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2013

## Political Law

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### Recommended Citation

Spencer Overton, Political Law, 81 GEO. WASH. L. REV. 1783 (2013).

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# FOREWORD

## Political Law

*Spencer Overton\**

### ABSTRACT

*Traditional “election law” or “the law of democracy” concentrated largely on constitutional analysis by judicial actors. That narrow focus, however, distorted scholars’ understanding of the problems confronting democracy and possible solutions. This Foreword proposes that the field should be understood more properly as “political law,” which includes the study of the activities not only of judges but also of policymakers, regulators, and practitioners. The Foreword also examines the concept of “political law community”—a concentration of scholars, judges, policymakers, regulators, and practitioners interested in the subject that can give rise to innovation and creativity. Finally, the Foreword reviews the George Washington University Law School’s Political Law Symposium, which brought together a diverse group in an attempt both to advance political law as a field and to build political law community.*

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\* Professor of Law and Director of the Political Law Studies Initiative, The George Washington University Law School. Bruce Cain, Heather Gerken, Michael Kang, Dara Lindenbaum, and William McGinley provided comments that helped develop my thinking. Jason Grimes and Lyndsay Steinmetz provided invaluable research assistance, and Rachel Applestein, Charles Davis, Kathleen Stoughton, and Stephanie Trifone played key roles in organizing the symposium.

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#### INTRODUCTION

When I began organizing the Political Law Studies Initiative at The George Washington University Law School,<sup>1</sup> I sought advice from some of the nation's leading political law practitioners, policymakers, regulators, and advocates. Many explained to me the disconnect between their work and election law as traditionally defined by the legal academy. It struck me that, unlike fields such as antitrust, intellectual property, securities, and tax, where scholars study the work not only of judges but also of policymakers, regulators, and practitioners, election law has focused predominantly on the work of the judiciary.

This Foreword discusses “political law,” which is broader than traditional “election law.” The study of U.S. Supreme Court decisions about campaign finance, redistricting, and voting rights is at the heart of both political law and election law. Political law, however, also encompasses the study of the activities of a broader array of legal actors, such as legislators and regulators, nonprofit organization advocates, and practitioners working for law firms, political parties, corporations, trade associations, and unions. Further, political law covers nonelection topics such as lobbying, pay-to-play, and gift regulations.<sup>2</sup>

Part I of this Foreword asserts that the legal academy's focus on traditional, court-centered election law is too limiting and proposes that scholars broaden their scope of inquiry beyond the judiciary. Part II examines the concept of political law community—the potential for innovation and creativity that can arise from a geographic concentration of scholars, policymakers, regulators, practitioners, judges, and advocates interested in the subject. Part III reviews The George Washington University Law School's advancement of political law as a

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<sup>1</sup> The Political Law Studies Initiative at The George Washington University Law School provides a political law curriculum for students and various lectures, panels, and social events for government officials, practitioners, policy advocates, law students, and scholars to discuss ideas and develop the political law field. See *About the Political Law Studies Initiative*, GW LAW, [http://www.law.gwu.edu/Academics/research\\_centers/politicallaw/Pages/AboutPLSI.aspx](http://www.law.gwu.edu/Academics/research_centers/politicallaw/Pages/AboutPLSI.aspx) (last visited Sep. 9, 2013).

<sup>2</sup> Many large law firms in Washington, D.C. call their practice groups in this area “political law.” See Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1107, 1118–19 (1999) (articulating the “potential benefits to both the legal scholars and political scientists if we thought of the field as *political regulation* rather than electoral law”) (emphasis added). I prefer the term “political law” to “political regulation” because I consider judges to be only a part of the “law.”

field and its attempt to build a community through its Political Law Symposium, which brought together leaders in the field immediately following the 2012 general election.

### I. TRADITIONAL ELECTION LAW VS. POLITICAL LAW

Election law was first defined as a subject in 1983,<sup>3</sup> and it grew out of constitutional law and political science.<sup>4</sup> Judicial opinions of the U.S. Supreme Court have been the central focus of election law,<sup>5</sup> and the enforcement of this rough boundary sparked a debate over the name of the field. Some follow the title of Professor Daniel Lowenstein's original textbook, *Election Law*.<sup>6</sup> Others, such as Professors Samuel Issacharoff and Richard Pildes, prefer the term "Law of Democracy," complaining that the term "election law" is too limited:

It narrows the field to microscopic regulatory details, as if the more fundamental choices about conceptions of democracy that underlie particular regulatory policies are fixed. "Election law" runs the risk of signaling to potential newcomers a tedious focus on the narrow regulatory questions of most interest to political junkies and also of encouraging a conceptualization of the field that meets these overly narrow expectations.

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<sup>3</sup> Paul Gronke, *When and How to Teach Election Law in the Undergraduate Classroom*, 56 ST. LOUIS U. L.J. 735, 737 (2012) (noting that "Election Law . . . was first claimed as a subject in 1983" (internal quotation marks omitted)).

<sup>4</sup> Richard L. Hasen, *Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1095 (1999) (describing election law as "related to but apart from its very different parents, constitutional law and political science"); see also Daniel H. Lowenstein, *Election Law as a Subject—A Subjective Account*, 32 LOY. L.A. L. REV. 1199, 1201 (1999) ("The key events in [the growth of election law] were the constitutionalization by the Supreme Court of representation in the early 1960s; the enactment of the Voting Rights Act in 1965 and its application by the Supreme Court . . .; and the enactment of the 1974 amendments to the Federal Election Campaign Act and of comparable legislation in most of the states." (footnotes omitted)).

<sup>5</sup> See e.g., Cain, *supra* note 2, at 1118 ("As defined by the forum and in the casebooks, the field under discussion is election law. As such, it limits the focus to the Court's decisions in electoral topics."); Hasen, *supra* note 4, at 1100 (observing that "where the courts have led, election law scholars surely have followed").

<sup>6</sup> See e.g., Hasen, *supra* note 4, at 1096 ("[Hasen] decided to use the term 'election law' in this symposium, following the title of Daniel Lowenstein's casebook."). Richard Hasen is also the founder of the Election Law Listserv and the Election Law Blog, the cofounder of the Election Law Journal, and a coauthor with Dan Lowenstein and Dan Tokaji on the *Election Law* textbook. See DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* (5th ed. 2012); Richard Hasen, *ELECTION L. BLOG*, <http://electionlawblog.org/> (last visited Sep. 9, 2013); Richard L. Hasen, *SCH. OF L. U.C. IRVINE*, <http://www.law.uci.edu/faculty/full-time/hasen/> (last visited Sep. 9, 2013).

Ultimately our concern is with the structural aspects of constitutional law, not the regulatory arcana of elections.<sup>7</sup>

The field's early focus on constitutional law is understandable. New fields need borders, both to facilitate meaningful conversations among participants and to define themselves to outsiders. The study of a series of U.S. Supreme Court decisions attracted the attention of two groups essential to the growth of an emerging field: student editors who select law review articles for publication and faculty members who vote on appointment and tenure. Just as Chief Justice John Marshall sustained the Court in its infancy by clearly distinguishing law from politics,<sup>8</sup> election law scholars distinguished their work from that of bureaucrats and political operatives who craft and enforce the bulk of the rules governing elections. Election law scholars added value to the development of law by flagging those jurists who strayed too far into the political thicket without neutral principles,<sup>9</sup> or by explaining how courts could more aggressively police the political process.

Election law, however, has matured beyond the need to cloak itself in U.S. Supreme Court jurisprudence. The area now has various scholars, courses,<sup>10</sup> and centers at major law schools.<sup>11</sup> It is docu-

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<sup>7</sup> Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173, 1174, 1183 (1999).

<sup>8</sup> Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 352 (1982) (book review) (describing the view that Marshall and the Federalist judiciary responded to "efforts at impeachment and alteration of the organization, jurisdiction, and administration of the Court by removing law from the realm of politics" (citing 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *THE OLIVER WENDELL HOLMES DEVISE: THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1801-15*, at 396-97 (Paul A. Freund ed., 1981))).

<sup>9</sup> See Hasen, *supra* note 4, at 1101 (asserting that alternatives to "law professors and political scientists debating the merits of election law judicial decisions" include judicial decisions unchecked by scholars or returning to "an era when these questions were non-justiciable" and leaving them to the legislative and executive branches).

<sup>10</sup> A listing of over 100 professors who teach a form of election law is currently available at <http://electionlawblog.org/archives/database.xls>.

<sup>11</sup> Such centers include: the Brennan Center for Justice at New York University School of Law, which has a Democracy Program that focuses on electoral reform, including voter registration, redistricting, and campaign finance, see *Programs*, BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/programs> (last visited Sep. 9, 2013); the Center for Law and Politics at Columbia Law School, which features a speaker series, research projects, and policy work that focus on the legal regulation of politics, *Center for Law and Politics*, COLUM. L. SCH., <http://www.law.columbia.edu/centers/law-politics> (last visited Aug. 23, 2013); Election Law @ Moritz at The Ohio State University Moritz College of Law, which offers expert commentary and an online repository of documents on election law issues, see *About EL@M*, ELECTION L. @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/about.php> (last visited Sep. 9, 2013); the Election Law Program at William & Mary Law School, which provides assistance to state court judges to resolve

mented by four casebooks,<sup>12</sup> an online listserv community and blog,<sup>13</sup> a dedicated peer-reviewed journal,<sup>14</sup> and regular law review symposia.<sup>15</sup>

*The activities of nonjudicial actors deserve serious study by legal scholars.*<sup>16</sup>

Looking at election questions largely through a judicial prism distorts our understanding of the problems that confront democracy and possible solutions to them. Judges are most comfortable with disputes that arise from discrete parties rather than broader questions about democratic structure, and they generally push election law claims into a conventional “individual rights versus state interest” paradigm.<sup>17</sup> None of the members of the current U.S. Supreme Court have served

election law disputes, *Election Law Program*, WM. & MARY L. SCH., <https://law.wm.edu/academics/intellecualife/researchcenters/electionlaw/index.php> (last visited Sep. 9, 2013); and the Political Law Studies Initiative at The George Washington University Law School, which provides an intensive political law curriculum and a neutral venue for government officials, practitioners, policy advocates, law students, and scholars to discuss ideas and develop the political law field, see *About the Political Law Studies Initiative*, *supra* note 1.

<sup>12</sup> MICHAEL DIMINO, BRADLEY SMITH & MICHAEL SOLIMINE, *VOTING RIGHTS AND ELECTION LAW* (2010); JAMES A. GARDNER & GUY-URIEL CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* (2012); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (4th ed. 2012); LOWENSTEIN ET AL, *supra* note 6.

<sup>13</sup> See Richard Hasen, *ELECTION L. BLOG*, *supra* note 6. The Election Law Listserv, managed by Daniel Lowenstein and Richard Hasen, is a forum for general discussion of substantive issues related to election law and serves as a place where subscribers can discuss ideas they have for scholarship, works in progress, and problems they are encountering in teaching and conducting research. *LAW-ELECTION—ELECTION L.*, <http://department-lists.uci.edu/mailman/listinfo/law-election> (last visited Sep. 9, 2013).

<sup>14</sup> *Election Law Journal: Rules, Politics, and Policy*, founded by Daniel Lowenstein and Richard Hasen and edited by Paul Gronke and Daniel P. Tokaji, is the leading peer-reviewed journal dedicated to up-to-date coverage and analysis of election law issues. See *Election Law Journal: Rules, Politics, and Policy*, MARY ANN LIEBERT, INC. PUBLISHERS, <http://www.liebertpub.com/ELJ> (last visited Sep. 9, 2013).

<sup>15</sup> See, e.g., Symposium, *Election Law as Its Own Field of Study*, 32 *LOY. L.A. L. REV.* 1095–1272 (1999); Symposium, *Teaching Election Law*, 56 *ST. LOUIS U. L.J.* 665–826 (2012).

<sup>16</sup> See Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY* 86, 89 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) (“Our primary complaint . . . is that election scholars, unsurprisingly, continue to look to the courts for structural solutions.”); Cain, *supra* note 2, at 1118–19 (asserting that election law limits the focus of the field to the Court’s decisions in electoral topics, and proposing that the field be thought of as “political regulation” to open up the field to more interdisciplinary research and to broaden the range of solutions to problems).

<sup>17</sup> Heather K. Gerken & Michael S. Kang, *Déjà Vu All Over Again: Courts, Corporate Law, and Election Law*, 126 *HARV. L. REV. F.* 86, 88 (2013) [hereinafter Gerken & Kang, *Déjà Vu All Over Again*], [http://www.harvardlawreview.org/media/pdf/forvol126\\_gerken\\_kang.pdf](http://www.harvardlawreview.org/media/pdf/forvol126_gerken_kang.pdf) (“Judges aren’t particularly adept at adjudicating the inherently structural claims at stake in

as an elected official, and many federal judges lack the real world political experience or the empirical political science training to grapple with thorny political questions.<sup>18</sup>

We deceive ourselves if we believe judicial actors make real “law” while dismissing the directives of other actors as mere “politics.” Although judges espouse a patina of neutrality, their decisions are often based upon subjective assumptions about democracy.<sup>19</sup> Why is the Court’s evolving definition of “corruption”—from a concept as expansive as “buying access” to a more stringent “quid pro quo” standard<sup>20</sup>—any less political than the passage of campaign finance restrictions by the legislature? Several other political judgments exist, such as determining the pervasiveness of voting discrimination, the burden of photo identification, and whether impermissible entrenchment warrants judicial invalidation of a campaign finance law or a gerrymandered legislative district.

Those who envision election law as applied constitutional law should appreciate that courts are not the sole constitutional actors.<sup>21</sup> The U.S. Constitution explicitly designates regulatory powers over elections to the states and to Congress,<sup>22</sup> which in turn have delegated power to various public agencies and private actors. All of these entities produce the bulk of the decisions that make constitutional principles meaningful to average citizens.

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election law cases. . . [T]hey often prefer to render highly formalistic opinions in the language of individual rights.”).

<sup>18</sup> *Id.* at 88 (observing that “[judges] don’t possess the training to judge, let alone manage, politics”).

<sup>19</sup> Nedelsky, *supra* note 8, at 359–60 (“The language of law is the language of individual rights, of neutral and immutable principles. It hides the assumptions, values, and judgments about the nature of freedom and the public good that underlie the conception of rights. . . [I]t removes or obscures aspects of class or social conflict.”).

<sup>20</sup> See *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (explaining that political corruption is limited to quid pro quo corruption and does not encompass “influence over or access to elected officials”).

<sup>21</sup> See Pamela S. Karlan, *Constitutional Law, the Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1196 (1999) (“The law governing politics is a form of applied constitutional law . . . .”); see also Issacharoff & Pildes, *supra* note 7, at 1183 (“Approaching the law of democracy from this vantage point [of the structural aspects of constitutional law] makes the field . . . a body of ideas that reflect the meaning and assumptions of constitutional law itself.”); Richard H. Pildes, *The Supreme Court: 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 31 (2004) (asserting that “issues concerning the design of democratic institutions and the central processes of democracy have increasingly become questions of constitutional law”). See generally James A. Gardner, *Election Law as Applied Democratic Theory*, 56 ST. LOUIS U. L.J. 689 (2012).

<sup>22</sup> U.S. CONST. art. 1, § 4, cl. 1.

Private practitioners, for example, petition the Federal Election Commission (“FEC”) for a ruling on whether a federal independent expenditure committee may accept contributions unlimited in size (thus creating the so-called “Super PAC”),<sup>23</sup> or whether a federal campaign may accept small grassroots contributions via text messaging.<sup>24</sup> State legislatures, secretaries of state, and county election boards and clerks establish rules and allocate resources in ways that determine the ease with which citizens may cast a ballot.

While it may be easier to criticize judges because they are generalists with burgeoning dockets who lack the time, expertise, or incentives to respond, nonjudicial decisionmakers may be a more engaged audience, and they may have more to teach scholars. Nonjudicial actors—and their incentives, strategies, behavior, legal directives, and interactions—provide a more complete understanding of how democratic principles are actually manifested.<sup>25</sup>

We limit the scope, depth, and significance of our scholarship when we focus solely on judges and fail to look for answers elsewhere. The focus on federal judges prevents us from distinguishing between problems best resolved by courts and those best resolved by other institutions.<sup>26</sup> It prompts us to ignore important insights, such as aligning the incentives of elected officials with those of voters.<sup>27</sup> We fail to completely anticipate the consequences and behavior by political actors that follows from new rules (or the lack of such rules). We fail to consider the impact of evolving technology on politics, and we spend too much time analyzing past controversies and not enough energy anticipating the next battlefield. Mimicking judicial classifications of problems also divides us into different institutional silos, and we miss discussions, insights, and solutions in overlapping areas. Political actors, such as lobbyists who chair fundraising committees, do not always fit into such neat categorizations.<sup>28</sup>

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<sup>23</sup> See FEC Advisory Op. 2010-11, at 1 (2010).

<sup>24</sup> FEC Advisory Op. 2012-17, at 1 (2013).

<sup>25</sup> See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474 (1998) (“[B]ehavioral economics allows us to model and predict behavior relevant to law . . . with more accurate assumptions about human behavior, and more accurate predictions and prescriptions about law.”).

<sup>26</sup> Cain, *supra* note 2, at 1119 (“Thinking of the field in this way may also help us see more clearly the proper line between problems that are best resolved by institutional changes as opposed to litigation and court intervention.”).

<sup>27</sup> Gerken & Kang, *The Institutional Turn in Election Law Scholarship*, *supra* note 16, at 89 (suggesting that we should structure democracy to align the incentives of political actors with constructive democratic goals and find ways “to harness politics to fix politics”).

<sup>28</sup> *Id.* (“There are sensible reasons to divide the labor between the electoral and legislative



The focus on constitutional law also overlooks key administrative law issues.<sup>29</sup> Some problems involve the structure of institutions that regulate political activity such as allocating responsibility among federal, state, and local officials and between different branches and agencies within each level of government; varying standards (or a lack of standards) stemming from decentralization (for example, different localities resolving similar disputes or multiple federal agencies investigating the same set of allegations); delegating discretion to private actors such as political parties (for example, by allowing them to challenge voters at the polls); agency capture; and review of agency decisions. Other challenges stem from rulemaking and adjudication, such as the adequacy of notice and process, the clarity and administrability of legal directives, and the balance between consistency and flexibility in decisionmaking.

The judiciary remains important, but it is just one part of an election “ecosystem” that affects—and in turn is shaped by—other nonjudicial actors.<sup>30</sup> Courts are unable to solve all of democracy’s problems, but considering nonjudicial perspectives allows judges to better understand the process and develop concepts to consider and dispose of cases more appropriately.<sup>31</sup>

The “law of democracy” sounds lofty, but “political law” more accurately captures the core of the field—how self-interested figures act within an institutional framework. A narrow focus on *election* law prompts us to overlook nonelection governance issues, such as pay-to-

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realms, but this disconnection is increasingly problematic in an era of continuous partisan contestation, in which electoral and legislative strategies are commonly fused.”); *see also* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 58–63 (2012) (proposing that the future of campaign finance regulation should focus on ex post regulation of corruption, such as bribery prosecution and lobbying regulation).

<sup>29</sup> Gerken & Kang, *Déjà Vu All Over Again*, *supra* note 17, at 98 (asserting that administrative law rather than constitutional law or civil rights law might be the best reform for the next generation of election law scholarship).

<sup>30</sup> R. MICHAEL ALVAREZ, LONNA RAE ATKESON & THAD HALL, *EVALUATING ELECTIONS: A HANDBOOK OF METHODS AND STANDARDS* 115 (2013) (explaining that “[e]lection administration is a highly complex process that involves multiple actors all working to achieve the goal of running an effective election”); STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES* 17 (2007) (“[A] state’s processes for administering its elections deserve to be understood as an ecosystem because the choices that a state makes about the procedures and requirements in one area inevitably affect the health and functioning of several other areas as well.”).

<sup>31</sup> Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1226 (1999) (asserting that law and economics concepts like incentive effects and the Coase Theorem have influenced private law cases, and that particular cultural assumptions and theories will begin to influence courts as election law develops).

play rules, government transparency, lobbying regulation, and legislative ethics committees.<sup>32</sup>

Expanding the scope of the field can seem messy and unsettling. Once we open the gates beyond judicial opinions, what are the boundaries of “political law”? Is government contracting political law? Is the act of lobbying political law? What’s more, opening the doors beyond “election law” reveals the complexity of the problems that confront us. Recognizing the inability of courts to solve all problems with democracy, however, it is doubtful whether a better alternative exists.

Through their writing, scholars are starting to move away from traditional court-centered election law and toward broader political law. The “new institutionalists” are emphasizing not just courts, but also legislatures and other decisionmakers.<sup>33</sup> In the aftermath of the disputed election of 2000, scholarship and teaching about election administration have gained new traction.<sup>34</sup> Heather Gerken used input from secretaries of state to shape her “Democracy Index,” and it now informs and improves election administration.<sup>35</sup> Professors Dan Tokaji and Michael Halberstam organized a lobbying conference in Spring 2013.<sup>36</sup> An American Law Institute (“ALI”) Principles of

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<sup>32</sup> Bruce E. Cain, *Teaching Election Law to Political Scientists*, 56 ST. LOUIS U. L.J. 725, 731 (2012) (“Election Law strictly conceived only touches on the front end of representation—that is, the selection of elected officials—and relegates the back end to legislative law.”).

<sup>33</sup> Kirsten Nussbaumer, *Election Law as Elective of Choice*, 56 ST. LOUIS U. L.J. 747, 753 (2012) (“Much of this new scholarship, especially the so-called ‘new institutionalism,’ is in fact pushing strongly toward greater emphasis on legislatures, administrative agencies, mechanisms of direct democracy, and other political actors . . . .”); Gerken & Kang, *Déjà Vu All Over Again*, *supra* note 17, at 89 (“There’s been an institutional turn in election law, as academics have begun looking away from the courts to cure what ails us.”); *see also, e.g.*, Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1812–13 (2012) (asserting that independent citizen commissions should adopt an arbitration system to reduce partisan stakes and encourage coalition building); Jennifer Nou, *Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts*, 118 YALE L.J. 744, 750–51 (2009) (asserting that procurement contracts are an important regulatory tool in election administration to further public and private accountability); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 631 (2007) (proposing legislatures adopt a cost-benefit analysis in crafting voter identification laws).

<sup>34</sup> Richard L. Hasen, *Introduction: Developments in Election Law*, 42 LOY. L.A. L. REV. 565, 566–67 (2009) (“Since 2000, nuts-and-bolts scholarship is ‘in,’ though broad election law scholarship on democracy and the courts certainly is not ‘out.’”). *See generally* Daniel P. Tokaji, *Teaching Election Administration*, 56 ST. LOUIS U. L.J. 675 (2012) (discussing controversial election administration issues that have emerged since the 2000 election).

<sup>35</sup> HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR SYSTEM IS FAILING AND HOW TO FIX IT* (2009).

<sup>36</sup> Conference at SUNY Buffalo Law School: Under the Influence? Interest Groups, Lobbying, and Campaign Finance (March 8–9, 2013) (a description of the conference can be found at <http://baldycenter.info/conferences/lobbying-and-campaign/>); *see also* Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105 (2008) (dis-

Election Law project comprised of scholars, regulators, and practitioners is providing model guidance for convenience voting.<sup>37</sup> This shift in focus toward the activities of nonjudicial actors represents one of the most significant developments in the field.

## II. POLITICAL LAW COMMUNITY

Intellectual communities bring together a critical mass of innovative people with common interests. A dynamic law school community, for example, features stimulating faculty lunch presentations, exchanges of draft papers, and casual office visits. Venues such as Silicon Valley, Nashville, and Los Angeles allow a core of creative people to collaborate on new ventures, connect with friends at receptions and over lunch, and respond to current events and evolving trends.<sup>38</sup> These academic, cultural, and professional communities allow people to develop personal relationships, affirm mutual aspirations and interests, mentor and be mentored, exchange and hone ideas, challenge conventional wisdom, and advance their respective fields.<sup>39</sup>

Washington, D.C. possesses the concentration of professional expertise to be a vibrant political law community. The city is home to more lawyers who create, interpret, enforce, and practice political law than any other city in the United States, and perhaps the world. Various corporations, trade associations, and unions hire significant numbers of in-house political law attorneys. The area also has over four dozen major law firms with political law or related practices, ten national party organizations,<sup>40</sup> over thirty major election-related non-

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cussing the need to bridge the disconnect between campaign finance and lobbying); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012) (same); Heather K. Gerken, Keynote Address: Lobbying as the New Campaign Finance (Nov. 12, 2011), in 27 GA. ST. U. L. REV. 1147 (2011) (same).

<sup>37</sup> Reporter Edward B. Foley and Associate Reporter Steven F. Huefner lead the ALI's Principles of Election Law group. See *Publications Catalog*, AM. L. INST., [www.ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=140](http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=140) (last visited Sep. 10, 2013).

<sup>38</sup> See NAT'L RESEARCH COUNCIL OF THE NAT'L ACAD., *BEYOND PRODUCTIVITY: INFORMATION TECHNOLOGY, INNOVATION, AND CREATIVITY* 20–24 (William J. Mitchell, Alan S. Inouye & Marjory S. Blumenthal eds., 2003), available at [http://lmc.gatech.edu/~xinwei/pub/texts/Beyond\\_Productivity.pdf](http://lmc.gatech.edu/~xinwei/pub/texts/Beyond_Productivity.pdf) (discussing intellectual communities—"creativity clusters"—of the creative arts and the sciences).

<sup>39</sup> See *id.*

<sup>40</sup> Such organizations include: the Democratic National Committee; the Republican National Committee; the Democratic Senatorial Campaign Committee; the National Republican Senatorial Committee; the Democratic Congressional Campaign Committee; the National Republican Campaign Committee; the Democratic Governors Association; the Republican Gover-

profit groups,<sup>41</sup> and six congressional committees and several federal agencies with jurisdictions that include political law.<sup>42</sup> Actors working in these environments provide a variety of professional perspectives—civil trial work, criminal prosecution and defense, appellate work, compliance, counseling, drafting regulations and legislation, legislative oversight, and advocacy for particular reforms or clients before relevant agencies and legislative committees.

Washington, D.C., however, is not the only venue with potential for political law community. Columbus, Ohio, for example, is home to a critical mass of scholars at the Election Law @ Moritz program at The Ohio State University Moritz College of Law, the nation's leading scholarly skeptic of campaign finance regulation (Bradley Smith), the Ohio Secretary of State, the Ohio Attorney General, relevant state legislative committees, the Ohio Democratic and Republican parties, and several political law practitioners and advocates.<sup>43</sup>

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nors Association; the Democratic Legislative Campaign Committee; and the Republican Legislative Campaign Committee.

<sup>41</sup> Nonprofit groups with a significant presence in Washington, D.C. include the following: Advancement Project; AEI-Brookings Joint Center for Regulatory Studies; America Votes; American Association of People with Disabilities; American Civil Liberties Union; Americans for Redistricting Reform; Asian American Justice Center; Brennan Center for Justice; Campaign Finance Institute; Campaign Legal Center; Center for Competitive Politics; Center for Responsive Politics; Citizens for Responsibility and Ethics in Washington; Common Cause; Democracy 21; Electronic Privacy Information Center; Fair Elections Legal Network; Fair Vote; The Heritage Foundation; Lawyers' Committee for Civil Rights Under Law; Leadership Conference on Civil and Human Rights; League of Women Voters; NAACP; NAACP Legal Defense and Educational Fund ("NAACP LDF"); National Association of Latino Elected Officials; National Association of Secretaries of the State; National Council of La Raza; People for the American Way; Pew Center of the States; Project Vote; Public Campaign; Public Citizen; SpeechNow.org; and U.S. PIRG; The Federation of State PIRGs.

<sup>42</sup> The congressional committees are the House Administration Committee, the House Committee on Ethics, the House Judiciary Committee, the Senate Judiciary Committee, the Senate Rules Committee, and the Senate Select Committee on Ethics. The federal agencies or components thereof include the following: Election Assistance Commission; Federal Election Commission; Federal Voting Assistance Program of the Department of Defense; Office of General Counsel and Legal Policy; Office of Government Ethics, Public Integrity Section of the Criminal Division of the Department of Justice; U.S. Office of Special Counsel; and Voting Section of the Civil Rights Division of the Department of Justice.

<sup>43</sup> Geographic political law communities play a special role in developing the field, in part due to the opportunity for constant personal interaction by participants, cultural immersion in the subject, and honest one-on-one, off-the-record conversations. Nongeographic political law communities, however, also play a significant role in advancing political law, such as Richard Hasen's Election Law Listserv, and professional associations like: the American Association of Law Schools' Legislation and the Law of the Political Process Section; the American Bar Association's two political law committees (the Standing Committee on Election Law and the Election Law Committee of the Section of Administrative Law and Regulatory Practice); the Council on Governmental Ethics Laws; the International Association of Clerks, Recorders, Election Offi-

The need for community is particularly acute in political law. Political affiliations often divide practitioners and policymakers. Lawmakers and other actors often craft rules for their own advantage. Regulated entities are often wary of regulators. Technology evolves and campaign and lobbying strategies change continuously, and thus clients routinely raise novel questions for which lawyers can provide no clear answers. Political law actors often lack a neutral venue in which to network and honestly discuss emerging problems and solutions uninhibited by posturing or paper trails.

Political law community allows for interdisciplinary bridges between various actors.<sup>44</sup> Lectures, panels, workshops, and symposia give presenters and participants a chance to discuss emerging issues. Reception, lunches, and other informal gatherings give people an opportunity to build relationships and speak more intimately about substantive issues. Political law community provides an opportunity to develop a guild of leaders who discuss ideas and develop both formal and informal norms.

Political law community can also afford the specialization and scale necessary to allow for concentrated study by students. Although election law may be a two-credit boutique seminar at some law schools,<sup>45</sup> a large political law market and a couple of dozen interested students can provide the demand for a more expansive curriculum. In addition to general courses on administrative law, legislation, corporate and labor law, and an introductory political law survey course, a law school can offer several specialized seminars on subjects such as voting rights, campaign finance, election administration, the law of lobbying, and congressional investigations.

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cials and Treasurers; the National Association of Election Officials; the National Association of Secretaries of State; and the National Association of State Election Directors. Law schools can also convene the political law community around a particular issue. The William & Mary Law School's Election Law Program, for example, specializes in assisting state court judges in resolving voting disputes. See *Election Law Program*, *supra* note 11.

<sup>44</sup> Karlan, *supra* note 21, at 1196–97 (discussing bridges in Voting Rights Act of 1965 litigation between political scientists, historians, sociologists, legal scholars, and litigators).

<sup>45</sup> See Chad Flanders, *Election Law: Too Big To Fail?*, 56 ST. LOUIS U. L.J. 775, 777 (2012) (asserting that election courses may be getting “too big” and should clip back particular topics); Gardner, *supra* note 21, at 693 (“[T]he 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.”); Nussbaumer, *supra* note 33, at 748 (“With U.S. Supreme Court opinions as the focus of the field—and the fact that only a small percentage of law school graduates have ever been situated to play a role in developing federal judicial doctrine about elections—one might then suspect that election law as a start-up enterprise was indeed a pretty high-end boutique.”).

Political law community also provides the critical mass of professors—many of them top political law practitioners—who can introduce students to cutting-edge issues and serve as mentors, contacts, and references for future professional opportunities. The scale and specialization the field also allows for well-defined employment tracks, including externships and summer positions with firms, political parties, relevant legislative committees and agencies, advocacy groups, and other entities.<sup>46</sup>

### III. THE GEORGE WASHINGTON UNIVERSITY'S SYMPOSIUM ON POLITICAL LAW

This symposium attempted to contribute to a political law field that increasingly focuses on both judicial and nonjudicial decisionmakers. It also aimed to help build the political law community here in Washington, D.C.

The George Washington Law Review and the George Washington University Political Law Studies Initiative held the symposium conference ten days after the 2012 presidential election.<sup>47</sup> The nation's first African-American president had just been re-elected, and the U.S. Supreme Court had just agreed to hear a case challenging the preclearance and coverage provisions of the Voting Rights Act of 1965.<sup>48</sup> The 2012 cycle had been the first presidential election to feature Super PACs,<sup>49</sup> and it also featured new laws in several states such as photo identification and proof of citizenship requirements, restrictions on early vote periods, and enhanced restrictions on former of-

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<sup>46</sup> See Nussbaumer, *supra* note 33, at 754–55 (describing an election-law focused externship with Minnesota's Secretary of State). The Ohio State University Moritz College of Law boasts a legislation clinic that focuses in part on election-law issues such as campaign finance, term limits, and direct democracy. See Terri L. Enns, *Clinical Professor of Law*, ELECTION L. MORITZ, <http://moritzlaw.osu.edu/electionlaw/faculty/enns.php> (last visited Sep. 10, 2013). The George Washington University Law School's Political Law Society actively works to place students in various positions in part through its database of internship opportunities (on file with the author).

<sup>47</sup> See 2012 GW Law Review Symposium: "Law and Democracy: A Symposium on the Law Governing Our Democratic Process," GW LAW (Nov. 16, 2012), <http://www.law.gwu.edu/News/2012-2013Events/Pages/2012LawReviewSymposium.aspx>.

<sup>48</sup> See *Shelby Cnty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012), *rev'd*, 133 S. Ct. 2612 (2013) (striking down the Act's coverage formula); see also Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2006)).

<sup>49</sup> See *Election 2012: Super PAC Spending*, LA TIMES (Nov. 20, 2012, 10:59 AM), <http://graphics.latimes.com/2012-election-superpac-spending/>.

fender voting rights.<sup>50</sup> Our six panels provided an opportunity to discuss these and other issues in depth.<sup>51</sup>

We were fortunate to attract thirty-five leaders in political law as panelists. Top scholars served on panels, including coauthors from all four election law casebooks, an editor of the *Election Law Journal*, the founder and moderator of the *Election Law Blog* and *Election Law Listserv*, and the reporter for the ALI's *Principles of Election Law* project.<sup>52</sup> Leading practitioners also spoke on panels, such as the general counsel of the Barack Obama 2012 presidential campaign, the chief counsel for the National Republican Senatorial Committee, the former general counsel of the John McCain 2008 presidential campaign, and the lawyer who represented George W. Bush against Al Gore before the Florida Supreme Court in the election dispute of 2000.<sup>53</sup> Panelists also included leaders in the campaign finance and voting rights communities, and the president of the group that monitors media spending by candidate campaigns nationwide.<sup>54</sup>

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<sup>50</sup> See *Election 2012: Voting Laws Roundup*, BRENNAN CTR. FOR JUSTICE (Oct. 11, 2012), <http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup>.

<sup>51</sup> To view the agenda for the symposium and video clips of the keynote addresses and panel discussions, see *PLSI's "Symposium on Political Law"—Videos, Podcasts, Media Coverage, and Photos*, GW LAW (Nov. 16, 2012) [http://www.law.gwu.edu/Academics/research\\_centers/politicallaw/Pages/SymposiumVideo.aspx](http://www.law.gwu.edu/Academics/research_centers/politicallaw/Pages/SymposiumVideo.aspx).

<sup>52</sup> Participating professors included: Richard Briffault (Columbia Law School); Guy-Uriel Charles (Duke University School of Law); Adam Cox (New York University School of Law); Kareem Crayton (University of North Carolina School of Law); Gilda Daniels (University of Baltimore School of Law); Josh Douglas (University of Kentucky College of Law); Edward Foley (The Ohio State University Moritz College of Law); Heather Gerken (Yale Law School); Lani Guinier (Harvard Law School); Richard Hasen (University of California, Irvine School of Law); Sherrilyn Ifill (University of Maryland School of Law); Sam Issacharoff (New York University School of Law); Michael Kang (Emory University School of Law); Pamela Karlan (Stanford Law School); Ellen Katz (University of Michigan Law School); Justin Levitt (Loyola Law School, Los Angeles); William Marshall (University of North Carolina School of Law); Alan Morrison (The George Washington University Law School); Nathaniel Persily (Columbia Law School); Richard Pildes (New York University School of Law); Michael J. Pitts (Indiana University School of Law); Brad Smith (Capital University Law School); and Daniel Tokaji (The Ohio State University Moritz College of Law). *Id.*

<sup>53</sup> Practitioners included: Bob Bauer (General Counsel, Obama for America); Sean Cairncross (Chief Counsel, National Republican Senatorial Committee); Michael Carvin (Jones Day); and Trevor Potter (Campaign Legal Center, former General Counsel of Senator John McCain's 2008 presidential campaign). *Id.*

<sup>54</sup> Campaign finance or voting rights thought leaders included: Eliza Newlin Carney (Roll Call); John Fortier (Bipartisan Policy Center); Ken Goldstein (President, Campaign Media Analysis Group, Kantar Media); Allison Hayward (formerly of Center for Competitive Politics); Sherrilyn Ifill (NAACP LDF); Lawrence Noble (Americans for Campaign Reform); Myrna Pérez (Brennan Center for Justice); Brad Smith (Center for Competitive Politics); and Monica Youn (Brennan Center for Justice). *Id.*

We heard keynote addresses from two top regulators and policy-makers of different political persuasions. Donald McGahn, a member of the FEC who has chaired the agency, spoke at the symposium dinner. Tom Perez, the Assistant Attorney General for Civil Rights at the U.S. Department of Justice (“DOJ”), delivered his remarks during lunch the following day.<sup>55</sup>

In organizing the event, we actively recruited not only speakers, but also symposium attendees, and we reserved a significant amount of time for conversation among panelists and symposium attendees. Most of the symposium participants were leaders in political law—FEC commissioners and staffers, Election Assistance Commission leadership, congressional staffers, DOJ lawyers, foundation officers, leaders from advocacy groups, leading political law practitioners, and journalists who cover political law. In recruiting both speakers and attendees, we aimed to gather leaders from different institutional silos and create a unique space for conversation among those who create, enforce, challenge, study, and practice political law.

In addition to panels and a published law review symposium, we featured four opportunities for informal social interaction—a dinner, a lunch, and two receptions—all of which allowed top policymakers, regulators, practitioners, and scholars to meet new people and reconnect with old friends. The intangible benefits of socialization cannot be captured on these pages, but hopefully these interactions advanced relationships and stimulated ideas that will shape future scholarship, policymaking, enforcement, and practice.

Of those panelists who chose to contribute pieces to this symposium Issue, some focus on courts. Gilda Daniels, for example, asserts that the Voting Rights Act needs an administrative process to review election changes due to voting discrimination.<sup>56</sup> Joshua Douglas provides the first analysis of the impact of the recently developed *Twombly/Iqbal*<sup>57</sup> civil litigation pleading standard (heightened from “notice pleading” to a more rigorous “factual plausibility” requirement) on election law cases.<sup>58</sup> Edward Foley observes that *Bush v. Gore*<sup>59</sup> and several recent decisions reflect an indeterminacy that undermines judicial credibility in political law cases and proposes various

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<sup>55</sup> *Id.*

<sup>56</sup> Gilda R. Daniels, *Unfinished Business: Why Section 5 of the Voting Rights Act Is Still Needed*, 81 GEO. WASH. L. REV. 1928 (2013).

<sup>57</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>58</sup> Joshua A. Douglas, *Election Law Pleading*, 81 GEO. WASH. L. REV. 1966 (2013).

<sup>59</sup> *Bush v. Gore*, 531 U.S. 98 (2000).



strategies for managing the indeterminacy.<sup>60</sup> Richard Hasen observes that both liberal and conservative judges unexpectedly intervened as backstops during the 2012 election cycle to prevent cutbacks in voting rights.<sup>61</sup> Bradley Smith distinguishes “elections” from “campaigns,” and he asserts that the U.S. Constitution does not explicitly grant power for government to regulate “campaigns” and instead creates a “wall of separation” between campaigns and state power.<sup>62</sup>

Other contributors to this Symposium Issue focus on nonjudicial issues. Kareem Crayton challenges the application of an employment gender bias lens to explain Hillary Clinton’s inability to secure the 2008 Democratic nomination for president.<sup>63</sup> Michael Kang observes that Super PACs in 2012 shifted political power to the very wealthy but not between political partisans, and he predicts future power shifts toward outside groups.<sup>64</sup> Monica Youn examines an antigay marriage ballot initiative to show that, contrary to conventional wisdom, disclosure of even modest individual contributions can provide useful insights.<sup>65</sup>

#### CONCLUSION

Election law has matured. We should democratize the law of democracy by recognizing that political law includes the study of both judicial and nonjudicial actors. We should also advance the field by consciously building political law communities that facilitate interaction between leading scholars, policymakers, regulators, practitioners, judges, and advocates. This symposium attempts to advance both of these goals.

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<sup>60</sup> Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836 (2013).

<sup>61</sup> Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865 (2013).

<sup>62</sup> Bradley A. Smith, *Separation of Campaign and State*, 81 GEO. WASH. L. REV. 2038 (2013).

<sup>63</sup> Kareem Crayton, *Gender Unbound? Making Sense of Hillary Clinton & Election 2008*, 81 GEO. WASH. L. REV. 1799 (2013).

<sup>64</sup> Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902 (2013).

<sup>65</sup> Monica Youn, *Proposition 8 and the Mormon Church: A Case Study in Donor Disclosure*, 81 GEO. WASH. L. REV. 2108 (2013).