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978-1-107-00167-1 - Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy

Edited by Guy-Uriel E. Charles, Heather K. Gerken and Michael S. Kang

Excerpt

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Introduction

The Future of Elections Scholarship

Guy-Uriel E. Charles, Heather K. Gerken, and Michael S. Kang

Race, Reform, and the Regulation of the Electoral Process: Recurring Puzzles in American Democracy is the first volume in Cambridge University Press's Cambridge Studies in Election Law and Democracy series. It offers a critical reevaluation of three fundamental and interlocking themes in American democracy: the relationship between race and politics; the performance and reform of election systems; and the role of courts in regulating the political process. This edited volume features contributions from some of the leading voices in election law and social science. The authors address the recurring questions for American democracy and identify new challenges for the twenty-first century. They consider not just where elections scholarship and electoral policy are headed, but also suggest where scholarship and policy ought to go in the next two decades. The book thus provides intellectual guideposts for future scholarship and policy making.

Most of the democratic reform during the twentieth century – and certainly the most important reform – has related to the central subject of race. Because electoral reform and regulation of the political process have been viewed largely through the prism of race, election law and reform have been framed largely in rights-based terms. Consistent with the civil-rights paradigm, courts emerged as the primary regulatory agents of American democracy and served as the vehicle through which much of the reform of American representative institutions has occurred. During the last fifty years, courts have helped achieve progressive reform on racial equality, and these successes have legitimated the regulatory role of courts in the political process.

As American democracy has matured and racial politics have evolved, however, it may be time to consider these central themes of race, reform, and regulation in different terms. With respect to racial progress, America is increasingly a multiracial society, and even the status of African Americans within American politics has changed. The approach that was effective when black-white relations and de jure discrimination were the dominant paradigms may require retooling as we consider

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questions of equality going forward. Electoral regulation presents a similar set of questions going forward. As we move away from the civil-rights paradigm and regulation centered largely around race, we may find that courts should play a less central role in regulating politics – something that would require us to develop new regulatory strategies and institutions for policing our democracy. Finally, whereas electoral reform has always faced substantial challenges, those challenges may be more acute when courts are not driving reform and the case for change turns largely on good-governance arguments rather than equality rationales. Here again, the twenty-first century presents new puzzles for those interested in election law and policy.

This volume is divided into three sections, each featuring some of the most profound thinkers in their fields. The first section addresses race and politics in the twenty-first century in the age of Obama. The second section addresses the proper role of courts in the regulation of the political process, particularly as the central focus of election law may be shifting away from the traditional civil-rights paradigm. Finally, the third section addresses the challenges of evaluating election performance and managing electoral reform going forward.

RACE AND POLITICS

Race has long been central to the study of American democracy. The most important democratic reforms of the twentieth century have been driven by concerns over racial equality. Nonetheless, with the election of Barack Obama and continuing challenges to the Voting Rights Act, we are entering a new pivotal period in American law and racial politics. As Jennifer Hochschild points out in her introduction to this section, two important questions face scholars today: (1) Is racial and ethnic stratification changing? (2) What should we do about change or its absence?

Richard Pildes and Pamela Karlan take these questions on directly while offering quite different answers. Pildes argues that times have changed sufficiently to warrant a new approach to voting-rights legislation. He warns against democratic design strategies that may entrench ethnic identities and advocates a dynamic approach to institutional design, one that allows politics to adapt to changes in ethnic and racial identification. In keeping with this view, he argues, those who care about racial equality should now focus on problems – such as felon disenfranchisement and badly run elections – that affect all groups but may have a disproportionate effect on racial minorities.

Karlan, in contrast, emphasizes continuity over change. Insisting on the persistence of racial bloc voting and local discrimination, she argues for a more muscular Voting Rights Act and greater emphasis on policing racial discrimination per se. She argues that Barack Obama's election, far from signifying the obsolescence of traditional voting-rights enforcement, is a timely opportunity for redefining it. She thus calls for courts to imagine the Voting Rights Act not as a strategy for getting us to "normal politics," but as an integral feature of "normal politics."

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Vincent Hutchings and his coauthors contribute to this debate by helping identify what we know and don't know about the existing state of racial and ethnic affairs. They negotiate the change/continuity theme by helping us move beyond the black-white paradigm that has dominated racial discourse, by describing the dimensions of intergroup conflict in a multiracial America, and by reminding us of the continued relevance of racial prejudice. As Hochschild points out, this study answers some question and raises many others about interracial rivalries and the notion of linked fate.

COURTS AND THE REGULATION OF THE ELECTORAL PROCESS

One underappreciated legacy of the Voting Rights Act is that most efforts to regulate the electoral process have focused on race and thus been framed in rights-based terms, thereby making courts the central regulatory institutions of American democracy. As American election law has matured, racial politics have evolved, and new regulatory challenges have emerged, some scholars have begun to think of regulation in different terms.

As David Schleicher details in his mapping of "election law's interior," many scholars have begun to think of electoral regulation in structural or institutional terms, and the field has thus taken what Heather Gerken and Michael Kang call an "institutional turn." More than a decade ago, two of this book's contributors, Samuel Issacharoff and Richard Pildes, called on courts and scholars to think of election law in structural rather than rights-based terms. As Schleicher points out, however, in the wake of that important debate, the field's attention turned elsewhere. As a result, in recent years, not much new ground was broken in thinking about the appropriate strategies for regulating the political process. The work here, as Schleicher explains, begins to sketch new paths for research and thus "add[s] to the structural picture" that was partially sketched a decade ago.

Gerken and Kang argue that we should turn away from courts as political regulators and instead focus on strategies that allow us to harness politics to fix politics. They propose a variety of "hard" and "soft" approaches for smoothing the terrain on which reform battles are fought and making genuine reform possible. Pulling together a variety of ideas, including many of their own, Gerken and Kang offer an intellectual framework for future research in this area.

Sam Issacharoff examines electoral regulation from a different angle by analyzing what role courts play in regulating politics in transitional democracies. After examining the use of specialized constitutional courts in other countries, Issacharoff expresses some optimism about the ability of these courts to structure the arena in which political competition takes place. Even though Issacharoff is more optimistic about the role courts can play in this context than Gerken and Kang are in the American context, he too conceives of the courts' role in decidedly structural terms.

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Rick Hasen, a long-time foe of the structural approach, nonetheless finds some common ground with Gerken and Kang while indirectly raising questions about Issacharoff's claims. Citing a dramatic increase in election law litigation as cause for alarm, Hasen joins Gerken and Kang in questioning the current reliance on courts as the primary regulators of the political process. Relying on work on the attitudinal model of judging, Hasen is quite pessimistic about the prospect of leaving it to judges to determine the structure of electoral regulations. Hasen is also skeptical, however, of other regulatory approaches, including many of those proposed by Gerken and Kang.

Christopher Elmendorf offers still another angle on the role courts can and should play in regulating electoral politics. The Supreme Court often relies on notions of legitimacy in justifying its regulatory choices. Elmendorf is sympathetic to the normative account one might offer for this practice. But his survey of existing work suggests that the Court is simply mistaken to think that there is a relationship between perceptions of legitimacy and electoral regulation. Elmendorf then considers whether and under what circumstances legitimacy ought to play a role in judicial regulation, identifying empirical and normative work that remains to be done on this question.

ELECTION PERFORMANCE AND REFORM

The last set of papers addresses the challenges of evaluating election performance and managing electoral reform. As Alex Keyssar observes in his introduction, even in the wake of the 2000 election fiasco, the pace of reform in the United States has been remarkably slow. Recent election controversies have revealed the ugly underbelly of our election system and raise serious questions about what we know and don't know about how well our election system is functioning. The papers in this section thus center on two key questions: How do we acquire information to evaluate our election system and why has it been so hard to reform it?

Archon Fung pairs a proposal for evaluating our election system with a strategy for reforming it. Based on the success of sites like *fixmystreet.com*, Fung has created *myfairelection.com*, which allows voters to report on problems they encountered when casting a ballot. This real-time, crowd-sourcing solution makes it possible for everyday citizens to monitor how well the election system is working. Were such an approach to catch hold, Fung's idea would not just allow us to identify where problems exist in our system, but make those problems visible to voters even in the absence of the type of electoral disaster we saw in Florida in 2000 and Ohio in 2004.

Joshua Fougere, Steve Ansolabehere, and Nate Persily examine American attitudes toward redistricting and find that most people know very little about how districts are drawn or why districting matters. They thus identify one of the key obstacles to reform: voters' lack of information about basic reform issues. The authors also suggest, however, that when voters are informed about how districting works, they

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object to the self-dealing inherent in the system and favor a nonpartisan districting process.

Alan Gerber considers the question of voter apathy, examining why voters turn out and how we might encourage them to do so. Reporting on an important methodological advance in the area, Gerber suggests the role that social pressure can play an important role in encouraging people to vote.

Finally, Edward Foley sketches a reform agenda for the next decade, a plan for “state of the art” election law by the year 2020 and describes its key features, including a state-of-the-art election infrastructure and a variety of good-governance reforms. Foley’s paper shows us just how much there is to do to improve our election system.

CONCLUSION

Bruce Cain, in his concluding essay, provides a broad overview of the basic questions the field faces in thinking about reform. Cain argues that most reform proposals can be classified as demanding “more democracy” or “less” and insists that the easy assumption that more democracy is better is mistaken. Instead, he shows that election reform inevitably involves a trade-off between important democratic values. Cain then maps the field along these dimensions, offering some concluding thoughts on the papers in this volume and what he calls “the promise of new election law institutionalism.”

It is our expectation that this volume will provide readers with a critical basis for appreciating and assessing the capacity and limits of race, reform, and regulation as the central organizing themes for understanding American democracy.