

THE NATURAL AND THE FAMILIAR IN POLITICS AND LAW

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INTRODUCTION

My inclusion among the teachers and scholars featured in this volume is the result of my tremendously good fortune. I was fortunate to have come to the attention of the editors of the *Saint Louis University Law Journal* as someone who might have some interesting words to say about teaching Election Law. I was fortunate to find two exceptional co-authors and a willing publisher for a casebook on the subject.¹ I was fortunate to obtain a job as a law professor, and I was still more fortunate to find a job at an institution that permitted me to teach my favorite subject in the curriculum and where friendly and helpful colleagues were always ready to discuss teaching, scholarship, politics, or indeed anything else. And I was fortunate to have had wonderful teachers myself—as a law student, as an undergraduate studying political science and history, and throughout my life.

And so I view this Essay partially as an opportunity to thank all those who have a hand in shaping my teaching. Whatever aptitude I have is due to their influence, and (as the saying goes) all errors are mine alone.

The most direct influence on my style as a teacher was my experience as a law student. In my last semester, I took the course on the Law of Democracy and was forever smitten with the subject. I had already been interested in politics and constitutional law, so it was not surprising that I would enjoy a subject that combined them. But the class itself—the areas of the law that were covered and the way in which they were covered—showed me how exciting law could be. Here was a subject that was crucial to every substantive area of law because it focused on the rules for selecting policymakers. It presented fundamental questions of federalism, separation of powers, individual rights, and equal protection, all in the context of high-stakes politics. What could be more fun?

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1. MICHAEL DIMINO, BRADLEY SMITH & MICHAEL SOLIMINE, VOTING RIGHTS AND ELECTION LAW (2010).

Professor Gerken managed the perfect balance of theory and doctrine, and her teaching style was demanding and rigorous with an underlying warmth and understanding. The students were engaged and offered their well considered and divergent opinions. I could not have dreamed of a better class. When I entered teaching, I consciously modeled my style on that of Professor Gerken and the other teachers of mine who had been particularly effective.

Perhaps it was her style that enabled me to grasp the central lessons of the course—lessons that have served me well in analyzing areas of the law apart from election law, and lessons that I attempt to impart to my students every semester. This Essay notes a few such lessons and a few ways in which Election Law can be a challenging subject to teach. I make no claim to being able to surmount those challenges as well as my teachers did, but I try to give my students the same love for the subject that my teachers gave me.

I. BASELINES

The biggest challenge facing students in Election Law is recognizing that, as Holmes wrote, “the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”² That is, laws should not be thought to be constitutional just because we are used to them, and laws should not be thought to be unconstitutional just because we are not.

Students (and, for that matter, everyone else) tend to accept election regulations with which they are familiar. Thus, for example, the one person, one vote rule;³ the propriety of citizenship, age, and residency requirements for voting;⁴ and the *White Primary Cases*⁵ strike most people—initially, at least—as correct. On the flip side, students are suspicious of literacy tests, property qualifications, and the preclearance requirements of Section Five of the Voting Rights Act because such laws are outside their experience or, in the case of Section Five, substantially different from the usual interplay between state and federal governments.⁶

Falsely equating “the way things have been” with “the way things should be” may be referred to as the fallacy of the baseline. The baseline is the set of

2. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

3. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

4. *E.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625 (1969).

5. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

6. *See South Carolina v. Katzenbach*, 383 U.S. 301, 358–62 (1966) (Black, J., concurring in part and dissenting in part); Michael Halberstam, *The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 *HASTINGS L.J.* 923, 926 (2011) (“[S]ection 5 preclearance has, almost universally, been regarded as a uniquely heavy-handed federal intervention into state and local lawmaking.”).

conditions we treat as “normal” and unexceptional; we tend to accept such a state of affairs without critical analysis. Laws varying from the baseline, however, tend to be received skeptically; we require a special justification for laws that we view as exceptional. Such an attitude, however common, is especially dangerous when engaged in by judges, who are supposed to decide cases consistently with “neutral principles,” and not to read the Constitution to conform to their policy views.⁷ In lawyers and law students, the attitude bespeaks an analytical breakdown—a failure to examine one’s own opinions with careful skepticism.

One of the aspects of election law in which the baselines problem is most prominent is in the selection of vote-counting methods—the system of rules that most directly determines how the voters’ wishes are translated into electoral outcomes. Because most Americans, including most law students, have experience with only plurality-winner systems, they tend initially not to see that selecting such a system is a choice. Declaring the winner to be the candidate who received the most votes seems the natural—perhaps the definitional—rule of democracy.

The Election Law course, however, permits the instructor to show students how alternative systems could be employed, and how other parts of our electoral process that form part of our baseline (notably, the two-party system) are related to the ways we determine the winners of elections.

Likewise with universal adult suffrage. While students seem to accept some amount of exclusions based on criminality, they are skeptical of all exclusions other than the ones approved by the Court in *Kramer v. Union Free School District No. 15*: age, citizenship, and residency.⁸ Students (and the Court in *Kramer* suffers from this failure as well) are often simultaneously unwilling to defer to legislative judgments about such limits on the franchise as property qualifications, and accepting of age, citizenship, and residency limits that could not pass the strict-scrutiny standard if such a test were to be applied to such limits on the “fundamental” right to vote.

Once one learns to recognize the distorting effect of baselines, the study of law becomes much more fun and it becomes much easier to critique the reasoning of legal arguments. Students learn that it is not sufficient to point to factual differences in cases; the significance of those differences must be explained. One might be inclined to accept, for example, a restriction limiting the franchise to residents.⁹ But without explaining *why* non-residents may be prevented from voting, a rule treating residency limitations as permissible

7. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 805 (1983); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

8. *Kramer*, 395 U.S. at 625.

9. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

lacks principle. Learning to ask *why*—to question our assumptions and to demand that law be justified by reason—is the single most important aspect of legal education and one that is eminently teachable in the Election Law course.

II. POLITICAL CORRECTNESS

Between teaching Constitutional Law and Election Law, I spend considerable time discussing pretty much every topic of conversation that is supposed to be off-limits in polite society. And any discussion of race, politics, sex (in both senses of the term), or religion is perilous. A comment by me or a student may offend someone in the class, and may result in antagonism that may make learning more difficult. In my experience, however, the greater danger has been the opposite one.

Most students are so afraid of saying something that could be perceived as offensive that it can be difficult to draw out criticism of portions of the canon that are politically sensitive. It is especially tough to inspire critical thinking about the one person, one vote rule because it is not only familiar to students (leading to the baseline problem), but it is upheld as the paradigm of fairness and, along with *Brown v. Board of Education*,¹⁰ as the most noteworthy judicial success of the civil rights era. Few students are so bold as to suggest that the one person, one vote cases were wrongly decided, because nobody wishes to be identified with the opponents of the civil rights movement.

Yet it is crucial for students to appreciate alternative arguments, both regarding the substantive meaning of the Equal Protection Clause and regarding the procedural concerns of judicial deference and political questions, because those principles reappear in cases where the moral imperatives are absent.¹¹ Are the students who champion judicial oversight of the political process in *Baker v. Carr*¹² and *Reynolds v. Sims*¹³ willing to apply the same principles when districts' populations deviate by as little as one percent?¹⁴ Does the 1960s judicial activism become less attractive when a different Supreme Court decides *Bush v. Gore*?¹⁵ Do students really subscribe to the state-action holdings of the *White Primary Cases* and the reach of

10. 347 U.S. 483 (1954).

11. Cf. JOHN STUART MILL, ON LIBERTY (1859), reprinted in THE BASIC WRITINGS OF JOHN STUART MILL 2, 38 (Random House 2002) ("He who knows only his own side of the case knows little of that.").

12. 369 U.S. 186 (1962).

13. 377 U.S. 533 (1964).

14. See *Karcher v. Daggett*, 462 U.S. 725, 727 (1983) (striking down New Jersey's reapportionment plan with population variances of less than one percent). See also *Kirkpatrick v. Preisler*, 394 U.S. 526, 528–31 (1969) (striking down a congressional districting plan with population variances of six percent).

15. 531 U.S. 98 (2000) (per curiam).

congressional power approved by the Court in *South Carolina v. Katzenbach*¹⁶ and *Katzenbach v. Morgan*,¹⁷ or do they care only about the fairness of the outcomes? Again, the answer may become clear when the class encounters more recent cases, such as the challenges to the 2006 reauthorization of the Voting Rights Act.¹⁸

Using such real-life examples or hypotheticals can easily test students' fidelity to principle by varying the ideologies of the affected parties. As a result, class discussions can often be productive and enlightening. They require the participation of students, however, which can be a problem if students are reticent to enter the debate. The professor can offer the arguments on behalf of the politically incorrect position, but that is rarely satisfactory. Debates are so much more lively and enjoyable when the students themselves drive the discussion. Students are apt to treat a class discussion as an exchange of ideas; they treat a discussion with the professor as a kind of test.

In my experience, good old-fashioned cold-calling can do wonders to produce a great class discussion. Students may not want to be perceived as supporting an unpopular position, but they are not perceived as the "bad guys" if they are specifically asked to make an argument on behalf of the unpopular side. Once the students offer the initial positions, then the discussion usually continues with the students engaging each other's arguments.

III. THE CHICKEN AND THE EGG

Another problem stems from the fact that elections are run according to rules established by officials who are chosen by elections that are run according to rules established by officials Election cases therefore confound standard arguments for deferring to elected officials' policy judgments and can bring out wonderful debates about the role of the courts in overseeing various aspects of the electoral process, from the right to vote, to districting, to speech and campaign finance, to vote counting. For some students, however, this can be challenging. Some are thrown by the uncertainty in constitutional law, and for those students it is even more unsettling (and disillusioning) when so many of the rules of democracy are so fluid.

At its best, the Election Law course takes advantage of this chicken-and-egg problem to destroy the myth of law's neutrality. It is easy to call attention to campaign finance regulations that might be thought to aid incumbents, to bipartisan gerrymanders, to the partisan use of the Voting Rights Act, to the partisan effects of efforts to disenfranchise and re-enfranchise felons, etc. A

16. 383 U.S. 301 (1966).

17. 384 U.S. 641 (1966).

18. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508 (2009).

student who knows to be skeptical of the motives of lawmakers is a student who has gained an important insight, and the course on Election Law is an excellent place to learn that lesson.

Nowhere is the chicken-and-egg problem more clearly presented than in the cases dealing with the rights of political parties. Parties are associations of individuals (the party in the electorate), run by leaders (the party organization), and governed in part by laws passed by members of parties who have been elected to office (the party in the government). When there is a conflict between the interests of those three aspects of the party, it is not clear which interests represent those of the party itself or, more fundamentally, what we mean by “the party.”

Consider two cases: *Duke v. Massey*¹⁹ and *LaRouche v. Fowler*.²⁰ In both cases, a candidate for the party’s nomination was prevented from running by the party leadership.²¹ (In *Duke*, the leadership was exercising authority pursuant to state statute.²²) The leadership invoked the right of “the party” not to associate with the candidate, but the very point of the candidacy was to see whether the candidate was preferred by the party in the electorate.²³ By keeping the candidate off the ballot, the leadership prevented the party in the electorate from voicing its choice—all in the name of the party.²⁴ The cases thus force us to consider the proper role of the courts in overseeing the election process—whether we see the Constitution as guaranteeing a role for individuals against party leadership or whether we see the Constitution as protecting the leadership against the rank-and-file.

After analyzing these cases, students better appreciate that judicial decisions about the rights of parties reflect judgments about democratic theory—the roles of parties and their relationships to voters and the government—even if those judgments are unstated in the opinions. And once they see the influence of democratic theories in cases adjudicating parties’ rights, they can more easily see the same influence in other areas of the course and in other areas of law.

19. 87 F.3d 1226 (11th Cir. 1996).

20. 152 F.3d 974 (D.C. Cir. 1998).

21. *Duke*, 87 F.3d at 1228–29; *Fowler*, 152 F.3d at 975.

22. *Duke*, 87 F.3d at 1229.

23. *Id.* at 1230; *see Fowler*, 152 F.3d at 976.

24. *Duke*, 87 F.3d at 1230; *see Fowler*, 152 F.3d at 976.

IV. NECESSARY BACKGROUND KNOWLEDGE

As is apparent from its title, election law is by its very nature interdisciplinary.²⁵ As fewer and fewer students enter law school with a background in political science, they are less and less equipped to engage the debates about democratic theory that occur throughout the Election Law course. A student who can call upon his or her own experience or his or her undergraduate training is in a much better position than other students to understand the implications of election laws. Political-science majors and others similarly trained are likely to appreciate at least the basic debates concerning campaign finance; they know some of the functions of political parties; they are conversant about events in politics that can be used as examples to illustrate points in class; and, more generally, they understand the way in which the rules of the election game affect the outcomes.

Students' lack of grounding in political science and democratic theory can be a greater or lesser handicap depending on the way a professor chooses to teach his or her course. The pioneering casebook in our field, originally written by Professor Lowenstein and now containing the additional contributions of Professors Hasen and Tokaji, focuses extensively on political theory and features cases no more prominently than it features essays on politics.²⁶ The quality of a seminar reflecting that approach would depend greatly on the previous exposure of students to the study of politics. My casebook concentrates far more on Supreme Court opinions and doctrine;²⁷ accordingly, knowledge of democratic theory may be less important for a course adopting that approach. Despite this, there is no escaping the fact that political science and political theory pervade the Election Law course, and students who are not familiar with them are at a decided disadvantage.

Similarly, differences in students' understandings of constitutional law can make it difficult to teach Election Law. Election Law (at least the way I teach it) is an advanced course in Constitutional Law with some additional material on the Voting Rights Act. The vast majority of the course requires knowledge of the Fourteenth Amendment's Due Process and Equal Protection Clauses, as well as the First Amendment. Yet even where Constitutional Law is a prerequisite for Election Law, the instructor cannot be confident that the students have the proper understanding of those aspects of constitutional doctrine and theory.

At the school where I teach, the First Amendment is often not covered at all in the Constitutional Law survey course—where it is covered, the chances

25. See generally James A. Gardner, *Election Law As Applied Democratic Theory*, 56 ST. LOUIS U. L.J. 689 (2012).

26. See DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* (4th ed. 2008).

27. See DIMINO, SMITH & SOLIMINE, *supra* note 1.

of campaign finance being mentioned are next to zero—and few students will have had the opportunity to complete a separate course on the First Amendment before beginning Election Law. Equal protection and due process are certainly covered in the survey course, but even there many students will require a refresher before covering the material in an advanced course. Further, different Constitutional Law courses have widely varying foci; one cannot depend on students knowing about Congress's power under Section Five of the Fourteenth Amendment, or state action, or the representation-reinforcement theory of judicial review, and so on.

The question for the instructor is what to do about students who come to the class without knowing much about politics, or whose understanding of constitutional law does not reflect the emphases that are featured in Election Law. One can use class time to review basic principles of constitutional law and politics, but because class time is so precious, minutes spent doing that are minutes taken away from more advanced lessons. My attempt at a solution was to develop written primers and to use them as introductions to the sections of the casebook. The primers provide background on the law and state the black-letter principles that appear in the casebook sections that follow. Thus, students can get the required background outside of class in a way that is tailored to the needs of the unit we are about to study. The approach has worked quite well. Not only does it prepare the students for class, but it helps them to focus on the challenging material that we cover in class, without worrying that they might be missing a fundamental aspect of doctrine.

V. CASE LENGTH AND DOCTRINAL COMPLEXITY

The aspect of casebook writing that I most enjoy is editing the cases themselves. Cutting out everything that is less than essential forces an editor to have a greater understanding of the cases than would be required to teach them, and good case editing can make a huge difference in the ability of a book to make its lessons accessible to students.

No matter how much work goes into editing cases, however, there is only so much that can be done with cases that routinely exceed 100 pages. Recent decisions on districting²⁸ and campaign finance,²⁹ for example, are impossible to present adequately in a few pages. This is not a criticism of the Court's writing style—a case editor can correct for that by cutting out the excess. Rather, the problem is that the law is so complex that hundreds of pages are needed to explain the decisions.

28. See, e.g., *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006).

29. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *McConnell v. FEC*, 540 U.S. 93 (2003).

The unit on campaign finance is a minimum of three weeks long, and can easily fill a seminar by itself. Sections Two and Five of the Voting Rights Act and the Court's *Shaw* jurisprudence³⁰ take another three weeks. And because the Court's current cases involve multiple issues, they are incomprehensible without the several weeks of background that the rest of the course provides. But the student who has just barely kept up with the background will be completely lost when it comes time to digest a behemoth such as *LULAC v. Perry*,³¹ *McConnell*,³² or *Citizens United*.³³

CONCLUSION

We should all be so lucky as to teach, write, and think about a subject as fascinating as election law, with its many inherent challenges. I am forever thankful to those who showed me how fun the law of politics can be, and to the students who allow me to share that fun with them.

30. *Shaw v. Reno*, 509 U.S. 630 (1993).

31. *LULAC*, 548 U.S. 399.

32. *McConnell*, 540 U.S. 93.

33. *Citizens United*, 130 S. Ct. 876.

