

INTRODUCTION

ELECTION LAW AT PUBERTY: OPTIMISM AND WORDS OF CAUTION

*Richard L. Hasen**

After reading the rich contributions to this symposium on “Election Law as Its Own Field of Study,” no one can seriously question whether election law is a subject in its own right, related to but apart from its very different parents, constitutional law and political science: *res ipsa loquitur*.¹

Symposium participants have pointed to some of the indicia demonstrating that election law stands on its own. It is taught in many fine law schools;² it is the exclusive subject of two casebooks;³

* Associate Professor of Law, Loyola Law School. B.A., 1986, University of California, Berkeley. M.A., 1988, J.D., 1991, Ph.D., Political Science, 1992, University of California, Los Angeles. Thanks to Matthew Gorman for research assistance.

1. For those political scientists in the reading audience, *res ipsa loquitur* is the well-known tort doctrine translated as “the thing speaks for itself.” For example, suppose that a barrel falls out of a window under defendant’s control injuring plaintiff. That very act proves the defendant’s negligence—*res ipsa loquitur*—because such incidents usually do not happen in the absence of defendant’s negligence. On the doctrine generally, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39 (5th ed. 1984 & Supp. 1998). I use this bit of jargon deliberately to make a point: those of us writing for both legal scholars and social scientists should not forget to make ourselves understandable to both groups.

2. See Pamela S. Karlan, *Constitutional Law, The Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1185 n.3 (1999).

3. See Bruce E. Cain, *Election Law as a Field: A Political Scientist’s Perspective*, 32 LOY. L.A. L. REV. 1105, 1105 (1999); Daniel Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1217 (1999). The first casebook appeared in 1995. See DANIEL H. LOWENSTEIN, *ELECTION LAW—CASES AND MATERIALS* (1995). The second casebook appeared in 1998. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* (1998). Other law school classes, notably constitutional law and legislation, cover election law subjects, but with a different focus. For more on this point, see Karlan, *supra* note 2.

an Internet-based discussion group for scholars on the subject has over 150 subscribers;⁴ and the number of law review articles and symposia on the subject has mushroomed in the last decade.⁵

But perhaps an even better indicator is that the many leading scholars in the field participating in this symposium have used their contributions as an opportunity for self-reflection rather than for a self-congratulatory love fest. The luxury of self-reflection demonstrates the field's maturity.

The exercise in self-reflection also shows a remarkable degree of diversity regarding issues facing the field, beginning with its proper name. I decided to use the term "election law" in this symposium, following the title of Daniel Lowenstein's casebook.⁶ Samuel Issacharoff and Richard Pildes, co-authors—along with Pamela Karlan—of the other casebook in this field, object that the term "election law" may signal a "tedious focus on the narrow regulatory questions of most interest to political junkies."⁷ In their view, the field is about "taking democracy itself out of the background and placing it squarely at the center of our inquiries."⁸ Not coincidentally, their casebook is entitled "The Law of Democracy."⁹

4. For more information about the election law listserv see Chicago-Kent, *Election Law* (visited Apr. 5, 1999) <<http://mlm.kentlaw.edu/election-law>>.

5. According to a rough count of law review articles available on Westlaw conducted by my research assistant, approximately four and a half times the number of election law-related law review articles and six times the number of law review symposia on election law topics have appeared since 1990, as compared to the pre-1990 period.

6. Lowenstein explains more about his development of the casebook in Daniel H. Lowenstein, *Election Law as a Subject: A Subjective Account*, 32 LOY. L.A. L. REV. 1199 (1999). As a matter of full disclosure, I note that I am now the co-editor with Lowenstein of this book's annual supplement and will be co-editor of the book's second edition, tentatively due to be published in 2001.

7. Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173, 1174 (1999). Lowenstein agrees that "nuts and bolts" election law questions have increased in number, but "we do not teach these issues and we do not write about them in law reviews; not because they are not there but because, for various reasons, we do not find them sufficiently interesting." Lowenstein, *supra* note 6, at 1202.

8. Issacharoff & Pildes, *supra* note 7, at 1174.

9. ISSACHAROFF ET AL., *supra* note 3.

Political scientist Bruce Cain observes in his symposium contribution that scholars operating in this field—including Lowenstein and Karlan—have proposed broader institutional solutions to political problems than those dictated by the controversies in election law cases.¹⁰ The question, according to Cain, “is whether the field is really election law per se or whether it is political regulation.”¹¹ Finally, Roy Schotland has perhaps the most descriptive and certainly among the most amusing of titles for his course in the subject, “Ballots, Bucks, Maps, and the Law.”¹²

All of the participants agree about one thing: the study of election law serves important pedagogical purposes. Karlan, for example, shows how the study of election law can enrich thinking about constitutional law questions, and vice versa.¹³ Schotland demonstrates how election law can, among other things, help students challenge their preconceptions, partisan viewpoints, and cynicism.¹⁴ And Adam Winkler shows how election law can help us to think better about corporate law and the nature of the corporation.¹⁵

But there are more points of controversy than consensus among the scholars. For example, Michael Fitts, a scholar known for drawing on political science insights in his election law writings,¹⁶ argues that in order for courts to effectively decide election law disputes, “some type of political black box, a pragmatic and evolving political process, is ultimately necessary.”¹⁷ Yet James Gardner, a scholar whose work in the field draws upon various traditions of political

10. See Cain, *supra* note 3, at 1119.

11. *Id.*

12. Roy A. Schotland, *And for the Student? The Seven Striking Strengths of “Ballots, Bucks, Maps & the Law,”* 32 LOY. L.A. L. REV. 1227, 1227 (1999).

13. See Karlan, *supra* note 2.

14. See Schotland, *supra* note 12.

15. See Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243 (1999).

16. See, e.g., Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective On Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988) (discussing the effect that doctrinal changes advanced by civic republican writers would have on political power and control).

17. Michael A. Fitts, *Confronting the Free Will Problem in Election Law Scholarship: The Hazards of Legal Fine Tuning*, 32 LOY. L.A. L. REV. 1121, 1134 (1999).

philosophy,¹⁸ contends that “the black box method is of highly questionable utility”¹⁹ in addressing normative questions about the role of elections in American politics.

Of all the areas of disagreement and discussion in these papers, I am struck most by two divergent views on perhaps the central question facing the field: whether the study of election law holds promise to affect political change in positive ways. Some scholars in the field have used election law to discover the sometimes hidden political assumptions of judges in deciding election law cases and to propose political solutions to the legal problems they present.²⁰ Scholars who have what I will term the “optimistic” view of election law laud this role for the field, while other scholars—some of whom admittedly engage in the same practice themselves²¹—have what I will term the “cautionary” view of election law.

Daniel Ortiz, for example, falls into the optimistic camp. His paper argues that election law has moved us “away from a largely rights-based, individual-centered view of politics, to a more prag-

18. See, e.g., James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421 (1996) (arguing that deliberative democracy is largely a failure).

19. James A. Gardner, *Stop Me Before I Quantify Again: The Role of Political Science in the Study of Election Law*, 32 LOY. L.A. L. REV. 1141, 1170 (1999).

20. I would put myself in that category. My recent articles have explored explicitly how we could structure election law to better promote political equality through use of campaign finance vouchers, an end to special campaign finance law treatment for media corporations, compulsory voting laws, and an end to court protection of the two-party duopoly. See Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. (forthcoming 1999) (opposing special campaign finance law treatment for corporate-owned newspapers); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996) (advocating campaign finance vouchers); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the State to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (opposing court protection of the two-party system) [hereinafter Hasen, *Duopoly*]; Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996) (advocating compulsory voting).

21. See, e.g., Fitts, *supra* note 17, at 1137 (discussing how Fitts’s own work on political parties may help “resolve one of the central dilemmas of constitutional law—defining majority will.”).

matic and structural view of election law as a matter of institutional arrangements.”²² To Ortiz, this is a positive development: “we may hope that as election law develops as a discipline, it will lead the courts, and the courts will follow.”²³ Issacharoff and Pildes are similarly sanguine about the field’s focus: “the central question is how deep into existing practices a robust, functional, historically-aware understanding of democracy will penetrate.”²⁴

In contrast, Cain, Fitts, and Gardner suggest greater caution. Cain suggests that political scientists may have played too strong a role in—among other cases—the political party cases, “using the courts to get what cannot be achieved by normal political means.”²⁵ Fitts argues that election law may bring too much transparency to our political process, thereby undermining the process’s public legitimacy.²⁶ Gardner argues that political science analysis of election law issues can create an aura of scientific verifiability, thereby obscuring the fact that normative decisions are for courts or society to make, not for political scientists.²⁷

Whether optimism or caution are in order, scholars on both sides of the divide trace the genesis of the issue to the Warren Court, and its decision in *Baker v. Carr*²⁸ to reject Justice Frankfurter’s argument that election law issues like apportionment of legislative districts are non-justiciable political questions.²⁹ In the line of cases following *Baker*, beginning with *Reynolds v. Sims*,³⁰ the Supreme Court held that voting districts must be apportioned according to one-person, one-vote principles, rather than through an accommodation of regional interests.

22. Ortiz, *supra* note 3, at 1218.

23. *Id.* at 1226.

24. Issacharoff & Pildes, *supra* note 7, at 1183.

25. Cain, *supra* note 3, at 1118.

26. See Fitts, *supra* note 17.

27. See Gardner, *supra* note 19, at 1168. This is not the appropriate forum for me to respond to Professor Gardner’s specific critique of my work on compulsory voting. See *id.* at 1168-70. For present purposes, I will just say that there is no such thing as bad press, and at least it is better to be called a “pathologist,” *id.* at 1170, than “pathological.”

28. 369 U.S. 186 (1962).

29. See, e.g., Issacharoff & Pildes, *supra* note 7, at 1180; Cain, *supra* note 3, at 1111.

30. 377 U.S. 533 (1964).

Following these cases, we now have courts deciding whether a host of election law practices like political patronage, campaign finance regulation, ballot access provisions, and congressional term limits are consistent with various constitutional provisions³¹ such as the Equal Protection Clause, the First Amendment, and the Qualifications Clause.³²

To borrow from Ortiz, where the courts have led, election law scholars surely have followed. And so scholars have debated the merits of the Court's election law decisions, beginning with whether the Court in *Reynolds* should have imposed strict formal equality in the creation of electoral districts.³³ Similarly, when the Supreme Court recently declared that states may enact ballot access restrictions and other restrictions on third parties in order to protect "a healthy two-party system,"³⁴ it did not take election law scholars too long to examine the holding. The more critical scholars declare it a protection of the Democratic and Republican party "duopoly"³⁵ or a political "lock-up."³⁶

The field of election law is driven not only by these court cases, however. Lowenstein's article demonstrates that it is also driven by

31. Thus far, the Supreme Court has not revisited its pre-Warren Court precedent that challenges to the initiative process under the Guarantee Clause are non-justiciable. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). This holding also has been subject to criticism by election law scholars. See ISSACHAROFF ET AL., *supra* note 3, at 669-75; LOWENSTEIN, *supra* note 3, at 284-85.

32. Among the original modern cases on these subjects are: *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Qualifications Clause challenge to a term limits law); *Buckley v. Valeo*, 424 U.S. 1 (1976) (First Amendment and Equal Protection challenges to campaign finance regulations); *Elrod v. Burns*, 427 U.S. 347 (1976) (First Amendment challenge to patronage practices); *Williams v. Rhodes*, 393 U.S. 23 (1968) (First Amendment challenges to ballot access laws).

33. See, e.g., Cain, *supra* note 3, at 1110-11 (discussing the *Reynolds*'s unintended consequence of preventing metropolitan traffic control plan in the San Francisco Bay Area).

34. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997).

35. Hasen, *Duopoly*, *supra* note 20, at 332.

36. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 683-87 (1998).

“the evolving interests and styles of legal academics and political scientists.”³⁷ Does that mean that academics are too dangerous to be trusted with election law scholarship?

As dangerous as it might be to have law professors and political scientists debating the merits of election law judicial decisions, the two alternatives are worse. One alternative is to push the cautionary view to its logical limit, and say that election law issues involve normative decisions to be made by courts without second-guessing by scholars. A second alternative is to return to an era when these questions were non-justiciable, in effect leaving these questions to the outcome of political struggles in the legislative and executive branches.

Neither of these alternatives is politically realistic or normatively palatable. Consider the first alternative, abandoning the critical enterprise of election law. As bad as scholars may be at discerning how election laws affect political outcomes, it is hard to believe that most judges would make better decisions on these issues in a vacuum. In fact, judges often rely upon their unstated understanding of political science in making their decisions, as the Supreme Court apparently did in its recent decision that political stability could be enhanced by a healthy two-party system.³⁸ It is better that election law scholars explore those assumptions and make them transparent to judges who will revisit these issues at a later time.

Nor is a return to non-justiciability of election law issues likely or desirable.³⁹ *Baker* let the genie out of the bottle, or to use another legal metaphor, after *Baker* we are no longer in a position to unring the bell. What would happen to our democratic process if courts were to declare that they would no longer adjudicate a claim that a legislature passed a statute keeping a political party off the ballot

37. Lowenstein, *supra* note 6, at 1211.

38. See Hasen, *Duopoly*, *supra* note 20, at 332 (noting that the Supreme Court decision in *Timmons* “seems to reflect an uncritical reliance on a substantial normative political science literature, the ‘responsible party government’ position, that argues for protection of the two-party system”).

39. Only Justice Thomas in recent years has suggested a return to non-justiciability of election law issues. See *Holder v. Hall*, 512 U.S. 874, 913 (1994) (Thomas, J., concurring) (“We would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America.”).

because the members of the legislature do not want political competition?⁴⁰ What if the courts would no longer adjudicate whether a school board could decide to exclude some adult citizen residents from voting in school board elections on grounds that they did not have enough of a stake or interest in the election?⁴¹ Or, what if the courts would no longer adjudicate whether a public employee working for the sheriff's department may be fired because the employee is a Republican and the new sheriff is a Democrat?⁴²

We would be worse off in a system without judicial review of election law cases even if a court would have decided most of these cases against the complaining party: "getting one's day in court" is part of the remedy itself. But in any case, election law scholars then would bring their analyses to bear on the political branches of government, especially to the people in those states with an initiative process. Whether the political process would self-correct some of its greater abuses is an open question, but election law scholarship would remain a necessary component in any self-correction.

Consequently, no matter what happens, election law scholars do not need to look for another line of work. Already there are predictions of a litigation explosion following the next round of redistricting after the 2000 census.⁴³ Other issues, such as campaign finance and term limits, continue to be hotly debated in the courts, legislatures, and by the people through the initiative process.⁴⁴

The cautionary words of some symposium participants are worth heeding, but only up to a point. To the extent that courts consider the arguments of election law scholars—even scholars urging caution⁴⁵—we have a responsibility to recognize the limitations in

40. See *Williams*, 393 U.S. at 34.

41. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622 (1969).

42. See *Elrod*, 427 U.S. at 347.

43. See Pamela S. Karlan, *The Fire Next Time: Reapportionment after the 2000 Census*, 50 STAN. L. REV. 731, 731 (1998).

44. For a look at the current issues facing courts in the election law area, see DANIEL H. LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: 1998-99 SUPPLEMENT (1998).

45. Justice Scalia, for example, cited Professor Fitts's work in arguing that patronage practices should be upheld as constitutional because the practice arguably helps the two-party system. See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) (citing Michael A. Fitts, *The*

our ability both to accurately predict the outcome of election law changes and to provide normative justifications for one or another view of the law.

But I remain in the optimists' camp, believing that the field—whatever we should call it—can be especially useful in fulfilling the Warren Court's promise of greater political equality. Caution can be especially dangerous in promoting inertia and discouraging innovation. Caution in election law scholarship counsels against thinking creatively and counter-intuitively about subjects central to the functioning and fairness of the American polity.

I propose that we reconvene this symposium in ten years to see how election law has progressed from puberty to adulthood—and perhaps to see how we have progressed to middle age and beyond, as well. Let's throw caution to the wind.