

ELECTION LAW AS APPLIED DEMOCRATIC THEORY

JAMES A. GARDNER*

Democracy does not implement itself. Offices do not spontaneously appear, along with election districts, political parties, polling places, ballots, and administrators. Eligible voters and qualified candidates do not sprout from the ground like mushrooms. A society's commitment to govern itself democratically can be effectuated only through law. Yet once law appears on the scene it becomes clear immediately that significant choices must be made in constructing any system of institutions designed to produce democratic self-governance.

This banal observation is the starting point for my approach to the field of election law as both a scholar and a teacher. I am interested in the content of election law, to be sure. It is in many respects a difficult, complex field, challenging and satisfying to study, in the books and in the classroom. But I am much more interested in examining—and evaluating, and subjecting to critique—the choices that our laws have made in seeking to structure a workable system of democratic self-rule. This is where the real challenge, and the greatest satisfaction, arises.

It is impossible to evaluate a choice by examining solely what has been chosen. One must instead contemplate a host of broader questions. What was the chooser trying to achieve? What was the range of feasible options? Does the chosen option achieve the relevant goals, and if so, how well? Might other options perform better, to what extent, and at what cost? To answer these questions, one must look beyond the law—and that is where the enterprise begins to get really interesting and, to my way of thinking, almost giddily enjoyable.

No body of law specifies its own goals, or reveals whether it is effectively achieving them. It is here, precisely, that election law connects to two fields with which it is so closely allied that, in my view, it cannot be usefully separated from either of them: democratic theory and empirical political science. Democratic theory, a branch of political philosophy, is capable of

* Vice Dean for Academic Affairs and Joseph W. Belluck and Laura L. Aswad SUNY Distinguished Professor of Civil Justice, University at Buffalo Law School, State University of New York. Thanks to Lynn King for research assistance.

providing at the front end an account (actually numerous competing accounts) of what democracy is, the benefits it is capable of providing, and the forms in which those benefits may be delivered. At the back end, empirical political science provides tools that, in the right circumstances, may be used to test the extent to which some particular legal regime or institution actually achieves the goals it was created to accomplish. As a discipline, then, election law bridges the gap between our aspirations for, and the frequently messy reality of, our political lives. It is the middle term in an equation that specifies whether and to what extent we realize perhaps the most significant dream of contemporary human beings: to live well under a just and lasting democracy.

What's not to love about a field like that?

I.

Sadly, given the richness of their political inheritance, Americans often lack a solid appreciation of the range of possible democratic practices. This shortcoming sometimes manifests itself in a presupposition that the way democracy is practiced here and now is the only way, or is in some sense the "real" way, and all other possibilities are therefore to be dismissed out of hand. This predisposition testifies to a general ignorance not only of the way things are done elsewhere in the world, but even more importantly of the sometimes remarkable variety of democratic practices employed throughout the United States today and in the past.¹ Many also display a depressing tendency to throw around democratic terms and concepts without any apparent appreciation for the complexity of the ideas to which they refer. Commonplace terms such as "represent," "gerrymander," "campaign," and "politics" are merely the visible tips of enormous conceptual icebergs. People who use these terms in public discourse often deploy them in ways that import layer upon layer of highly significant and eminently contestable assumptions, assumptions of which the speaker all too often seems unaware.

Actively involved specialists such as lawyers, judges, legislators, and even academics are not immune from these oversights. After nearly a half-century of important decisions deeply influencing the ground rules of American democracy,² the Supreme Court has yet to articulate conceptions of many fundamental aspects of democratic practice that are sufficiently coherent and stable to permit legislators or lower courts to rely on them with confidence. This instability and lack of predictability extends to such critical questions as the scope and content of the right to vote, the nature of constitutionally

1. I provide a quick survey of the historical evolution of the American election campaign in JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR? THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS* ch. 1 (2009).

2. These decisions begin with the two seminal one person, one vote cases, *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

adequate legislative representation, the function of speech and money in electoral politics, and the acceptable role of race in drawing legislative districts.³

People frequently talk—and complain—about the laws that structure our electoral processes, yet depressingly few seem to recognize not only that electoral laws make important choices about how democracy is to be practiced, but that some of these choices involve significant tradeoffs among desirable democratic goals. To give but one example, it is all too common for otherwise well-informed critics of electoral laws and practices to claim simultaneously that the composition of a legislature ought to reflect partisan support in proportion to its appearance in the electorate, and that all legislative elections must always be competitive, a logical impossibility.⁴

Political science, which ought to carry a significant share of the burden of educating the public about such matters, rarely does so. Unfortunately in my view, the study of American politics in political science departments has come to focus on a topic of high contextual but no intrinsic interest: who will win any given election. With the exception of the very best work in the field, political science tends to analyze every issue in terms of its partisan consequences. Lawyers, lawmakers, and the public might wish to know, to give but one current example, whether an independent districting commission is likely to draw fairer election districts than a legislature. Political scientists will tell you instead whether such a change in any particular state would favor Democrats or Republicans. This kind of response inadvertently supports a corrosively cynical view of democracy in which questions about the long-term justice of democratic institutions⁵ are displaced completely by questions about the short-term partisan advantages of legal innovations, whatever their justification.

For the most part, it has been political philosophers who have had the perspicacity to recognize and ask the most important questions about democratic institutions and the courage to attempt to answer them. What are, or should we be, trying to accomplish by instituting a system of democracy? What can we legitimately ask of democracy and what benefits is it genuinely capable of delivering? How can we best extract those benefits while avoiding countervailing costs or risks? Are our democratic institutions structured so as

3. See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 506–07 (2004).

4. For an explanation, see James A. Gardner, *What is “Fair” Partisan Representation and How Can It Be Constitutionalized? The Case for Fixed Election Districts*, 90 MARQ. L. REV. 555, 567–72 (2007).

5. See, for example, DENNIS F. THOMPSON, *JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES* (2002) for a refreshing focus on institutions.

to deliver on democracy's promise? Might other institutional arrangements perform better? Measured how, and against what standard?

This way of thinking, it seems to me, leads us in the right direction. It relegates law to its proper role as neither more nor less than the handmaiden of well-articulated democratic ideals. It reminds us that laws structuring the democratic process are not features of the natural world, to be unquestioningly accepted or venerated, but on the contrary embody a series of contingent choices made by a succession of human beings for a variety of purposes. It is these choices, as I have said, that most interest me, and my principal goals in both studying and teaching election law are to determine what the salient options are, identify the choices that have been made, and most importantly, lay bare the tragic reality that all choices involve tradeoffs, and consequently that there is only so much any polity can do through law to institute a successful and satisfying system of democratic self-governance.

II.

In designing my course in Election Law, which I have taught now for more than fifteen years, I have proceeded from several assumptions that either flow from or at least acknowledge these sentiments. First, I assume that my students will know little about any of the course material. Students generally take Election Law because they are interested in and follow politics. But although this means they will know something about the way Americans practice democracy, and will have participated in these practices, they are likely to have minimal or no prior exposure to the actual legal framework within which these practices take place. I further assume that they will have little or no prior exposure to democratic theory and at best a rudimentary exposure to empirical political science. As a result, I assume that I am going to have to take some time simply to acquaint them with these bodies of thought, that I will have time to cover only the most directly salient aspects of the fields, and that this coverage will, unfortunately, necessarily be frustratingly superficial.

Next, I assume that none of my students is actually going to practice election law. If there are enough lawyers in the United States to form an election law bar, surely it is tiny. Notwithstanding the recent growth in election-related litigation,⁶ few practicing lawyers will ever have a candidate or political party for a client, or will ever advise or represent a voter challenging some electoral law or a government defending one. This assumption has two important consequences for the shape of the course. First, it relieves me of any obligation to devote significant time to covering the field at a level of doctrinal detail that would be relevant to the everyday concerns of the practitioner. As is

6. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 70 (2009).

true of most legal fields, much of the daily attention of practitioners of election law is occupied by relatively routine matters that are of great interest to the parties, but of comparatively little conceptual interest—the validity and submission of signature petitions, satisfaction of tax and reporting obligations, and so forth.

Second, the fact that almost none of my students will be practicing election law means that the function of the course in the law school curriculum is less to prepare students for the actual field of practice they will enter than it is to build a more general kind of legal and democratic citizenship. Consequently, my main goal in presenting the material is to help my students become savvy consumers and users—and informed judges and critics—of democratic laws and practices. Even when lawyers do not practice in a particular area, their knowledge of law as an organized enterprise and of its relationship to other social and political institutions often puts them in a position to offer useful information and analysis to the general public. If my students ever go on to think about the subject again after taking my class, I hope they will be in a position to offer such analysis.

In this sense, my approach to Election Law is not all that different from my approach to the basic course in Constitutional Law, which I have taught for more than two decades. Few lawyers will ever come within sniffing distance of a constitutional issue. For all but a very few lucky students who may at some point enjoy the pleasure and the challenge of handling matters raising constitutional questions, the course serves instead as a building block of general legal citizenship by educating lawyers in the larger structures of their universe and inculcating the values of sound legal citizenship. Indeed, Election Law is in most respects essentially an advanced, very challenging upper-level course in constitutional law. Although some significant subfields, such as the Voting Rights Act,⁷ revolve around statutory issues, most of the recurring problems in the field—franchise restrictions, redistricting, ballot access, candidacy requirements, and the regulation of political parties, campaign speech, and campaign finance—all involve issues of constitutional law. The complexity of these issues and the controlling judicial analyses is what makes the field—and, I hope, the course—endlessly challenging, stimulating, and just plain fun.

Finally, like any teacher, I unavoidably bring to the course certain predispositions of interest and approach. Unlike most of my colleagues in the field, I am not, as the reader may already have surmised, a political junkie. I can't tell you who is running for office in swing districts, who is vulnerable to a challenge, or whose previously safe seat is threatened by a redistricting plan. I don't know which candidates the parties are supporting financially and which

7. 42 U.S.C. §§ 1973–1973aa-6 (2006).

they are writing off. I can't tell you who has a good field organization, who has great polling support, or who has the slickest and most effective ads. I am frankly not much interested in the one aspect of democratic politics that has come to dominate public conversation about it—the horse race.

As I conceive things, the outcomes of particular elections are not to any great or at least interesting degree the result of immediate political moves and countermoves made in any particular cycle by any particular set of political actors. They are, rather, outcomes of complex processes that were set in motion long before anyone could have known the specific conditions in which partisans would contest, or even who the contestants might be. Those processes were established by law and by convention, and those laws and conventions define the norms under which, and parameters within which, individual political actors contest for power. An election is thus a complex interaction between established structural parameters, largely unpredictable changes in public opinion, and the contingent responses of particular political actors to the environment in which they happen to find themselves at the moment in which they engage in electoral contestation. Who wins an election in any given place on any given day is just soup sloshing around in the bowl, and about as interesting.

What concerns me much more is the impact of democratic practices on ordinary people, and in consequence their impact on the kind of lives we live as citizens. Which individuals or parties hold power at any given moment is transitory. But the characteristics and indeed the substantive quality of democratic politics are forces that touch all of us constantly, and over the long term. They not only shape the behavior of participants in democratic life in the short run but, by inculcating potentially powerful lessons about democracy, can have lasting effects on the nature of democratic participation and thus on the public life of democratic citizens.

III.

My course materials, which have been in development for more than fifteen years, now in co-authorship with Guy-Uriel Charles of Duke Law School, will soon be published commercially.⁸ They are designed to provoke just the kinds of questions that I have so far been discussing. To this end, the course begins with a succinct overview of the major extant theories of democracy. Short readings from political philosophers like John Locke and John Stuart Mill; democratic theorists such as Benjamin Barber, Anthony Downs, Judith Shklar, and Joshua Cohen; social scientists such as political historian Jean Baker and political network theorists Robert Huckfeldt and John

8. JAMES A. GARDNER & GUY-URIEL CHARLES, *ELECTION LAW* (Aspen Publishers, forthcoming 2012).

Sprague; and even the poet of democracy himself, Walt Whitman, provide students with a stock of concepts that, while rarely capable of resolving difficult questions, serve the useful function of providing some well-grounded conceptual landmarks against which students may orient their own intuitions. Another early section provides students with a quick introduction to some important themes that cut across all portions of the course: the influence of a strongly antidemocratic strain of eighteenth-century republicanism on the structure of the Constitution's basic democratic institutions; the immense historical significance of racial discrimination in the evolution of all aspects of American election law; and the Constitution's unusual and sometimes frustratingly chaotic distribution of the authority to regulate elections between the state and national governments.

Following these introductory materials, the book proceeds to work its way through the corpus of election law by examining in sequence the major institutions of which it is comprised and the relationships among them. The arc of its progression is, if I do say so myself, so logical as to be almost natural. It begins at the place where all contemplation of politics must necessarily begin: with the political subject, the citizen and voter, the one who is democratically represented. The book then goes on to consider the nature and legal significance of political representation; turns its attention to the official and candidate, the one doing or offering to do the representation; and then proceeds to examine three institutions that play a hugely important role in the way that the representation relationship is established: political parties, campaigns, and electoral administration.

To put this progression in the terminology of legal doctrine, the book begins with a thorough examination of the right to vote and the grounds on which it may be restricted. It then examines the constitutional framework governing representation of voters in legislative bodies. Coverage includes the nature and basis of political representation, how the law defines the community represented, the problem of virtual representation, the many questions associated with drawing legislative districts, and constitutional treatment of discrimination in representation through racial or partisan manipulation of the methods of election or the boundaries of election districts. Before leaving representation, the book devotes significant coverage to federal statutory regulation of the representation relationship in the form of the Voting Rights Act.

From there, the book moves on to consider the legal treatment of candidates for office, including the establishment of qualifications for and conditions upon the holding of elected office. This section also devotes attention to the unusual nature of candidates for judicial office, and the special rules that apply to judicial elections. Coverage moves next to the party system, including principles of ballot access, the constitutional status of the two-party system, regulation of primary elections, and political patronage. It then

proceeds to two chapters on election campaigns, one covering constitutional treatment of the regulation of campaign speech, and the other handling issues relating to campaign finance. Finally, the book concludes with a chapter devoted to the newly-emerged topic of election administration, which it considers alongside the body of law governing remedies for electoral mistakes and maladministration.

IV.

To give a better idea of the ways in which the general approach outlined above informs my teaching, it may be useful to provide a few concrete examples from the classroom. One place where the focus on democratic theory significantly informs the way I frame and pursue a topic comes in the way I introduce the section of the course on representation. This part of the course covers malapportionment, the Court's one person, one vote revolution and its extension to local bodies, discrimination in the choice of election methods such as at-large voting or place systems, and partisan gerrymandering. Instead of simply diving into the one person, one vote decisions such as *Reynolds v. Sims*,⁹ I begin with a session contemplating the institution of representation itself. What is political representation? Who is entitled to be represented, and why?

This commitment to opening space for such questions leads me to set up the standard doctrinal material with three preliminary detours. First, I assign *Kramer v. Union Free School District No. 15*.¹⁰ This case is for most purposes a rather standard voter qualification case, yet it furnishes an excellent vehicle for directing students' attention to the important preliminary question of what might conceivably ground a claim of entitlement to legislative representation. *Kramer*, the plaintiff, was by law ineligible to vote in local school board elections because he neither had children in the schools nor owned taxable property in the district.¹¹ New York State defended the exclusion of *Kramer*, and others like him, on the ground that school boards are obliged to represent only those who have an interest in their affairs, a group the state claimed was limited to those whose children would be subjected to educational policies established by school boards, and those who would pay taxes on property levied by the boards.¹² Considering the case in terms of the grounds upon which individuals might or might not be *entitled* to representation on the school board nicely frames rich issues concerning the purposes that democratic representation might be said to serve, and how the structure of legislative representation might or might not conduce to achieving those goals.

9. 377 U.S. 533 (1964).

10. 395 U.S. 621 (1969).

11. *Id.* at 624-25.

12. *Id.* at 631.

Also by way of introduction, I assign two cases, contradictory in spirit, which I use to frame the question of how we might think about the community that is, or should be, represented by any particular legislative body. In the first case, *Hunter v. City of Pittsburgh*, the Supreme Court famously held that localities have no constitutional standing, and that the Pennsylvania cities of Allegheny and Pittsburgh could constitutionally be consolidated over the objection of a majority of the people of Allegheny, expressed in a referendum.¹³ The case can thus be understood as a judicial determination that the boundaries of local communities are so contingent and thinly rooted that they do not count for purposes of assigning representation to those who live within those boundaries.

Against this, I juxtapose *Milliken v. Bradley*, a case in which the Supreme Court held that, for purposes of enforcing a school desegregation order, a federal court could not redraw the boundaries of a municipal school district to extend into the suburbs so as to capture white families who had fled the city to escape racial integration.¹⁴ In contrast to its reasoning in *Hunter*, the Court in *Milliken* held that school district boundaries are real and significant, and presumptively may not be disturbed.¹⁵ Although the cases are formally distinguishable—the former deals with the plenary power of states and the latter with the limited remedial power of federal courts—their reasoning is in tension in ways that always help generate illuminating class discussions about the nature of local community and its significance for decisions structuring legislative representation.

Finally, I further explore the nature of representation by assigning *Holt Civic Club v. City of Tuscaloosa*, a frequently overlooked case in which the Supreme Court sustained a law extending the police jurisdiction of Tuscaloosa to outlying unorganized suburbs without correspondingly extending the opportunity to vote in Tuscaloosa legislative elections to residents of these outlying areas.¹⁶ This meant that residents of suburban towns were governed by laws enacted by the Tuscaloosa City Council without having any electoral voice in choosing council members.¹⁷ This case places front and center the concept of virtual representation and its appropriate role, in light of American political history and ideology, in determining who is entitled to representation on any particular legislative body. With the issues thus framed, the ensuing discussions of such standard doctrinal fare as one person, one vote and gerrymandering are far better informed and far more lively.

13. 207 U.S. 161, 174–75, 179 (1907).

14. 418 U.S. 717, 744–45 (1977).

15. *Id.* at 745.

16. 439 U.S. 60, 69–70 (1978).

17. *Id.*

Another area in which thinking of election law as applied democratic theory makes a difference to my teaching is in the section of the course dealing with candidates. Here I cover constitutional treatment of qualifications for office, such as term limits, and the placement of conditions on candidacy such as resign-to-run statutes, civil service rules that force potential candidates to trade government employment against candidacy, and ethics restrictions that require financial disclosure as a condition of candidacy. Most teachers would skip this area in the interest of time, and I have struggled with that impulse myself. However, it is an area that year after year generates one of the best classes of the semester.

I frame these issues by presenting them to the students under the heading of the ideal of impartial public service—an idea which by itself contrasts starkly with what follows in the course, namely, the immense role of political parties in choosing candidates and structuring representation, an area in which raw partisanship based on the naked pursuit of self-interest sounds the dominant theme. Here, though, I introduce the ideal of impartial rule with Henry St. John Bolingbroke's famous essay *The Idea of a Patriot King*,¹⁸ which greatly influenced the founding generation, followed by a short excerpt from Robert Wiebe's *The Search for Order*,¹⁹ which describes the Progressive revival of the ideal of impartial governance in the early twentieth century. With the students thus prepared, I begin the class with two questions: (1) What, if anything, is at stake when we choose elected officials, and (2) What qualities do we want in elected officials? This never fails to generate an energetic and illuminating discussion. My students always have very strong opinions about the qualities candidates and elected officials ought to have, the standards of behavior by which they ought to conduct themselves, and the relationship between the personal qualities of candidates and the quality of their governance. As a result, this material never fails to produce a lively conversation that effectively lays the conceptual groundwork for contemplation of the more mundane and sometimes repetitive doctrinal issues of government power, equal protection, and free speech and association that infuse the constitutional treatment of laws regulating candidacy.

For me, these extremely positive experiences in the classroom validate my choice of approach in teaching the course. Granted, it is probably harder to make Election Law boring than many other courses. In other fields, students almost invariably experience a disappointing disjunction between their expectations for a course and the deflatingly dull reality of the pertinent legal doctrine. Tree-huggers who take Environmental Law are often disappointed to find that the course has almost nothing to say about nature but a good deal to say about the fine details of administrative law. Students with a passion for

18. HENRY ST. JOHN, VISCOUNT BOLINGBROKE, *THE IDEA OF A PATRIOT KING* (1749).

19. ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877-1920* (1967).

human rights who take Constitutional Law are invariably disappointed to find a course that devotes more attention to the crating of apples and the shape of truck mudflaps than it does to the rights of the accused.

Election Law exhibits this commonplace problem to a much lesser degree. The field is important and always topical, and the course invariably attracts students with a serious and often intense interest in democratic politics. Many of the decisions are well-known and much-discussed in public; after all, how many Supreme Court cases other than *Citizens United v. FEC* have been the subject of extended commentary by a nationally known comedian like Stephen Colbert?²⁰ Since I make a point of teaching the course during the fall of every federal election year, virtually everything I cover has some relevance to the prospects for some candidate or party that some students in the class are following enthusiastically.

It would be easy to capitulate to the topical, short-term interests of my students and permit class discussion to focus on the influence of various aspects of election law on the prospects of success for specific candidates or parties in whom they happen to take an interest. Yet by directing their attention constantly to much broader and more enduring principles of democratic theory I think I am able to accomplish something much more valuable. By demonstrating performatively, in class, that contemplation of democratic theory satisfyingly both enlivens and deepens an understanding of election law, I show them—or at least hope and aspire to show them—the significance of this body of law to the way we live as citizens of a democracy, something in which we all have an interest that is not only profound, but profoundly shared.

20. See, e.g., *Let Freedom Ka-Ching*, COLBERT NATION (Sept. 15, 2009), <http://www.colbertnation.com/the-colbert-report-videos/249055/september-15-2009/the-word---let-freedom-ka-ching>.

