in “political questions,”³ state and federal courts at many levels became players in the reform arena. The Court’s new openness to playing referee and last resort line-drawer in redistricting cases coincided with a parallel flurry of post-Watergate reform activity in the areas of campaign finance, transparency, and lobbying that was nurtured by the political incentives of divided government in the 1970s.⁴ The struggle over the meaning and implementation of these efforts spilled into the courts. As the push for political reform continues, the volume of litigation swells also, adding ever more cases to the Election Law curriculum.

Political scientists were drawn into election law because many of the legal determinations hinged on empirical facts:⁵ (for example, measurements of racial polarization levels, the impact of political funding patterns on legislation and elections, and the size of the residual vote in election administration disputes). Political regulation, however, also intersects with the study of government in other ways. Although it has not always been so clear to either political scientists or legal scholars, election law draws on democratic theory

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1. See Daniel H. Lowenstein, *Election Law as a Subject—A Subjective Account*, 32 LOY. L.A. L. REV. 1199, 1201–02 (1999) (citing FREDERICK C. BRIGHTLY, A COLLECTION OF LEADING CASES ON THE LAW OF ELECTIONS IN THE UNITED STATES (1871)).

2. 369 U.S. 186 (1962); see Richard L. Hasen, *Introduction: Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1099–1100 (1999).

3. *Baker*, 369 U.S. at 209–11.

4. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1267 (1974).

5. I discuss this further in Bruce E. Cain, *Election Law as a Field: A Political Scientist’s Perspective*, 32 LOY. L.A. L. REV. 1105, 1118–19 (1999).

as much as empirical findings, as reformers frequently invoke high-minded goals such as equality of representation or political legitimacy to justify their proposals.

To his credit, Professor Lowenstein was the earliest proponent of a legal/political science partnership. This was reflected from the beginning in his casebook, *Election Law*, by the inclusion of political science materials along with the cases themselves and attending commentary notes.⁶ I audited his Election Law course in the eighties to learn more about the law, and was pleasantly surprised and impressed by the way he related materials from the two disciplines to give background to the cases and to frame their meaning for the political system. At the time, since redistricting was the biggest topic in election law, a number of political scientists—myself, Bernie Grofman, Dick Engstrom—were involved as expert witnesses in political and racial redistricting cases. Daniel Lowenstein himself had hands-on election law experience as the first Chair of the Fair Political Practices Commission.⁷ So from the onset, Election Law was also cross-pollinated in a second sense, combining practitioners and scholars. Despite different backgrounds and training, it meant that the lawyers and political scientists shared some common experiences with cases and disputes. The Law and Politics group of the American Political Science Association (“APSA”) and the *Election Law Journal* have fostered these cross-pollinations self-consciously.

But teaching Election Law to political scientists remains a challenge, outside of the growing but still limited number of joint Ph.D.-J.D. scholars the field is currently producing. The joint degree phenomenon is a welcome development in many ways, but it is not a practical way to educate the many other political scientists, or for that matter, lawyers whose work will touch on election law issues, or the many undergraduates who could profit by understanding the constitutional framework for political regulation. A truly cross-disciplinary approach to teaching Election Law must expose the law or political science student to the framework of the other discipline. That is not a simple matter, but also not impossible.

In this short Essay, I will elaborate on some of the challenges of teaching Election Law across disciplinary boundaries, and recommend some guidelines gleaned from my own teaching experiences. In the end, I believe that Lowenstein’s basic dual approach is the best, but it involves trading off some of the depth and technicality usually involved in graduate training. But cross-

6. See DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND MATERIALS xviii (3d ed. 2004) (discussing the interdisciplinary nature of the textbook).

7. *Daniel Hays Lowenstein: Biography*, UCLA SCH. LAW, <http://www.law.ucla.edu/faculty/all-faculty-profiles/emeritiprofessors/Pages/daniel-hays-lowenstein.aspx> (last visited Feb. 23, 2012).

disciplinary exposure might promote a deeper view about regulatory strategy and doctrines.

I. CROSSING THE DISCIPLINARY DIVIDE

Social scientists and lawyers are trained to think differently. Political scientists look to identify patterns and causes, testing theories with data and focusing on the central tendencies rather than dwelling on the specifics of individual cases. What political scientists cannot explain as a statistical regularity falls into an error term that is commonly assumed to consist of random factors. Legal thinking elevates elements of the error term to a higher level of importance; a particular case fact or nuance can make all the difference between decisions falling one way or the other. In theory, and sometimes in practice, these complementary perspectives can work in a symbiotic fashion.

Political scientists and legal scholars also draw on different literatures when they look at election law problems. The former will know a lot about the relevant empirical literature or theories of representation, but little or nothing about the court rulings or related law review commentary. A few years ago, one of my distinguished peers gave a featured talk about campaign finance reform at the annual APSA meeting, urging the political science community to advocate for curbing independent spending by the political parties and enforcing mandatory public financing to restore political competition, unaware at the time of the legal constraints on his ideas. He was quite surprised when I told him that many of his ideas were likely unconstitutional.

I was reminded of this divide at a recent Law and Politics dinner that placed me at the same table with several young election law scholars. The political scientists enthusiastically described at length game theoretic models of political competition and multivariate equations that explained the measurable effects of *Citizens United*.⁸ At the other end of the table sat a former *Yale Law Journal* Editor and Supreme Court Clerk writing about the different venue options in redistricting cases. As they described their work to one another, I wondered how much each understood and appreciated what the other was doing. If the election law field is going to thrive, they will need to.

When I have taught from the leading Election Law casebooks to political science graduate students, I have found that they get impatient at wading through all the case detail even though, of course, the cases are substantially edited. Many of them lack the rudimentary foundations in constitutional law and need to be given some instruction on legal concepts such as strict scrutiny, compelling state interests, and narrowly tailored remedies in order to understand the Court's way of thinking about the constitutionality of different political reforms. But if you can quell the political science graduate students'

8. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

initial rebellion, they come to see that the courts deal with fascinating problems, and that what looks simple and easy to generalize from five miles up in the quantitative intellectual skies, looks perplexing and complicated at the legal ground level. Having a mixed class of lawyers and political scientists is useful in that regard, because I can turn to the law students to get a reliable distillation of the cases whereas the political scientists tend to get overwhelmed by the story and sometimes miss the bottom line significance of what they are reading. Too many law students can also be a problem because they tend to dominate the legal discussion, being more at home with case materials.

Problems arise in the other direction, of course, when attention turns to the relevant empirical findings. As in economics, the technical barriers to political science research have risen, and people who wield these methodological hammers like to dwell on the minutiae of their applications or the possibility of applying alternative and usually ever more sophisticated techniques. It would be helpful if lawyers contemplating a career in election law would take elementary statistics courses just as it would be better for the political scientists to take Constitutional Law, but neither handicap is fatal. The important takeaway is an understanding of the basic research design and bottom line findings. Which estimation procedure is used and why is most often a secondary or tertiary issue.

To achieve the dual goals of helping the law students understand how political science research is conducted and not overwhelming them at the same time, I try to include both empirical studies and overview articles. My favorite empirical articles for the purpose of demonstrating the empirical method are those that try to measure the impact of campaign money on election outcomes and policy.⁹ They nicely illustrate how simple intuitions (for example, money obviously corrupts) can be misleading (donations typically go to those who are already supporters and evidence of influences on votes are clearer with narrower, technical issues).¹⁰ They also illustrate such issues as two-way causation and the need to look over time, as well as cross-sectional data.¹¹ Increasingly there are nice overviews of literatures, some of which have been done by legal scholars. These are better for a macroscopic look at the literature.

9. Some of these literatures are vast and have conflicting results. It is helpful to find articles that sift through the various studies such as Douglas D. Roscoe & Shannon Jenkins, *A Meta-Analysis of Campaign Contributions' Impact on Roll Call Voting*, 86 SOC. SCI. Q. 52 (2005).

10. See, e.g., W. P. Welch, *Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports*, 35 W. POL. Q. 478 (1982).

11. One of the first and still classic discussions of the two way causation problem, which when corrected leads to different results, is Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469 (1978).

A more fundamental divide is between the different norms of inquiry in legal scholarship and social science. For the social scientist, the prevailing professional ethos is the impartial pursuit of facts, updating and altering theories in a Bayesian manner as the weight of evidence builds in one direction or the other. For the lawyer, evidence is assessed in an adversarial framework, highlighting confirming evidence and downplaying disconfirming evidence. Arguments in a legal brief are often lined up like supplicants in a royal court. If the judge does not accept the first one, he or she is asked to consider another, even if it is inconsistent with the first.

This can be a serious problem for those political scientists who agree to be an expert witness. “Coaching” sessions before depositions or trial testimony can be tense as social science experts, by training and instinct, want to tell judges everything they know about a given subject, while the lawyers try to keep them harnessed within the core arguments. Social science research articles are meant to assess empirical evidence dispassionately, and journal referees are all too eager to punish by rejection those who claim more than they have truly proved. The hedged conclusions that finally appear in these articles can come back to haunt the expert witness, which makes the whole judicial activity seem even more harrowing.

Another critical difference between legal and political science is the greater comfort legal scholars have with moving from the empirical to the normative or vice versa. Not particularly to our credit as a field, political science has largely quarantined normative discussion to the subfield of “Political Theory,” and much of that enterprise is about writing intellectual history rather than creating new concepts. Most empirical studies are motivated by an opportunity to advance the literature, such as a new way to measure or conceptualize a previous finding or conventional generalization. Normative considerations, if they make it to print at all, are tacked onto the end of the article, almost as a chagrined afterthought. Deriving empirical questions from normative questions or policy debates is less frequent and garners fewer professional rewards.

Legal scholarship is much more normative and policy-oriented to begin with, and more likely than a political science article to take the broader, more synthetic view. I once gave a lecture on the Voting Rights Act to social scientists at a prestigious neighboring research university that was greeted with astonishment because a section of my talk discussed the law’s normative value as opposed to purely looking at related behavioral issues. Undergraduate students are more comfortable with this unholy mix, because they have not yet been trained to think otherwise or socialized to feel guilty when they stray from what can be rigorously measured towards the “squishier” questions of justice or fairness.

Political science’s failure in this regard has opened up opportunities for other fields. Policy schools have assumed this chore with respect to

government programs and budgeting. Legal scholars have filled the gap on institutional design as evidenced by the work of Ned Foley, Dan Tokaji, and Richard Hasen on election administration,¹² Heather Gerken on democracy assessments,¹³ and Rick Pildes and Sam Issacharoff on political competition¹⁴ (just to cite a few examples). I hope that the Election Law classes that I teach encourage political scientists to loosen their professional straightjacket just a bit, and engage in these types of questions more often in the future.

II. SILO-ING AND THE COHERENCE OF THE ELECTION LAW FIELD

As academic fields develop, scholars inevitably choose to specialize more. Expertise extends vertically as the requirements of understanding and contributing to a subject grow with each new case and scholarly article. This trend is quite apparent in political science, as evidenced by the number of new officially recognized APSA subfields.¹⁵ Coupled with the lack of professional incentives to look across subjects in a synthetic way, academic specialties tend to grow apart like solar systems in an expanding universe. To their credit, the political scientists and legal scholars in the election law field to date have tended to work in several subject areas. But it is not clear whether there is any framework that pulls this all together. To put it another way, how do we convey to students that Election Law is anything other than a collection of election-related cases that have been decided by the Supreme Court?

In my approach, I have tried to place Election Law within the larger context of political reform and regulation. Narrowly conceived, Election Law covers only the disputes over political regulations and institutions that happen to be decided by the courts, whereas the entire political reform spectrum includes all legislative, direct democracy, and constitutional attempts at democratic improvement. Court rulings and logic have dramatically shaped U.S. political efforts at reform. The fact, for instance, that an appearance of quid pro quo corruption, but not political inequity, is a valid compelling state purpose that justifies important political speech and association rights

12. E.g., Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350 (2007); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937 (2005); Daniel P. Tokaji, *Leave it to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065 (2007).

13. E.g., HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009).

14. E.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999).

15. See APSA *Organized Sections*, AM. POL. SCI. ASS'N., http://www.apsanet.org/content_4596.cfm (last visited Feb. 23, 2012).

limitations¹⁶ has both limited the range of options open to political reformers and incentivized campaign finance advocates to reframe as many democratic harms as they plausibly can as “corrupt.” This may explain to some degree why the public believes corruption is rampant in government, even though politics is by any conceivable measure less corrupt than it used to be.¹⁷

But causation flows in the other direction—from the political system to the courts—as well. Constitutional conventions are for political reasons essentially no longer viable pathways for political reform in the modern era.¹⁸ Groups are sophisticated venue shoppers, avoiding forums that will lead to likely defeat and opting for those with a higher prospect for success. As a consequence, state courts are seeing more amendments to state constitutions that test the boundaries of the revision doctrine that was meant to protect against fundamental rule changes motivated by political advantage. It is important for Election Law students to see the influence and pressures that both flow into and emanate from the courts, and not view Election Law as isolated judicial doctrine.

Moreover, Election Law strictly conceived only touches on the front end of representation—that is, the selection of elected officials—and relegates the back end to legislative law. Topics like lobbying reform, conflict of interest regulation, and open meeting laws are not strictly speaking about elections. But lobbyists often chair fund-raising committees and bundle individual contributions for elected officials. Conflict of interest logic has seeped into the approaches that reforms like McCain-Feingold have taken to campaign finance.¹⁹ And transparency expands on all fronts for similar democratic justifications. There are sensible reasons to divide the labor between the electoral and legislative realms, but this disconnection is increasingly problematic in an era of continuous partisan contestation, in which electoral and legislative strategies are commonly fused. This is yet another advantage of putting the field in the broader political science framework of political regulation.

16. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 904–05 (2010) (reaffirming that political inequity is not a compelling state interest); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (holding that preventing the appearance of corruption can be a compelling state interest).

17. See Richard Morin & Claudia Deane, *In Abramoff Case, Most See Evidence of Wider Problem*, WASH. POST, Jan. 10, 2006, at A07.

18. See Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1520 (2009).

19. Bruce E. Cain, *More or Less: Searching for Regulatory Balance*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 263, 268 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011).

III. THE PLACE OF DEMOCRATIC THEORY IN ELECTION LAW

As election law has moved from a purely rights-based approach towards a more structural viewpoint, it has become more obvious than ever before that there has to be a clear, more explicit consideration of the democratic goals underlying reform proposals.²⁰ Political reform aims to achieve democratic improvement. Clarifying what goals these proposals are meant to achieve is an important step in truly improving the U.S. political system. It is important to expose students not only to fundamental democratic theory, but also to the intermediate theories that fill in the gaps of the democratic architecture.

Given the demands of working in the cases as well as the empirical studies, it is hard to give this subject its due consideration. I have used Robert Dahl's *A Preface to Democratic Theory*²¹ as one of the initial readings because it makes two important points that apply to reform: first, that the critical feature of any democratic state is the opportunity for a free election in which voters can choose between at least two candidates or party slates.²² Not only does this give the students a sense of what is absolutely fundamental to all democracies, but it also shows that the basic architecture of a democracy is quite bare. Lots of the other varied features in different democracies—whether to have political parties, how to count ballots and decide winners, the level of transparency, whether to give voters an initiative option, and the like—are all equally compatible with the basic requirements of a democracy.

This is important because there is a tendency in all of us to think that the reform we prefer will make the system “more democratic.” A few years ago, a number of political scientists and legal scholars were vigorously advocating for multiparty systems and proportional representation rules, suggesting that more choice equaled more democracy.²³ Having more than two parties or candidates on a ballot might indeed be a welcome change in America today at some or all levels of government, but it does not make the system more democratic. It simply replaces one form of democracy with another, each with its advantages and disadvantages.

This leads to a second point: that many of the various theories about representation are what have been called “intermediate democratic theories.”²⁴ Dahl himself contrasts two very important variations in his seminal book. One is the Madisonian strand that divides power and blends the perspectives of the

20. For further discussion, see *id.*

21. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (expanded ed., 2006).

22. See *id.* at 3 (“But at a minimum . . . democratic theory is concerned with processes by which ordinary citizens exert a relatively high level of control over their leaders.”).

23. See, e.g., DOUGLAS J. AMY, *REAL CHOICES/NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE DEMOCRACY* (2d ed. 2002).

24. A term I borrow from Daniel H. Lowenstein. See Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 784–85 (1985).

majority and minority.²⁵ The other is populism that privileges the majority at all stages of democratic design.²⁶ This distinction is very helpful in understanding why equally well-intentioned reformers might disagree about what they are trying to do. There are ongoing, non-terminating debates about the relative merits of representative versus direct democracy, delegate versus trustee forms of representation, deliberative versus market-based competition and the like. The challenge is how to expose students to these various variations within the confines of a one semester course. My preference has been to give them an overview lecture on this topic rather than try to assign lots of additional readings. But my overriding point is that given the normative and policy orientation of the election law field, I have always made it a priority to include a segment on democratic theory about reform goal considerations to provide a context for what is being contested in the courts.

IV. TEACHING ELECTION LAW

It is not just inevitable, but quite possibly a good thing, that Election Law is taught in different ways. A class itself often has different purposes given the different expectations and backgrounds of the students. Some might be looking to make this their career focus while others are just sampling out of casual interest. The political scientist is naturally going to put Election Law in a broader political context than law professors who are trying to give students vocational skills and background. Going forward, I would hope that some of this material filters down into undergraduate education, because in the end, voters directly or indirectly make the choices about political reform that sometimes end up in the courts.

25. See DAHL, *supra* note 21, at 4.

26. See *id.* at 34–35.

