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TEACHING ELECTION LAW

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Teaching Election Law

Nicholas O. Stephanopoulos

ABSTRACT

In the last couple years, new editions of the two most prominent election law casebooks have been released, and one entirely new casebook has been published. This is an opportune moment, then, both to review the volumes and to assess the state of the field. Fortunately, both are strong. All of the casebooks are well-organized, thorough in their coverage, and full of insightful commentary. And the field, at least as presented by the volumes, is impressively confident in its substantive and methodological choices. There is a high level of consensus as to both the subject areas that election law should include and the analytical methods that it should employ.

Instructors looking to select a casebook thus are faced with an embarrassment of riches. Because all of the volumes are excellent, my suggestion is that instructors make their choice based on their own substantive and methodological inclinations. Those who are most interested in representational issues and in doctrinal context should select Issacharoff, Karlan, and Pildes. Those who wish to emphasize campaign finance and empirical political science should choose Lowenstein, Hasen, and Tokaji. And those who want to focus on democratic theory, history, and an unusually wide array of sources should pick Gardner and Charles. There is no going wrong here.

INTRODUCTION

MY FIRST EXPOSURE TO ELECTION LAW came in a seminar, “The Law of Democracy,” that I took as a second-year law student.¹ Owen Fiss was my professor, and he assigned us the casebook edited by Samuel Issacharoff, Pamela Karlan, and Richard Pildes (“Isskardes”), then in its second edition.² What I failed to realize at the time was how distinctive a version of election law I was learning. Fiss, who had not taught the class before, tried to fit election law doctrines into the broader constitutional law theories that are his forte. Isskardes resisted this merger but had pedagogical quirks of their own, most notably their heavy focus on race and representation and their deep interest in doctrinal context.

When I began teaching election law myself, I chose to use the Isskardes casebook, by then in its fourth edition,³ because it was the one with which I was most familiar. I did supplement the casebook with law review articles that I posted as optional readings, as well as empirical political science findings that I explained to my students. But in most respects my class followed the Isskardes (and Fiss) template. Race and representation was the single largest unit on my syllabus, and I often found myself delving into the complex relationship between election law and constitutional law.

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¹This was in the spring of 2005, almost a decade ago.

²See THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (Samuel Issacharoff et al. eds., 2d ed. 2002). I refer to all editions of this casebook as “Isskardes,” in honor of its three distinguished editors.

³See THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (Samuel Issacharoff et al. eds., 4th ed. 2012). I first taught election law in the winter quarter of 2013, shortly after the fourth edition’s release.

It was not until I examined two other election law casebooks for this review—the fifth edition of Daniel Lowenstein, Richard Hasen, and Daniel Tokaji (“Lowhaji”),⁴ and a new volume by James Gardner and Guy-Uriel Charles (“Gardles”)⁵—that I appreciated how many different ways there are to guide students through this material. For starters, neither Lowhaji nor Gardles devote nearly as much space as Isskardes to race-related issues. Instead, Lowhaji’s emphasis is on campaign finance, while Gardles’s is on democratic theory and institutions. Lowhaji and Gardles also are not as doctrinally oriented as Isskardes. Lowhaji provide countless citations to law review articles, while Gardles often look further afield to work by theoretical and empirical political scientists. Gardles offer the additional innovation of bolded substantive headings after each excerpted case, rather than the more conventional series of numbered points.

There exist multiple visions, then, of how to teach election law, not just one. In this review, I describe and gently interrogate these visions. I begin by explaining in more detail the substantive focus of each casebook. How much attention each election law issue *should* receive, of course, is a largely unanswerable question. Instructors will have to choose among the volumes based on their own subject matter preferences. Next, I summarize the sources on which each casebook principally relies in its commentary sections.⁶ Again, there is no right answer to whether Supreme Court decisions are best supplemented by lower court cases, historical accounts, comparative analysis, democratic theory, or empirical findings. Instructors will have to pick in accordance with their own sense of election law’s place in the academy. Lastly, I offer a few thoughts on what the casebooks tell us about the state of the field. On the whole, I am encouraged by both the agreement as to what topics belong in the course and the recognition of election law’s fundamentally interdisciplinary nature.

One final point should be stressed at the outset: All three casebooks are fine works that do an admirable job of presenting the decisions and scholarship that make up election law.⁷ All three are well organized, clearly written, and impressive in their coverage of the relevant material. I am therefore in the fortunate position of not having (and indeed being unable) to rank the casebooks on the basis of quality. Instructors too will have the luxury of choosing

among them based on their own substantive and methodological inclinations.

I. THE SUBSTANCE OF ELECTION LAW

What are the topics that comprise election law? And how should they be prioritized? These are probably the most important questions faced by casebook editors, but there is no consensus as to their answers. In a provocative recent essay, for example, Chad Flanders argues that the “core topics of election law, topics that an introductory class...simply must cover” are “participation, representation, and political parties”—but *not* campaign finance, the Voting Rights Act (VRA), or election administration.⁸ Conversely, Issacharoff and Pildes assert that minority representation, which Flanders would omit from the election law canon, is the “central issue in American democracy.”⁹ Likewise, Tokaji claims that “Election Law teachers would...do well not only to include election administration in the survey course, but also to feature election administration issues near the beginning of the term.”¹⁰ And Roy Schotland’s pithy summation of election law, “ballots, bucks, maps and the law,” includes one subject that Flanders would exclude entirely

⁴See ELECTION LAW: CASES AND MATERIALS (Daniel Hays Lowenstein et al. eds., 5th ed. 2012). As with Isskardes, I fuse the editors’ surnames into a single (perhaps ungainly) noun.

⁵See ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM (James A. Gardner and Guy-Uriel Charles eds., 2012). Here too I meld the editors’ surnames.

⁶By commentary sections I mean all of the casebook sections that are *not* excerpts from major election law cases.

⁷I am sure the other two election law casebooks, VOTING RIGHTS AND ELECTION LAW (Michael Dimino et al. eds., 2010), and ELECTION LAW AND LITIGATION: THE JUDICIAL REGULATION OF POLITICS (Edward B. Foley et al. eds., 2014), are fine as well. The former has been in print for a bit too long to address now, while the latter was not yet publicly available when I wrote this review.

⁸Chad Flanders, *Election Law: Too Big to Fail?*, 56 ST. LOUIS U. L.J. 775, 778, 783–84 (2012).

⁹Samuel Issacharoff and Richard H. Pildes, *Not by “Election” Alone*, 32 LOY. L.A. L. REV. 1173, 1181 (1999).

¹⁰Daniel P. Tokaji, *Teaching Election Administration*, 56 ST. LOUIS U. L.J. 675, 675 (2012).

(“bucks”) and two that he would cover only partially (“ballots” and “maps”).¹¹

In my view, it is not possible to assess the relative significance of most election law topics. Areas such as redistricting, campaign finance, minority representation, and election administration are simply too different from one another—and too important in their own distinct ways—to be meaningfully compared. Accordingly, I do not try here to evaluate the substantive organization of each casebook relative to some platonic ideal of what an election law course ought to contain. I do point out issues that each casebook emphasizes or neglects, but my discussion is primarily descriptive.

Beginning with Isskardes, then, their casebook is notable for both its heft—it checks in at 1262 pages, almost 40% longer than Lowhaji or Gardles—and its focus on race and representation. There are separate chapters on preclearance, vote dilution under the Constitution, vote dilution under the VRA, and racial gerrymandering, which run in sum to 350 pages, more than a quarter of the volume’s total length.¹² Some of the race-related cases that only Isskardes excerpt are *Whitcomb v. Chavis*,¹³ *Johnson v. De Grandy*,¹⁴ *Bartlett v. Strickland*,¹⁵ and *LULAC v. Clements*.¹⁶ Isskardes also include detailed accounts of the 1982 amendments to the VRA¹⁷ and the operation of the three *Gingles* prongs.¹⁸ Their casebook clearly reflects their view that minority representation is the “central issue in American democracy.”¹⁹

Beyond race-related issues, Isskardes dedicate more space than Lowhaji or Gardles to redistricting, election administration, and alternative electoral systems.²⁰ The gap with respect to redistricting is due mostly to Isskardes’s inclusion of one-person, one-vote cases such as *Colegrove v. Green*,²¹ *Baker v. Carr*,²² *Gray v. Sanders*,²³ and *Karcher v. Daggett*.²⁴ The election administration gap is attributable to the hundred or so pages that Isskardes allocate to the saga of *Bush v. Gore*.²⁵ And Isskardes’s chapter on alternative systems such as cumulative voting, preferential voting, and proportional representation has no analogue in Lowhaji or Gardles.²⁶

In contrast, Isskardes assign about the same number of pages as Lowhaji and Gardles to the regulation of political parties. All three casebooks cover a similar set of decisions spanning the White Primaries, parties’ associational rights, and minor party ballot access. Isskardes also commit substan-

tially *less* space than Lowhaji to campaign finance. In a single sprawling chapter, they march briskly and chronologically through cases from *Buckley v. Valeo*²⁷ to *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*.²⁸ It is evident from this treatment that campaign finance is not at the heart of their conception of election law. As they wrote in the preface to their casebook’s second edition, “we sought merely to present enough material to enable

¹¹Roy A. Schotland, *And for the Student? The Seven Striking Statements of “Ballots, Bucks, Maps and the Law,”* 32 LOY. L.A. L. REV. 1227, 1227 (1999); see also, e.g., Bruce E. Cain, *Election Law as a Field: A Political Scientist’s Perspective*, 32 LOY. L.A. L. REV. 1105, 1105 (1999) (citing “general areas of representation, campaign finance, corruption, and the associational rights of political parties” as core of election law); Edward B. Foley, *Election Law and the Roberts Court: An Introduction*, 68 OHIO ST. L.J. 733, 734 (2007) (“[E]lection law is conceptually coherent as a field that unites the specific areas of campaign finance, legislative redistricting, and voting procedures as well as other specific areas, like ballot access and the regulation of party primaries.”); Michael J. Pitts, *One Person One Vote: Teaching “Sixth Grade Arithmetic,”* 56 ST. LOUIS U. L.J. 759, 759 (2012) (“The opinions leading up to and comprising the Redistricting Revolution of the 1960s represent the most fundamental element of the course in Election Law.”).

¹²See ISSKARDES, *supra* note 3, at 514–768, 840–934.

¹³403 U.S. 124 (1971).

¹⁴512 U.S. 997 (1994).

¹⁵556 U.S. 1 (2009).

¹⁶999 F.2d 831 (5th Cir. 1994) (en banc).

¹⁷See ISSKARDES, *supra* note 3, at 623–51.

¹⁸See *id.* at 696–720.

¹⁹Issacharoff and Pildes, *supra* note 9, at 1181; see also Cain, *supra* note 11, at 1105 (observing that “the Issacharoff-Karlan-Pildes collection concentrates more on voting rights and racial gerrymandering”); Paul Gronke, *When and How to Teach Election Law in the Undergraduate Classroom*, 56 ST. LOUIS U. L.J. 735, 737 (2012) (“Issacharoff and colleagues focus much more resolutely on...minority voting rights....”).

²⁰Isskardes also devote more space to the right to vote, but this is largely because their chapter on the franchise includes a section on racial discrimination as well as cases such as *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), that the other casebooks cover elsewhere.

²¹328 U.S. 549 (1946).

²²369 U.S. 186 (1962).

²³372 U.S. 368 (1963).

²⁴462 U.S. 725 (1983).

²⁵531 U.S. 98 (2000) (per curiam); see ISSKARDES, *supra* note 3, at 1074–1177. However, Isskardes do not expend much space on election administration issues such as voting technology, voter registration, and vote fraud.

²⁶See ISSKARDES, *supra* note 3, at 1178–1262.

²⁷424 U.S. 1 (1976).

²⁸131 S. Ct. 2806 (2011); see ISSKARDES, *supra* note 3, at 332–513.

an introduction to the topic in a course we envisioned as focusing more on other areas.”²⁹

If Isskardes are concerned above all with representation (both racial and otherwise), then it is money in politics that holds the greatest interest for Lowhaji. Fully six of their fifteen chapters, totaling 322 of their 920 pages, address aspects of campaign finance law.³⁰ There is a chapter on bribery (a topic ignored by Isskardes and Gardles), a chapter on *Buckley* itself, and then a chapter on each major form of campaign finance regulation: spending limits, contribution limits, public financing, and disclosure.³¹ Some of the decisions that only Lowhaji excerpt are *Spechnow.org v. FEC*³² and *Ognibene v. Parkes*³³ (as well as all of the bribery-related cases).³⁴ They also include extended commentaries on potential reforms³⁵ and the empirical aspects of money in politics.³⁶

Given the attention they lavish on campaign finance, Lowhaji do not explore any other topic in equivalent depth. But even though their sections on political parties and election administration are not especially lengthy, they are quite thorough. Lowhaji usefully divide their coverage of parties into a chapter on major parties and a chapter on minor ones; and they cover issues omitted by Isskardes and Gardles such as the party in the legislature, presidential nominations, and public financing for minor parties.³⁷ Similarly, Lowhaji’s use of voter participation as a prism through which to examine the Help America Vote Act (HAVA), the National Voter Registration Act (NVRA), and the VRA’s language assistance provisions is innovative and nicely executed.³⁸ This section may reflect the influence of Tokaji, an expert on election administration who became one of the casebook’s editors in its previous edition.³⁹

But while Lowhaji’s discussions of political parties and election administration are concise yet satisfying, their analyses of the right to vote and minority representation are a bit too quick for my taste. With respect to the franchise, the only Supreme Court cases they excerpt are *Harper v. Virginia State Board of Elections*⁴⁰ and *Kramer v. Union Free School District No. 15*.⁴¹ Landmark cases on the exclusion of women,⁴² felons,⁴³ and illiterates⁴⁴ from the polls are absent, though they are included by both Isskardes and Gardles. Likewise, vote dilution under the Constitution is mentioned only in passing by Lowhaji,⁴⁵ while it occupies an entire chapter in Isskardes. Lowhaji also excerpt just three VRA Section 2 cases, *Thornburg v. Gingles*,⁴⁶ *Holder v.*

Hall,⁴⁷ and *LULAC v. Perry*,⁴⁸ thus relegating key decisions such as *Johnson v. De Grandy*⁴⁹ and *Bartlett v. Strickland*⁵⁰ to the margins. I am sure that my expectations in these areas have been shaped by my own election law education, but I was still left wanting more.

Finally, the hallmark of the Gardles casebook is its emphasis on democratic theory and the institutions of American democracy. While Isskardes and Lowhaji begin with brief introductions featuring a few obligatory references to Burke and the Federalist Papers, Gardles start with two long prefatory chapters, one on different theories of democracy, the other on important aspects of the American political system.⁵¹ The theoretical chapter includes excerpts from Plato, Locke, Mill, Downs, and Rousseau,⁵² while the American chapter explores republicanism, the history of racial discrimination, and the division of electoral authority between the federal and state governments.⁵³ None of this material is present in Isskardes or Lowhaji, but it makes for an excellent introduction to the course. It “embed[s] the field of election law in

²⁹*Id.* at ix. They made this comment with respect to the casebook’s first edition. The campaign finance chapter was expanded substantially in the second edition (though it still does not approach the thoroughness of Lowhaji on this topic).

³⁰See LOWHAJI, *supra* note 4, at 599–920.

³¹See *id.*

³²599 F.3d 686 (D.C. Cir. 2010) (en banc).

³³671 F.3d 174 (2d Cir. 2012).

³⁴See also Cain, *supra* note 11, at 1105 (observing that “Lowenstein’s [casebook]...is more focused on campaign finance”).

³⁵See LOWHAJI, *supra* note 4, at 874–81.

³⁶See *id.* at 641–43, 676–80.

³⁷See *id.* at 413–534. On the other hand, Lowhaji do not excerpt important political primary cases such as *California Democratic Party v. Jones*, 530 U.S. 567 (2000), or important ballot access cases such as *Burdick v. Takushi*, 504 U.S. 428 (1992).

³⁸See LOWHAJI, *supra* note 4, at 323–40.

³⁹See *id.* at xvii (noting Tokaji’s addition to the casebook).

⁴⁰383 U.S. 663 (1966).

⁴¹395 U.S. 621 (1969).

⁴²See *Minor v. Happersett*, 88 U.S. 162 (1874).

⁴³See *Richardson v. Ramirez*, 418 U.S. 24 (1974).

⁴⁴See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959).

⁴⁵See LOWHAJI, *supra* note 4, at 202–03.

⁴⁶478 U.S. 30 (1986).

⁴⁷512 U.S. 874 (1994).

⁴⁸548 U.S. 399 (2006).

⁴⁹512 U.S. 997 (1994).

⁵⁰556 U.S. 1 (2009).

⁵¹See GARDLES, *supra* note 5, at 1–92.

⁵²See *id.* at 1–36.

⁵³See *id.* at 37–92.

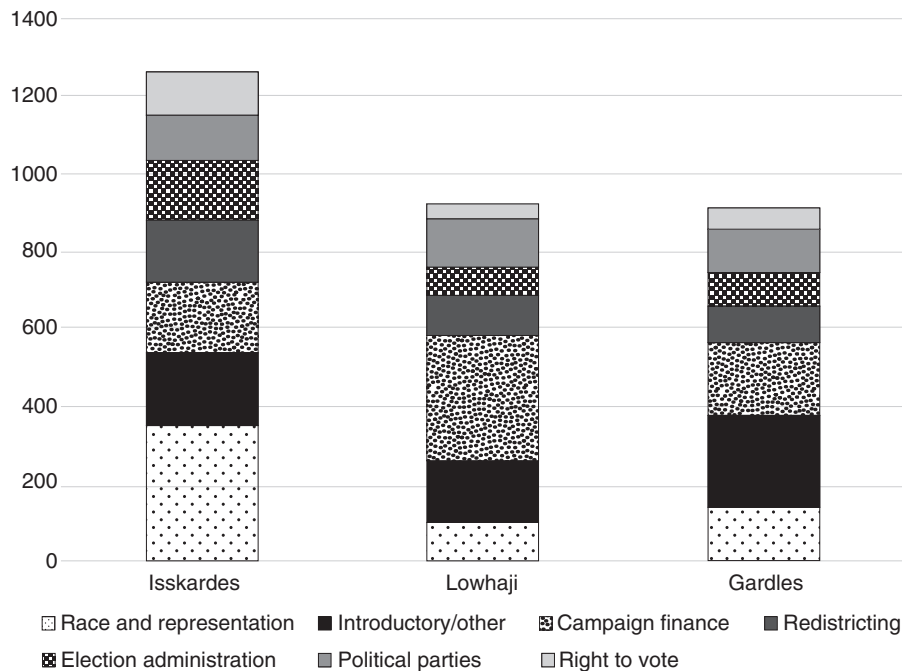


FIG. 1. Subject matter page allocations in election law casebooks.

a broader context that reveals its connection to... democratic theory,” as Gardles put it in their preface.⁵⁴

The Gardles casebook also stands out for the attention it pays to a pair of doctrinal topics that are covered more briskly by Isskardes and Lowhaji: candidate qualifications and campaign speech. The chapter on candidate qualifications covers term limits, residency requirements, resign-to-run requirements, and the like.⁵⁵ The chapter on campaign speech goes through restrictions on its content and manner, the fairness doctrine, and disclosure requirements.⁵⁶ These are not issues at the heart of election law as I (perhaps inaccurately) perceive the field, but they may appeal to certain instructors.

Furthermore, even though they are not very lengthy, Gardles’s sections on the right to vote and political parties are quite effective. The chapter on the franchise is organized by the type of restriction at issue: gender, residency, literacy, age, wealth, etc.⁵⁷ This is a logical way to present a large number of cases, and I would not be surprised if it caught on with other casebook editors. Likewise, the chapter on parties is subdivided into units on political theory, ballot access, primary elections, and patronage. This too struck me as a useful format for conveying a sizeable amount of information.⁵⁸

On the other hand, I was left unsatisfied by Gardles’s treatment of representational issues. In contrast

to Isskardes’s six chapters on these issues, Gardles attempt to squeeze reapportionment, partisan gerrymandering, constitutional vote dilution, statutory vote dilution, preclearance, and racial gerrymandering into just two sections.⁵⁹ Unsurprisingly, there are some casualties along the way. For instance, *Reynolds v. Sims*⁶⁰ is the only legislative reapportionment case that is excerpted, and *Vieth v. Jubelirer*,⁶¹ the most important partisan gerrymandering case of the last generation, is noticeably absent. Similarly, *Thornburg v. Gingles*⁶² is the only VRA Section 2 case that is excerpted, and all of the

⁵⁴See *id.* at xxiv.

⁵⁵See *id.* at 397–448. Isskardes also cover term limits in their chapter on direct democracy. See ISSKARDES, *supra* note 3, at 993–1020.

⁵⁶See GARDLES, *supra* note 5, at 561–636. Lowhaji also cover certain campaign speech issues in their chapter on campaigns. See LOWHAJI, *supra* note 4, at 535–98.

⁵⁷See GARDLES, *supra* note 5, at 93–146.

⁵⁸See *id.* at 449–560.

⁵⁹See *id.* at 147–396.

⁶⁰377 U.S. 533 (1964). A case involving a special purpose district and the one person, one vote rule, *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), also is excerpted.

⁶¹541 U.S. 267 (2004). *Vieth* is mentioned briefly, see GARDLES, *supra* note 5, at 254–56, but not excerpted.

⁶²478 U.S. 30 (1986).

subsequent evolution of this provision is left to the notes. In the campaign finance chapter as well—which is otherwise very strong—none of the major contribution limit cases, such as *Nixon v. Shrink Missouri Government PAC*⁶³ and *Randall v. Sorrell*,⁶⁴ are included.

Because the discussion to this point may seem like a blur of cases and doctrines to some readers, I end this Part with a chart that illustrates graphically many of the above observations (see Figure 1). The chart shows the number of pages devoted by each casebook to seven major topics: race and representation, introductory/other, campaign finance, redistricting, election administration, political parties, and the right to vote.⁶⁵ The much greater length of Isskardes is immediately apparent, as is their heavy focus on race and representation. Lowhaji's emphasis on campaign finance also is impossible to miss, as is Gardles's on issues that fit into the introductory/other category. But perhaps the clearest takeaway is that it should not be difficult for instructors to choose a casebook that mirrors their own substantive preferences. In a nutshell, instructors should select Isskardes if they wish to highlight representational issues, Lowhaji if they want to stress campaign finance, and Gardles if their interest is primarily in democratic theory.

II. THE METHODS OF ELECTION LAW

If the *substance* of election law is the most important issue with which casebook editors must wrestle, the field's intellectual *methods* surely come in a close second. But just as there is no consensus as to content,⁶⁶ so too is there marked disagreement as to techniques. In earlier times, most scholars believed that the doctrines of mainstream constitutional law could be applied to election law as well. As Heather Gerken has noted, "election law [formerly] looked a bit like a faraway outpost of constitutional law."⁶⁷ Some observers still adhere to this position; Flanders, for instance, has deemed "interdisciplinary work" a "temptation that we might be better off resisting."⁶⁸ Most contemporary academics, however, have embraced the links between election law and political science in particular.⁶⁹ But here too there is tension between those who depend heavily on empirical findings (and even carry out their own empirical analyses),⁷⁰ and those, like Gardner, who emphasize the "pitfalls

associated with reliance on political science."⁷¹ And political science is not even the only field that is entwined with election law. Still other scholars consider history an "important interdisciplinary node,"⁷² or argue that election law is "especially well-suited to comparative study."⁷³

As with the subjects that an election law casebook has to prioritize, I do not believe it is feasible to rank by relative value the methods that a casebook should employ. Again, the various techniques are too dissimilar from one another, and too significant in their own right, to be usefully compared. I have my own methodological inclinations, of

⁶³528 U.S. 377 (2000).

⁶⁴548 U.S. 230 (2006).

⁶⁵These topics are ordered by the number of pages devoted by Isskardes to each of them. In addition, introductory/other includes direct democracy, alternative electoral systems, candidate qualifications, and campaign speech; campaign finance includes bribery; redistricting includes reapportionment and partisan gerrymandering; and election administration includes remedies.

⁶⁶See *supra* notes 8–11 and accompanying text.

⁶⁷Heather K. Gerken, *What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 7 (2010).

⁶⁸Flanders, *supra* note 8, at 786; *cf.*, e.g., Issacharoff and Pildes, *supra* note 9, at 1183 ("Ultimately our concern is with the structural aspects of constitutional law..."); Pamela S. Karlan, *Constitutional Law, the Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1188 (1999) ("[O]ur political institutions and practices cannot be understood in a vacuum: they are a piece of constitutional law.").

⁶⁹See, e.g., Cain, *supra* note 11, at 1119 ("[T]his field consists of elements of democratic theory, law, public policy, and empirical political science."); Michael R. Dimino, *The Natural and the Familiar in Politics and Law*, 56 ST. LOUIS U. L.J. 701, 707 (2012) ("[T]here is no escaping the fact that political science and political theory pervade the Election Law course..."); Richard L. Hasen, *Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1095 (1999) (referring to political science as one of election law's "parents").

⁷⁰I count myself in this group, along with scholars such as Chris Elmendorf, Michael Gilbert, Jim Greiner, Nate Persily, and Doug Spencer.

⁷¹James A. Gardner, *Stop Me Before I Quantify Again: The Role of Political Science in the Study of Election Law*, 32 LOY. L.A. L. REV. 1141, 1144 (1999); see also James A. Gardner, *Election Law as Applied Democratic Theory*, 56 ST. LOUIS U. L.J. 689, 691 (2012) [hereinafter Gardner, *Applied Theory*] (claiming that "[w]ith the exception of the very best work in the field, political science tends to analyze every issue in terms of its partisan consequences").

⁷²Kirsan Nussbaumer, *Election Law as Elective of Choice*, 56 ST. LOUIS U. L.J. 747, 752 (2012).

⁷³Tokaji, *supra* note 10, at 686; see also ISSKARDES, *supra* note 3, at xiv; Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 775 (2013) ("This Article proceeds in comparative fashion...because...there is much that we can learn by looking beyond our borders.").

course, but I try to bracket them in the discussion that follows. My goal is simply to describe the cognate fields on which each casebook focuses, so that instructors can choose among the volumes based on their own views of election law's place in the academic universe.

Beginning with Isskardes, then, my assessment is that, relative to Lowhaji and Gardles, they include more comparative analysis and more scrutiny of legal doctrine—but less democratic theory and less empirical political science. As noted earlier, Isskardes dedicate an entire chapter to alternative electoral systems, thus demonstrating their commitment to “provid[ing] a comprehensive overview of alternatives to the traditional American approach.”⁷⁴ Their case notes also brim with detailed questions about the Justices' reasoning, and descriptions of notable lower court decisions, and accounts of on-the-ground developments before and after major cases. By comparison, the volume of references to theoretical and empirical political science scholarship seems lower to me. These references are unquestionably *present*, but they are not as *abundant* as in Lowhaji or Gardles.

Lowhaji, on the other hand, shower the reader with citations to law review and political science articles. It is not uncommon for them to provide string cites of a dozen or more publications (often with little, if any, discussion after each source). They clearly keep their introductory promise to be “alert to empirical findings of social scientists.”⁷⁵ Their casebook also is notable for its tendency to substitute excerpts from academic works for Supreme Court decisions. Among the scholars whose pieces are featured in the same fashion as landmark cases are Richard Ellis on direct democracy,⁷⁶ Morris Fiorina on political parties,⁷⁷ and Edward Foley on campaign finance.⁷⁸ However, Lowhaji offer much less comparative analysis than Isskardes; one learns little from their casebook about how other countries address tricky election law issues. There also is somewhat less in the way of traditional doctrinal commentary (though it still accounts for a substantial fraction of the case note content).

Finally, Gardles display some of the same characteristics as Lowhaji, only to an even greater extent. For example, in contrast to the half dozen or so excerpts from academic works in Lowhaji, there are *several* dozen such excerpts in Gardles. In the first two chapters alone (covering democratic theory and American democratic institutions), I

counted twenty-three selections from figures including Plato, Judith Shklar, Walt Whitman, Taylor Branch, and Alexander Keyssar.⁷⁹ The unconventional excerpts continue unabated in the more doctrinal sections that follow. The chapter on candidate qualifications begins with Henry St. John Bolingbroke on the idea of a patriot king,⁸⁰ the chapter on election administration with a Senate subcommittee hearing transcript,⁸¹ and so forth. Like Lowhaji, Gardles also provide many citations to empirical political science findings. But they make a different choice with respect to the tradeoff between quantity and coverage. They typically include fewer citations than Lowhaji, but with more discussion of each finding.

Gardles stand out as well for their greater attentiveness to history. Their chapters on candidate qualifications, political parties, campaign speech, and campaign finance all include useful accounts of how the issues have been addressed in previous eras.⁸² With respect to comparative analysis, furthermore, Gardles occupy an intermediate position between Isskardes and Lowhaji. They discuss foreign countries' policies on reapportionment, minority representation, and campaign finance,⁸³ but not as thoroughly as Isskardes. Lastly, what is clearly sacrificed by Gardles is the doctrinal commentary that is the staple of most casebooks. They offer fewer questions about Justices' arguments than Isskardes and Lowhaji, fewer articulations of legal rules, and fewer references to lower court decisions. And there is no doubt that this doctrinal deficit is deliberate. As Gardles write in their introduction, they aim not to “prepare students for the actual field of practice,” but rather to “focus on the most general (and, in our view, the most interesting) aspects of the field.”⁸⁴

Because these appraisals of the casebooks' methods are somewhat abstract, I conclude this Part by examining more carefully how each volume treats two specific topics: partisan gerrymandering and

⁷⁴ISSKARDES, *supra* note 3, at xiv; *see id.* at 1178–1261.

⁷⁵LOWHAJI, *supra* note 4, at 3.

⁷⁶*See id.* at 342–50.

⁷⁷*See id.* at 417–27.

⁷⁸*See id.* at 686–93; *see also* Dimino, *supra* note 69, at 707 (noting that Lowhaji casebook “features cases no more prominently than it features essays on politics”).

⁷⁹*See* GARDLES, *supra* note 5, at 1–92.

⁸⁰*See id.* at 397–99.

⁸¹*See id.* at 831–34.

⁸²*See id.* at 397–402, 449–54, 561–64, 637–52.

⁸³*See id.* at 215–16, 353–54, 690.

⁸⁴*Id.* at xxv.

political parties.⁸⁵ Beginning with gerrymandering and Isskardes, their focus on doctrinal context is evident throughout their chapter on the issue. They include excerpts from three Supreme Court decisions (*Gaffney v. Cummings*,⁸⁶ *Karcher*, and *Vieth*), they relentlessly probe the Justices' arguments,⁸⁷ and they describe lower court cases in California, Colorado, Florida, Georgia, Illinois, Indiana, Maryland, and North Carolina.⁸⁸ There also is some discussion of empirical political science findings,⁸⁹ but it is brief by comparison.

Lowhaji, on the other hand, provide about twenty pages of legal and empirical analysis before excerpting their sole Supreme Court case (*Vieth*).⁹⁰ This analysis covers states' redistricting criteria, metrics of gerrymandering such as partisan bias and seat/vote ratios, and potential institutional and procedural reforms.⁹¹ After the *Vieth* excerpt and some related observations, Lowhaji end their chapter with a twenty-page section on competitiveness, which also draws heavily from the political science literature.⁹² Gardles, lastly, greet the reader with a selection of highly theoretical material on the different types of representation.⁹³ They then excerpt *Davis v. Bandemer*⁹⁴ rather than *Vieth*, and follow this passage with a mix of doctrinal and empirical commentary. Among the empirical topics they tackle are policy distortion, voter alienation, electoral responsiveness, and legislative polarization.⁹⁵

The casebooks' respective styles are equally clear in their chapters on political parties. Isskardes begin with a brief history of American parties,⁹⁶ and later offer a description of party regulation abroad⁹⁷ as well as a Downsian account of why U.S. electoral rules typically give rise to two major parties.⁹⁸ But the core of their discussion is again doctrinal and contextual. They excerpt *thirteen* separate Court decisions—covering the White Primaries, individuals' participatory rights, parties' associational rights, and third party ballot access—and accompany these passages with their familiar blend of questions about the Justices' reasoning and summaries of lower court cases.⁹⁹

In contrast, Lowhaji lead off their section with a long discussion of party accountability featuring an excerpt from political scientist Morris Fiorina.¹⁰⁰ They then address the White Primary Cases not by providing the decisions' actual text but by showcasing one of Lowenstein's articles on the subject.¹⁰¹ In sum, forty pages go by before the first Court case, *Tashjian v. Republican Party of Connecticut*,¹⁰² is

excerpted, and it is one of only five decisions to receive such treatment. The commentary on these cases is mostly doctrinal, though there is also a thorough explanation of the obstacles faced by third parties in the U.S. system.¹⁰³

Finally, Gardles open their chapter with Washington's famous warning about the "baneful effects of the spirit of party," and follow it with an extended treatment of republicanism, the rise of the modern party in the nineteenth century, and the responsible party government debate of the mid-twentieth century.¹⁰⁴ Only at this point do the case excerpts begin—but once they begin, they proceed in rapid-fire fashion, numbering twelve in total.¹⁰⁵ The excerpts are supplemented by a substantial amount of doctrinal analysis, though there are notes as well about two-party versus multiparty systems¹⁰⁶ and the coherence of American parties.¹⁰⁷

My conclusion, then, is that the casebooks differ in their methodological orientations at least as much as in their substantive priorities. Isskardes are relatively (though far from exclusively) focused on doctrinal context. Gardles downplay doctrinal analysis in favor of democratic theory, empirical political science, and historical exposition. And Lowhaji are somewhere

⁸⁵I choose these topics because all three casebooks devote approximately the same space to them. There are 71 pages on partisan gerrymandering in Isskardes, 65 in Lowhaji, and 54 in Gardles. Similarly, there are 118 pages on political parties in Isskardes, 122 in Lowhaji, and 112 in Gardles.

⁸⁶412 U.S. 735 (1973).

⁸⁷See, e.g., ISSKARDES, *supra* note 3, at 777, 779–82, 819–22.

⁸⁸See *id.* at 782–90, 822–27, 832–33.

⁸⁹See *id.* at 785–86, 828–29.

⁹⁰See LOWHAJI, *supra* note 4, at 100–21.

⁹¹See *id.*

⁹²See *id.* at 144–63.

⁹³See GARDLES, *supra* note 5, at 147–52, 162–69; cf. Gardner, *Applied Theory*, *supra* note 71, at 696 (“Instead of simply diving in[...] I begin with a session contemplating the institution of representation itself.”).

⁹⁴478 U.S. 109 (1986).

⁹⁵See GARDLES, *supra* note 5, at 260–71.

⁹⁶See ISSKARDES, *supra* note 3, at 215–17.

⁹⁷See *id.* at 275.

⁹⁸See *id.* at 316–17.

⁹⁹See *id.* at 221–331.

¹⁰⁰See LOWHAJI, *supra* note 4, at 413–31.

¹⁰¹See *id.* at 431–41.

¹⁰²479 U.S. 208 (1986).

¹⁰³See LOWHAJI, *supra* note 4, at 495–500.

¹⁰⁴See GARDLES, *supra* note 5, at 449–62.

¹⁰⁵See *id.* at 467–557.

¹⁰⁶See *id.* at 492–97.

¹⁰⁷See *id.* at 511–12.

between these poles with respect to both doctrinal and non-doctrinal techniques. Instructors with a wide range of methodological preferences thus should be able to pick a volume that suits their tastes.

III. THE STATE OF ELECTION LAW

The release of two updated casebook editions, and one entirely new casebook, is an opportune moment for assessing the state of election law.¹⁰⁸ In my view, the message conveyed by these volumes is quite encouraging and exciting. Despite the differences between the tomes, there is a good deal of agreement as to both what topics should be included in the field and what methods should be used to study them. Election law also comes across as an exceptionally dynamic area, much of whose content is still in doctrinal and empirical flux. But I worry that the casebooks do not fully capture the range of election law scholarship. In particular, some of the field's major cleavages are not conveyed, and some of its potentially unifying theories are not presented.

In Part I of this review, I stressed the ways in which the casebooks diverge substantively: Isskardes's emphasis on race and representation, Lowhaji's focus on campaign finance, Gardles's interest in democratic theory, and so on.¹⁰⁹ But what was left unsaid earlier is the volumes' high degree of subject matter *convergence*. All three sets of editors agree that an election law course ought to cover race and representation, campaign finance, redistricting, election administration, political parties, and the right to vote.¹¹⁰ The only topics that are included in some casebooks but not in others are direct democracy, alternative electoral systems, candidate qualifications, bribery, and campaign speech.¹¹¹ These issues are not at the core of most conceptions of election law—none of them is included in Schotland's reference to “ballots, bucks, [and] maps”¹¹²—and together they account for only a small fraction of the casebooks' total length.¹¹³

What this means is that the substantive boundaries of election law are reasonably clear. There is no great controversy over which topics lie within its domain and which lie without.¹¹⁴ This is an auspicious position for the field to occupy—secure in the subjects that it studies, and untroubled by anxiety about its place in the broader public law world. And if anything it probably will be *easier* to prioritize election law's various subfields in the future.

Thanks to the Supreme Court's recent decision in *Shelby County v. Holder*,¹¹⁵ Section 5 of the VRA is now effectively defunct. The next edition of Isskardes therefore will be unlikely to devote as much space to the VRA specifically, or to race and representation generally. Likewise, thanks to a series of recent cases,¹¹⁶ it is now obvious that no expenditure restriction can pass muster with the current Court. It thus is doubtful that the next edition of Lowhaji will attend as carefully to spending limits specifically, or to campaign finance generally. Doctrinal evolution may induce convergence not only with respect to *coverage*, but also with respect to *emphasis*.

The methodological story resembles the substantive one. As I explained in Part II, the casebooks do differ in their preferred academic approaches, with Isskardes being more doctrinally oriented, Gardles paying the most heed to political science scholarship, and Lowhaji falling someplace in between.¹¹⁷ But these differences pale in comparison to the volumes' methodological similarities. All three sets of editors agree that election law cannot be taught through doctrinal analysis alone. All three sets also agree that the additional modes of inquiry that hold the most promise are democratic theory, empirical social science, historical study, and comparative examination. Even Isskardes, the most doctrinally inclined of the editors, frequently employ all of these techniques.¹¹⁸ There is thus a consensus that

¹⁰⁸The moment is even more opportune given the 2010 issuance of one more casebook and the forthcoming publication of yet another one. See *supra* note 7.

¹⁰⁹See *supra* Part I.

¹¹⁰See *id.* These topics are ordered again by the number of pages devoted to them by Isskardes. See *supra* note 65.

¹¹¹See *id.*

¹¹²See Schotland, *supra* note 11, at 1227.

¹¹³Specifically, they take up 174 pages in Isskardes (out of 1262), 178 in Lowhaji (out of 921), and 128 in Gardles (out of 910).

¹¹⁴See Cain, *supra* note 11, at 1105 (noting his “basic conclusion that there is a core to this field, about which scholars share common knowledge, if not common conclusions”); Foley, *supra* note 11, at 734 (“[E]lection law is conceptually coherent....”).

¹¹⁵133 S. Ct. 2612 (2013).

¹¹⁶Chief among these, of course, is *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹¹⁷See *supra* Part II.

¹¹⁸See, e.g., ISSKARDES, *supra* note 3, at 10, 316, 889, 936, 1179, 1239, 1247 (democratic theory); *id.* at 35, 79, 94, 123, 158, 176, 470, 498, 582, 676, 699, 785, 828, 845, 910, 1214 (empirical social science); *id.* at 22, 55, 103, 111, 206, 215, 333, 514, 625, 1243 (historical examination); *id.* at 22, 55, 103, 111, 206, 215, 333, 514, 625, 1243 (comparative study).

“[e]lection law is truly an interdisciplinary enterprise,” as political scientist (and *Election Law Journal* editor) Paul Gronke puts it.¹¹⁹

As the insights from cognate fields continue to accumulate, all three casebooks may benefit by adding as editors scholars who are not law professors. When I perused the volumes for this review, I was impressed by the range and quality of their non-legal content. But even as a law professor myself—and hence not an expert on non-legal issues—I still noticed omissions in the casebooks’ coverage of topics with which I am familiar. To give just one example, a good deal of democratic theory argues that voters’ policy preferences should be aligned with those of their representatives,¹²⁰ and a good deal of empirical scholarship tries to assess the effects of different electoral rules on preference alignment.¹²¹ Yet almost none of this literature is cited by the casebooks, even though it is some of the most relevant and interesting work of contemporary political science. I doubt that this material would have been missed by a specialist in the area. I also doubt that the interdisciplinary promise of election law will be fulfilled until the interdisciplinarity progresses from casebook *content* to casebook *editing*.¹²²

While the most important aspects of a legal field may be its substance and its methods, they do not exhaust the universe of noteworthy characteristics. Three key additional facets are a field’s dynamism, its level of judicial and scholarly agreement, and its overall intellectual coherence. I close this Part, then, by considering what the casebooks do (and potentially could) tell us about these issues. To begin with, it is evident from all three volumes that election law is a subject that is still very much in flux. In area after area, major excerpted cases were decided not decades or generations ago, but rather in the last few years. Think of *Crawford v. Marion County Election Board*¹²³ in the right-to-vote context (decided in 2008), *Washington State Grange v. Washington State Republican Party*¹²⁴ in the political party context (also 2008), *LULAC and Shelby County in the VRA context* (2006 and 2013), and *Citizens United, Arizona Free Enterprise, and McCutcheon v. FEC*¹²⁵ in the campaign finance context (2010, 2011, and 2014). This remarkable series of landmark decisions is part of what makes election law such an exhilarating field. The pillars of the doctrine are shifting before our very eyes. The relationship between law and politics remains protean.

Next, however, the casebooks do only a passable job of revealing the intense disagreement among judges and scholars as to many election law issues. The degree of judicial discord is illustrated effectively enough by the dueling excerpts from majority and dissenting opinions. But the extent to which scholars clash over democratic values, doctrinal applications, and policy recommendations often is not conveyed fully. For instance, perhaps the most contentious debate in the redistricting domain is whether there exists a manageable standard for identifying a partisan gerrymander (and, if so, what it is). The casebooks all *allude* to this debate, but none of them presents the assorted positions in much detail.¹²⁶ Similarly heated disputes over the electoral effects of franchise restrictions,¹²⁷ the link between primary type and legislative polarization,¹²⁸ and the underlying purpose of the VRA¹²⁹ tend to be addressed in abbreviated fashion. A

¹¹⁹Gronke, *supra* note 19, at 736; *see also, e.g.*, Gardner, *Applied Theory*, *supra* note 71, at 689 (“[E]lection law connects to two fields with which it is so closely allied that, in my view, it cannot be usefully separated from either of them: democratic theory and empirical political science.”); Nussbaumer, *supra* note 72, at 748–52 (going through series of “interdisciplinary nodes” connecting election law to other fields).

¹²⁰*See* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 313–16, 320–23 (2014) (summarizing this literature).

¹²¹*See id.* at 323–56 (summarizing this literature).

¹²²*Cf.* Bruce E. Cain, *Teaching Election Law to Political Scientists*, 56 ST. LOUIS U. L.J. 725, 727 (2012) (“Political scientists and legal scholars also draw on different literatures when they look at election law problems. The former will know a lot about the relevant empirical literature or theories of representation....”).

¹²³553 U.S. 181 (2008).

¹²⁴552 U.S. 442 (2008).

¹²⁵134 S. Ct. 1434 (2014).

¹²⁶*See* ISSKARDES, *supra* note 3, at 819–27 (mostly discussing lower court cases in notes following excerpt from *Vieth*); LOWHAJI, *supra* note 4, at 139–40 (citing without discussion array of articles published after *Vieth*); GARDLES, *supra* note 5, at 260–67 (focusing on reasons why gerrymandering is perceived as problematic).

¹²⁷*See* ISSKARDES, *supra* note 3, at 95–96 (citing single study on voter fraud prevalence); GARDLES, *supra* note 5, at 834–35 (citing pair of studies). *But see* LOWHAJI, *supra* note 4, at 319–21 (discussing issue in greater detail).

¹²⁸*See* ISSKARDES, *supra* note 3, at 274–80 (not addressing this issue); LOWHAJI, *supra* note 4, at 462–75 (same); GARDLES, *supra* note 5, at 543–49 (same).

¹²⁹*See* ISSKARDES, *supra* note 3, at 750–68 (focusing on constitutionality of Section 2 and Justice Thomas’s effort to narrow it to vote denial claims); LOWHAJI, *supra* note 4, at 224–28 (summarizing scholarly views on *Gingles* in particular); GARDLES, *supra* note 5, at 336–41 (providing mostly doctrinal commentary on *Gingles*).

reader would realize that scholars disagree with both the Court and one another, but she would not grasp how riven the field actually is.

Finally, the casebooks are shakier still in their coverage of theories that aim to unify the varied subfields of election law. In recent years, scholars have proposed several approaches for deciding cases (and framing questions) across a wide range of areas: Hasen's political equality principles,¹³⁰ Issacharoff and Pildes's competition-centered structuralism,¹³¹ Justice Breyer's participatory account,¹³² my own alignment approach,¹³³ and so forth. None of the casebooks' introductory chapters discuss these theories at any length, nor do any of the volumes feature concluding sections seeking to weave together the preceding material. In fact, the only references I found to the theories are a passage on how the White Primaries suppressed competition in Isskardes,¹³⁴ analyses of the effect of redistricting on competition in Isskardes¹³⁵ and Lowhaji,¹³⁶ a comment on how election administration influences participation in Lowhaji,¹³⁷ and a note in Gardles that preference alignment is one available model of representation.¹³⁸ These references do not adequately educate a reader about the theories' trans-substantive goals—their hopes of yoking together an array of topics under a single banner. The references do not adequately make the point that election law is a coherent field of study, not merely a collection of issues pertaining to the regulation of elections.

Fortunately, neither this point, nor the previous one about the field's internal rifts, would be very difficult to make. A short introductory or concluding section on overarching election law principles would suffice to show that there is a thematic unity to the field. Similarly, for each major topic, a few more of the case notes could be devoted to summarizing the rival academic positions. Many of the relevant sources already are cited in the casebooks—it is just their *presentation* that would have to change.¹³⁹ Through these minor revisions, a reader would gain an understanding of the one subject not already covered in enough detail in the volumes: the contours of the field's scholarly landscape.

CONCLUSION

The only conclusion that one can draw from the three new or updated casebooks is that the state of

election law is strong. The field has a clear sense of its substantive identity. Methodologically too, there is a striking consensus about the field's interdisciplinary nature. And the steady supply of major election law decisions means that the field is in no danger of becoming dull. As for the minor nits I have picked with the casebooks, all of them could be addressed without much difficulty in future editions. With a political scientist editor or two, some additional commentary about the field's academic cleavages, and some more discussion of its unifying theories, all of my concerns would be satisfied. Then the casebooks would fulfill their interdisciplinary promise while also accurately reflecting the relevant scholarship.

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¹³⁰See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM Baker v. Carr to Bush v. Gore* (2003).

¹³¹See, e.g., Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643 (1998).

¹³²See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

¹³³See Stephanopoulos, *supra* note 120.

¹³⁴See ISSKARDES, *supra* note 3, at 237–38.

¹³⁵See *id.* at 828–31.

¹³⁶See LOWHAJI, *supra* note 4, at 144–63. This analysis is located in the chapter on partisan gerrymandering but discusses other issues as well. Perhaps it could be moved to the beginning or end of the casebook.

¹³⁷See *id.* at 323–40. This commentary also addresses issues beyond election administration, and so could be moved to a more prominent location.

¹³⁸See GARDLES, *supra* note 5, at 151.

¹³⁹An example of the kind of presentation I have in mind is Lowhaji's survey of scholarly views on *Gingles*. See LOWHAJI, *supra* note 4, at 224–28.

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