

## AND FOR THE STUDENT? THE SEVEN STRIKING STRENGTHS OF “BALLOTS, BUCKS, MAPS & THE LAW”

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There's no free lunch at the curriculum table: each course has strengths and weaknesses, every coin has two sides, but this course's strengths are unusual enough to merit focus. I leave it to others to explore the weaknesses and so help us improve on those.<sup>1</sup> Whether or not one teacher's focus converts any new believers, it may stir useful exchange among people already doing this course. I emphasize what this course offers students.

### I. A CHALLENGE TO PRECONCEPTIONS AND POLARITIES

#### *A. A Preconception that Goes Beyond Election Law: On Law and Ethnic Differences*

In most courses, many students begin with few preconceptions, let alone feelings. For example, in Administrative Law, some students may be anti-regulation or pro-consumer, but few will have strong feelings. In Criminal Law, many students start with significant pro- or anti-police attitudes. In Election Law, as in any course that deals with legislation regarding ethnic issues, many students start out with firm positions on whether the Constitution is “color-blind.” Few concrete encounters with that question are as potent for exploring how the government approaches and should approach racial differences as the Voting Rights Act (“VRA”)<sup>2</sup> and the judici-

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1. I note only one weakness: the course's tendency to bring out partisan and similar biases. The value of openness probably makes that a strength when it comes to the student, but possible bias wants full attention when it comes to the teacher or casebook editor.

2. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified

ary's annual contests over it.

Election Law provides an opportunity to re-examine what one means by "affirmative action." Districting is not like the simple polarity of some people being favored over others, as in for example, employment selection or college admission. Rather, districting involves complex polycentricity. The issue becomes whether some district lines may be drawn to create a majority of people from one or more ethnic minorities, or whether ethnicity is the one characteristic that must be segregated away from the varied array of districting factors, such as community of interest and partisanship. Unlike the color-blind selection of individuals for a limited number of jobs, where for each winner there is a loser, most districts likely include some voters who differ from their "neighbors" in ways that make them a relatively distinct minority.

The VRA's history is clear. Few if any students are surprised by the history that led to the VRA. Many, however, are surprised by the post-1965 history of efforts to evade the VRA, such as the number of jurisdictions that moved from single-member to at-large districts or from elective to appointive offices. In addition, a number of districts employed a panoply of obstacles to the VRA. These obstacles, exposed in the 1981 hearings on re-enacting the VRA, so outraged Henry Hyde that his committee approved strengthening, not only re-enacting, by a vote of twenty-five to one.<sup>3</sup> Perhaps these recent events are surprising because even after the VRA was passed, fueled by such strong national consensus, there was widespread resistance although the resisters had to realize that their efforts could succeed for at most only brief periods. This relatively recent history tests the view that today racism is behind us. Revealingly, some students who are unsympathetic to VRA districting have a hard time keeping in mind that a section 2<sup>4</sup> suit cannot be successful without proof of the denial of equal opportunity. The history and continuing evidence of

discrimination provide unforgettable examples of the ways in which

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as amended at 42 U.S.C. § 1971, 1973 to 1973bb-1 (1994)).

3. See MICHAEL PERTSCHUK, *GIANT KILLERS* 159, 162, 179 (1986).

4. See Voting Rights Act § 2, 79 Stat. at 437 (prohibiting the abridgment of voting rights by reason of race and color).

those who had power used the law to sustain it.<sup>5</sup>

Whether one prefers color-blind law or instead believes that that preference is sheer blindness, one confronts the fact that with our “rainbow” population, VRA battles are often not as initially imagined—between better-off whites and poorer blacks. Rather, these battles are often between blacks and Hispanics, or between poor whites and poor blacks, or between Caribbean blacks and other blacks. In addition, even within a cohesive ethnic group there may be sharp differences on which remedy will be more fruitful for them. The differences turn on, for example, whether to create one majority-minority district or two “influence” districts.<sup>6</sup>

Another shift from polarity to complexity is that some minority advocates attack the great increase in minority representation that the VRA has produced and deem it insufficient change. That same increase, however, is under attack by various other groups as actually reducing minority power by isolating minority representatives.

One last value in examining districting is that the problem of drawing district lines forces students from the happy array of abstract criteria to Sophie’s Choice-type ranking. We begin with the familiar exaltation of contiguity and compactness, and of all feasible adher-

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5. Sympathizing with an oppressed minority does not require being smug about the majorities who fight to protect their positions. No one should dismiss the resistance to the VRA as simple racism. A major message from this course is that all majorities, not merely racial majorities, have an understandable preference for the status quo.

A leading Mississippi segregationist described his resistance in a way that I believe anyone anywhere in the nation might use to describe their defense of their own status quo:

I was born in Mississippi and the United States and I’m the product of my heredity and education and the society in which I was raised, and I have a vested interest in that society, and I along with a million other white Mississippians will do everything in our power to protect that vested interest. It’s just as simple as that . . . . It’s primarily a struggle for power and I think we would be stupid indeed if we failed to see where the consequences of a supine surrender on our part would lead.

FRANK PARKER, BLACK VOTES COUNT 6 (1990) (quoting a speech by William J. Simmons, head of the Citizens Council, an all-white segregationist group).

6. For an outstandingly luminous account of the struggles in Georgia before and after *Miller v. Johnson*, 515 U.S. 900 (1995), see Robert A. Holmes, *Reapportionment Strategies in the 1990s: The Case of Georgia*, in RACE AND REDISTRICTING IN THE 1990S 191 (Bernard Grofman ed. 1998).

ences to political lines, geographic regions and communities of interest, and the political interests of either protecting incumbents or promoting competitiveness. The usual examination of the realities about these major criteria follows. When we try, however, to draw district lines for a hypothetical jurisdiction, we encounter acute competition, even conflict, among the criteria. This competition highlights that choice is inescapable, a loud and clear lesson that there is no free lunch and a fine posing of the oldest question of governance: who shall choose? That leads directly to the question of what should be the process for making these choices, as noted below.

*B. Preconceptions About Aspects of Election Law: Campaign Finance*

Campaign finance provides a rare instance of the need to move from myths to realities. Campaign finance is a subject on which many students have strong views, even feelings, like much of the public but naturally more intense. A few years ago, the dominant myth was that political action committees (“PACs”) have inordinate power and that it would be a good thing to abolish them or restrict them. The value for the student is far less in looking at whether abolishing them would be constitutional—though, of course, we do look—than in taking two non-legal steps. First, Sargent Friday’s step: get the facts.<sup>7</sup> For example, just roughly, how many PACs give how much money? How would you answer that question? Would you be surprised to learn that the proportion of PACs—the total number is over 4,000—that give nothing at all is thirty-five percent? That the proportion giving \$1-\$5,000 is another twenty percent? That those PACs which gave between \$250,001-\$500,000 total two percent, or from \$500,001-\$1,000,000 total one percent, or over \$1,000,000 another one percent?<sup>8</sup> The second question: do you

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7. Unless one believes that one can study the law of politics without relevant facts, the two splendid casebooks on Election Law desperately need a supplement presenting at least campaign finance data. My own supplement is available to anyone who, like me, finds existing data sources both too voluminous and, understandably, lacking in focus on aspects pertinent for the course, such as independent spending or in-state sources versus out-state sources. The data should cover at least a decade and be updated every two years.

8. See FEC data for 1997-1998 through Nov. 13, 1998, published in

consider PACs like Emily's List, or PACs that promote or oppose gun control, or promote or oppose abortion rights, or oppose or support the rights of immigrants, undesirable? Or are such PACs instead exemplary exercises of the freedom of association? There is always value in advancing thinking from lumpy, abstract aggregates like "PACs are bad" to concrete distinctions like "grass-root PACs call for a different approach."

In the past few elections, paranoia about PACs has faded and the dominant evils have become "soft money" and "issue ads." Regarding soft money, relatively little value lies in asking why it is undesirable to fund voter registration and get-out-the-vote drives. Nor do we deal much with whether banning soft money would be constitutional. Rather, the illuminating query is asking how a ban would work. If the national party committees were barred from raising soft money, how many days would pass before there would be a new Washington office for each party's "coalition of state parties," which would raise soft money directly instead of through the national party committees?<sup>9</sup>

If soft money is to be stopped, the reality of our federalism calls for one of two steps. One possible step would require that state elections be subject to the Federal Election Campaign Act<sup>10</sup> if those elections are held at the same time as federal elections. Any constitutional question regarding that approach is moot because it would give state and local office-holders a risk-free opportunity to run against the Members and so Congress will never try that route. The obvious alternative step, to follow Connecticut's lead, is to have states bar any funds that do not comply with local law for state and local elec-

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COMMITTEE FOR ECONOMIC DEVELOPMENT, INVESTING IN THE PEOPLE'S BUSINESS: A BUSINESS PROPOSAL FOR CAMPAIGN FINANCE REFORM 16 (1999). Having watched these data for a decade, I know that the proportions have changed very little, in 1987-88 they were, respectively 32%, 27%, 1.5%, 0.52% and 0.48% (Source: FEC).

9. The proposal to ban soft money by limiting the national party committees is not merely a hypothetical easy to mock. It is exactly the terms of a March 1999 reform proposal, one drawing editorial praise, made by the Committee for Economic Development. *See id.* at 34; Editorial, *Stirrings on Campaign Finance*, WASH. POST, Mar. 19, 1999, at A28.

10. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 [hereinafter FECA].

tions. Assume, for working purposes that most states take that step and stop all soft money from flowing to parties. This would stop neither “issue ads” by non-party groups nor independent spending of “hard money.” At this point, we reach the cutting-edge of current reform proposals: impose various limits on all election-related advertising during, for example, the sixty days before the election. It is too early for any consensus on the wisdom and constitutionality of such proposals.<sup>11</sup> But the point for this essay is how far the student has moved from the simplicity of “stop that evil” to the reality of how fluid are campaign funds, and how likely it is, given past experience, that new bans will mean new flows around the bans.

### *C. Summing Up the Course’s Challenge to Preconceptions*

The election law course is not unique, probably not even unusual, in taking students from a preconception that there are fairly clear problems for which fairly clear solutions are available, to a realization that the problems are complex and the solutions not obvious or they would already be in place.

## II. A CHALLENGE TO CYNICISM

Few domains of legal regulation have been as problematic as campaign finance regulation, a major segment of this course.<sup>12</sup> Many students come into Election Law believing that “what everybody does” includes illegal conduct. Many other students, who start with a rosy faith that we can reasonably and easily regulate “what everybody does,” may abandon hope as they run into the realities of the situation. For example, a recent law journal symposium about

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11. How, if political speech is at the core of the First Amendment, can one ban genuinely independent grass-roots groups from public advocacy for their concerns at the very times that matter most, and in ways they believe effective? A separate, tougher question is raised by the proposal requiring disclosure of the major sources funding such advocacy.

12. As noted in other articles in this symposium, our course is blessed with two fine casebooks. I have learned invaluablely from SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* (1998), and its newly available information and exceptional analyses. But I continue to use the impressively solid DANIEL LOWENSTEIN, *ELECTION LAW* (1995), our subject’s pioneer book, because it treats campaign finance as one of the most critical current issues in “The Law of Democracy,” one of particular interest to and value for students.

campaign finance reform was entitled “Will Anything Work?”<sup>13</sup> How far we have come from Watergate and what Bayless Manning called the “purity potlatch.”<sup>14</sup>

Consider just one of the reasons for our fall from faith, or rise to wisdom, since a generation ago: So many of us—including myself—were naive enough to believe that, for example, having an independent commission would be a crucial step forward to assure enforcement of whatever regulation<sup>15</sup> was enacted. We so totally underestimated that if the statute is written by the likes of Wayne Hayes,<sup>16</sup> the commission would have a unique structure. Common Cause described this structure most memorably in an early study entitled: “Stalled from the Start.”<sup>17</sup> The Federal Election Commission

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13. Symposium, *Campaign Finance Reform: Will Anything Work?*, 6 J. L. & POL'Y 1 (1997).

14. Or as Theodore Roosevelt put it in commenting on the 1907 financial panic: “[T]hey have passed thru the period of unreasoning trust and optimism into unreasoning distrust and pessimism.” Jean Strouse, *The Brilliant Bailout*, THE NEW YORKER, Nov. 23, 1998, at 62, 75.

15. The word “regulation,” for me and many people as old as I, is not automatically a bad word, indeed, it has many favorable connotations of protecting the public interest and promoting general welfare. I used to call my course “Election and Campaign Finance Regulation.” A few years ago I was surprised, though I should not have been, when a student who was one of that year’s most engaged class participants came to me to say “this course has a lousy title.” The course is now titled “Ballots, Bucks, Maps & the Law.”

16. Wayne Hayes was the Chairman of the House Administration Committee, from 1971 to 1976, and far from a civics-class model legislator in either policy or his use of power. He might still be in Congress if he had not hired a typist whose only reason for being hired had nothing to do with her typing.

17. See COMMON CAUSE, STALLED FROM THE START: A COMMON CAUSE STUDY OF THE FEDERAL ELECTION COMMISSION (1981). The Federal Election Commission is one of only two federal agencies with an even number of commissioners; but unlike the other one, the International Trade Commission, the FEC cannot take any action without majority approval. Going from law to experience, FEC commissioners have almost always been appointed in pairs, one from each party. To that extent, Congress has retained—or perhaps even increased—the substance of its power over appointments despite *Buckley*’s having stricken Congress’s original formal power to appoint four of the six commissioners. See *Buckley v. Valeo*, 424 U.S. 1, 140-43 (1976). Last, almost all FEC commissioners have enjoyed a consistency of reappointment that is simply unique. The record-holders were the commissioners who left in 1998, one having been appointed to the original commission in 1975, the other having served since 1978.

("FEC") does not merely have special closeness to Congress—that closeness means the FEC has special concern about incumbents' interests.<sup>18</sup>

The first reaction to discovering that the enforcement agency is as it is may be simple cynicism—"the system is loaded." But any such reaction fades as we explore the implications.

First, given that all legislators have an interest in the regulation of their campaigns that differs dramatically from their interest in, for example, securities regulation or zoning regulation, what can be done to secure effective enforcement? If we move from the federal scene to the state or local scene—for example, California's Fair Political Practices Commission or New York City's Campaign Finance Board—can we find steps that might be adopted at the federal level? To what extent do we find that more than legal steps are needed? For example, in a city, a regulatory body may be visible to the voters and likely to have members of such local repute that they bring an independence not easily provided by law.<sup>19</sup> Perhaps the difficulties

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18. As I write, concern regarding incumbent's interests is exemplified with rare clarity by a recent FEC ruling. In February 1999, the FEC ruled that a challenger cannot use any of her or his campaign funds for a personal salary, as that would be a prohibited "personal use." See *FEC Strikes a Blow Against Challengers Who Need Money to Pay Living Costs*, 20 POL. FIN. & LOBBY REP. 5 (Mar. 10, 1999). The Commission had previously deadlocked on this issue in 1992, in the face of a staff position that this use could be distinguished from general "personal use." This year, one new Republican Commissioner joined three Democratic Commissioners to form a majority. Dissenting veteran Commissioner Lee Ann Elliott wrote that the ruling left self-employed challengers at an unfair disadvantage and that any abuses could be protected against by limiting the amount of the salary to the level of pay that members of Congress enjoy. New Commissioner David Mason joined Elliott dissenting and wrote that the ruling was probably unconstitutional. Is there not sufficient reason to believe that any challenger's abusive self-compensation from campaign funds during the campaign would be taken care of by accountability to the contributors and the voters? Although that safeguard has its own limits, do they outweigh the protection this ruling gives to incumbents?

19. At least one strain of American political culture is deeply rooted in Madisonian skepticism about mechanisms that rely heavily on personal virtue; as a consequence, many Americans seem easily persuaded by the argument that truly neutral commissioners are hard to find or that the potential for abuse in systems that strive for impartiality is unacceptable.

of assuring independent regulators mean that our aspirations for what can be done at the federal level should differ from what can be done at the state or local level.

Second, given the legislators' special interest in campaign finance regulation, as we move from the structure of the enforcement agency to the substance of the statute that the agency implements, must we not stay alert for incumbent-protective provisions? Only incumbents can write laws. Perhaps this means that forms of regulation which are simple—like disclosure—and, thus, clearly visible for public accountability, need less scrutiny than forms of regulation which involve more complex judgments, like setting the level of a spending limit.

Finally, the legislators' special interest in campaign finance regulation is only one instance of their special interest in election regulation generally. When we explore, for example, ballot access regulation, we find similar tendencies to protect incumbents or their parties. One might infer that cynicism or defeatism about campaign finance regulation is unduly narrow; the flaws are inherent in all election regulation. On the other hand, one might reach new respect for the limits of law in regulating politics, and new awareness of the importance of doing as much as possible—definitely including legal regulation—to keep the political process open so that it “regulates” itself.

No one can deny the progress that has been made in campaign finance disclosure. Our first federal campaign finance disclosure requirements were enacted in 1910 in response to one of the great furors of the muckraking era.<sup>20</sup> That first statute, however, was such a sham that public pressure produced amendments only one year later. Despite these amendments, the statute remained such a sham that in 1981, the then-chairman of the FEC gave this woeful picture about the old law:

I was a personal witness to [the] lack of enforcement [before the 1971 enactment of FECA]. In the '60s I served as chief counsel for the [House] Special Committee to Investigate Campaign Expenditures. Every two years I would take

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(1992).

20. A few states had effective disclosure requirements even earlier.

a leave from my law firm in Boston and devote three months to the work of that special committee . . . . There were numerous cases where candidates spent hundreds of thousands of dollars, and [due to loopholes in the law] the reports filed would indicate expenditures of only a couple of thousand dollars.<sup>21</sup>

Disclosure is less forceful legal intervention than many people want or than we need. But recognizing its limits must not obscure how potent it is and how much public support it has. Just before the end of the 1996 presidential campaign, some misguided, hyper-legalistic souls at the Democratic National Committee announced that they were not required to file the last pre-election disclosure report. Only one or two days of front-page coverage of that decision led to its reversal. Many observers believe that in the last days of the 1996 campaign, Clinton and therefore down-ballot Democrats lost substantial support because of disclosures about contributions from allegedly foreign sources. Disclosure is not thought of as dynamite, but it works like dynamite to open the political process to public accountability.

However, settling for disclosure alone is defeatism and a declaration of despair. Surely our imagination and our nation's resources<sup>22</sup> can find ways to go beyond disclosure and address such fundamental flaws in our campaign finance system as the huge,

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21. HERBERT E. ALEXANDER & BRIAN A. HAGGERTY, *THE FEDERAL ELECTION CAMPAIGN ACT: AFTER A DECADE OF POLITICAL REFORM* 19 (Joyce J. Bartell ed., 1981) (quoting former FEC Chairman John W. McGarry). Aspects of the sham included that the disclosure requirements did not cover primaries, runoffs, or intrastate political committees. *See id.* at 15.

22. One of the best ways of putting these costs in perspective is given in 1989 testimony in the California Assembly:

Most important [of all], there must be public funding of campaigns. It is illogical to argue that taxpayer money should not be spent on campaigns. The \$79 billion now being spent [by California that year] translates into over 1/2 billion for each legislator. The financing of the total election from the general fund, even at high campaign spending levels, would cost much less than 1/10 of 1% to stimulate the sensible spending of the remaining 99.9% in the public interest.

*Is this Really Necessary?: Testimony of Prof. Robert C. Fellmeth*, 11 CAL. REG. L. REP. 19, 20 (1991).

ever-growing “incumbent-challenger gap”—the fact that so few challengers have enough funds to be viable candidates, let alone to present vigorous challenges.<sup>23</sup> Until 1986, our law provided tax credits for political contributions. The tax credit provision was repealed despite an all-out preservation effort led by the liberal Democratic Study Group working together with Representative Newt Gingrich, because it was opposed by Chairman Dan Rostenkowski—sufficient reason for sending him to jail. Tax credits could be graduated to encourage small contributors. In addition or instead of tax credits, serious proposals have been made for some system of vouchers for all registered voters. Now that the Internet facilitates buying everything imaginable, surely we can find ways to encourage broader participation in contributing to candidates, parties and political groups.

These various discoveries might be viewed as only spreading and deepening cynicism. Discovery, however, brings its own joy, and cynicism fades as we build greater understanding of the complexity of the challenge, the inescapable interrelationships of substantive law with the institutions that enforce and confront it, and the relevant surrounding culture.<sup>24</sup> Any view of law that lacks such understanding will be too fragile to stand up to experience. Cynicism is corrosive, skepticism is fruitful. Unduly rosy views and unduly dark views are disabling. Appreciating the realities about the hurdles and limits that face the application of law to politics is the first step to finding ways to overcome those hurdles and limits.<sup>25</sup> How many courses offer such opportunities for creativity?

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23. *See, e.g.*, GARY C. JACOBSEN, *THE POLITICS OF CONGRESSIONAL ELECTIONS* (1996); LARRY MAKINSON, *THE BIG PICTURE: MONEY FOLLOWS POWER SHIFT ON CAPITOL HILL* (1997).

24. For the finest example of the importance of the surrounding “culture” to how law is carried out, see ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 5-7 (1993) (describing the differences between a Northern Italy (Bologna) regional office and one in Southern Italy (Bari), both administering the same national statute).

25. The challenge facing campaign finance reform is what I call the current American Dilemma, with apologies to Gunnar Myrdal. On the one hand, we are committed to political equality, expressed most famously as “one person one vote.” *Reynolds v. Sims*, 377 U.S. 533, 558-60 (1964). On the other hand we are committed to a private enterprise economy. Although economic activity is subject to many forms of regulation, none of that regulation is aimed at

## III. PROCESS

Although all students are taught Civil Procedure and most take Criminal Procedure and Administrative Law, apparently the value of process remains elusive. The value of process “sticks to the ribs” when one encounters legislative procedures in which a legislature’s black members are excluded from the redistricting committees, or are included but not told when there are meetings.<sup>26</sup> When all the minority party members are excluded,<sup>27</sup> a debate about the value of process includes surprising elements. Some students argue that fuller process is useless because the majority will win anyway. Others argue that democracy comes down to the opportunity to debate differences openly in order to involve the public.<sup>28</sup>

Districting is a super-charged vehicle for examining how we view procedure and the relative strengths and weaknesses of different institutions. First, should a court reviewing a districting plan take into account the procedures by which it was adopted? Justices Powell and Stevens believed so.<sup>29</sup> It is attractive to think of including among the factors weighed in review of a districting that the plan was the result of not ordinary legislating but instead of “railroading” by the majority to keep its lock on power. However, when we compare why and how the Court broke into the malapportionment “lock-up,”<sup>30</sup> we find how much more problematic it would be for the federal courts to embark on reviewing legislatures’ choice of procedures.

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stopping the production of economic inequalities. It is Panglossian to believe that campaign finance law can bridge the differences between political equality and economic inequality.

26. See *Major v. Treen*, 574 F. Supp. 325, 330, 334 (E.D. La. 1983).

27. See *Davis v. Bandemer*, 478 U.S. 109 (1986). In *Davis*, the alleged partisan gerrymandering had been accomplished by “vehicle bills”—ones without content. See *id.* at 114 n.2. All members of the Conference Committee were from the majority party, although four minority party members were “advisers” without votes. See *id.*

28. For a model of openness, see Frank J. Macchiarola & Joseph G. Diaz, *Decision Making in the Redistricting Process: Approaching Fairness*, 19 J. LEGIS. 199, 202 (1993).

29. See *Davis*, 478 U.S. at 168, 175 (Powell, J., concurring in part and dissenting in part); *Karcher v. Daggett*, 462 U.S. 725, 759-61 (1983) (Stevens, J., concurring).

30. See *Baker v. Carr*, 369 U.S. 186, 192-95 (1962).

Second, even if the courts should not intervene to ensure fair, democratic process in districting, should we revise state constitutions or legislative rules to assure openness by requiring, for example, supermajority passage?<sup>31</sup> Or should we make state courts directly responsible for redistricting if the ordinary legislative process does not do the job in a timely fashion? Should we shift the process to a commission rather than the legislature? A recent study of how commission-enacted redistricting plans have fared in the 1990s suggests that such plans stand up in court better than plans produced by the ordinary political process.<sup>32</sup> Bruce Cain, as experienced and wise as anyone in these matters, argues powerfully for leaving districting to the legislature, which “cannot . . . create the comforting facade of agreement that a commission offers. It only promises a tolerant, open way for a polity to resolve its disagreements . . . a considerable achievement in itself.”<sup>33</sup> Wherever one might come out on procedures for districting, one surely comes out more conscious of how much procedure matters.

#### IV. FOUR MORE STRENGTHS IN BRIEF

##### *A. Relative Institutional Competence, as Between Courts and Legislatures, and as Between Law and Laissez Faire*

Districting is a good laboratory for this study, as just noted. Another example is who should make the rules for political parties—the national or the state legislatures, or the national or state parties? One of the glories of our pluralism and federalism is the interesting problems they generate. Consider the problem of Wisconsin’s primary elections, which originated at the beginning of this century

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31. See Bruce E. Cain, *Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist, and Reformer*, in *POLITICAL GERRYMANDERING AND THE COURTS* 117, 139 (Bernard Grofman ed., 1990).

32. See Jeffrey Kubin, *The Case for Redistricting Commissions*, 75 *TEX. L. REV.* 837, 861-72 (1997).

33. BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 191 (1984); DAVID BUTLER & BRUCE E. CAIN, *CONGRESSIONAL REDISTRICTING* (1992). “Many academics reject outright the very notion of an objectively fair redistricting process . . . . However valid their position may be, it must not be allowed to deter the reformer.” Kubin, *supra* note 32, at 839 n.10.

with Wisconsin's legendary Governor "Fightin' Bob" LaFollette.<sup>34</sup> Two sacred features of Wisconsin primaries are that they are "open"—anyone can vote in any party's primary—and that the choice of the voters in presidential primaries binds the delegates to the national convention.<sup>35</sup> When the Democratic National Committee decided that open primaries were producing results that embarrassed the national party, they promulgated a rule that either the primary could not be open or the delegates could not be bound by its results.<sup>36</sup> The Supreme Court held that a national party's rule prevailed over both a state law and local party preference.<sup>37</sup> The *La Follette* case poses several acute questions. Who is the party: the 100 members of the national committee,<sup>38</sup> at least when it comes to presidential matters, or the state party when it is their own state's primary? What are the pluses and minuses of having the diversity of state laws subject to override by whatever small national committee a party chooses to have? Should a court decide such questions, or should they be left to resolution by the political process—a federal statute, or political ferment? Consider a view from an earlier generation:

[T]he character of American federalism cannot be separated from the character of its political parties. These national parties are locally based; their supreme aim is to capture the Presidency; and to do this, given the electoral system with a state's block of electoral votes counted as a unit, the great prizes are the closely contested, populous industrial states, where racial or other minority groups may hold the balance of power. Not territorial representation but the federal structure of American parties is the nexus between federalism and the recognition of group interests.<sup>39</sup>

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34. See *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

35. See *id.* at 109-12.

36. See *id.*

37. See *id.* at 120-26.

38. Unlike the Democratic National Committee, the Republican National Committee has almost no rule-making power, which is retained by the GOP's quadrennial convention.

39. Paul Freund, *Foundations and Development of American Federalism*, in

*B. Remedies*

One of the most under-studied aspects of law, remedies are particularly worth attention in this course. The Voting Rights Act has worked a revolution in districting where there are sufficiently large and cohesive groups of minority voters. However, can nothing be done to assure electoral opportunity for smaller groups like the twenty-five percent of a district who may be Hispanic? Here we explore alternatives to America's "givens": geographic-based, single-member districting. And once again, campaign finance is a remarkable vehicle for evaluating remedies. The most oft-considered tough problem arises from the uniqueness of the electoral scene: it is not the rare campaign in which the pressure to win overrides concern about complying with campaign finance law—"so they'll call us naughty and fine us, *after* we've won." Is it feasible to expect to set and enforce fines so high that they do inhibit misconduct? Or to expect to be able to remove people from office?

Another rich problem of remedies is presented by the new Arizona and Massachusetts laws, adopted in 1998 by successful ballot propositions.<sup>40</sup> Each law provides that the agency granting public funds to qualifying candidates, will increase the grants if a "non-participating" candidate exceeds the spending limits or, in Arizona, if independent spending opposes a participating candidate or favors a non-participating candidate. Let us assume that, around three weeks before an election, a participating candidate applies for an additional grant, claiming entitlement because of a triggering event. Will the non-participating candidate—or independent spending group—have a right to participate in the decision on whether the triggering event did occur? Whatever the answer to that, will the agency's decision be subject to judicial review? If there is any agency process and/or judicial review, can the system operate in time? And if there is not agency process or at least judicial review, does the system provide due process?

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FEDERALISM AND THE NEW NATIONS OF AFRICA 160-62 (David P. Currie ed. 1964).

40. See ARIZ. REV. STAT. § 16-905 (1998); MASS. GEN. LAWS Ch. 55A § 11 (1998).

### C. *Advanced Constitutional Law*

Like courses in Church and Constitution, or Foreign Affairs and the Constitution, Election Law enriches several slices from the Constitutional Law feast. The “advanced” work is mainly two-fold: to broaden the focus from rights traditionally thought of as “individual” to evaluate “group rights” and to broaden the focus from relationships between government and individual to include the institutions of pluralism—parties and political groups. Several articles in this symposium set forth so well the methods and value of, for example, enriching law with political science. We Election Law fans and our colleagues in, say, Church and Constitution, would benefit if Constitutional Law scholars would help us compare several types of “advanced” courses in our shared domain.

### D. *Empowering*

The law that regulates politics, like much regulation<sup>41</sup> in fact supports the “establishment”—the two major parties, incumbents, and groups that enjoy substantial resources and organization. For example, simply to get a candidate on the ballot requires knowledge that is always available to major party candidates, but almost always a serious hurdle for third parties, independents, and even challengers in primaries.<sup>42</sup> Probably more than in any other law school course, students who may want to challenge the establishment are empowered, and to that extent, our open democracy is strengthened.

Can we offer more than that?

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41. As I indicated, I am old-fashioned enough to be more pro-regulation than neutral, let alone anti-regulation. *See supra* note 15. I have scoffed at those who believe that nothing works except unfettered markets and their own analytic powers. *See* Roy A. Schotland, *Overview: New Myths and Old Realities*, in LAWRENCE G. GOLDBERG & LAWRENCE J. WHITE, *THE DEREGULATION OF THE BANKING AND SECURITIES INDUSTRIES* 9 (1979).

42. *See* E. JOSHUA ROSENKRANZ, *VOTER CHOICE '96* (1996).