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ELECTION LAW AS A FIELD: A POLITICAL SCIENTIST'S PERSPECTIVE

*Bruce E. Cain**

If the minimal definition of a field of legal study is a collection of cases, then election law clearly qualifies. Presently, two important published volumes of election law cases exist—one edited by Daniel Lowenstein¹ and the other by Sam Issacharoff, Pam Karlan and Richard Pildes²—covering the general areas of representation, campaign finance, corruption, and the associational rights of political parties. There are some noteworthy differences between the two volumes: Lowenstein's covers a few more topics, such as lobbying, and is more focused on campaign finance, while the Issacharoff-Karlan-Pildes collection concentrates more on voting rights and racial gerrymandering. But, given the respective expertise of the various editors and the commercial imperative to differentiate approaches, discrepancies are both understandable and sufficiently minor so as to not detract from the basic conclusion that there is a core to this field, about which scholars share common knowledge, if not common conclusions.

Political scientists contribute to the election law field in three ways. First, they study and write about many of the phenomena with which these cases deal. For instance, political scientists such as Herb Alexander and Gary Jacobson have studied the effects of campaign contributions on elections and legislative behavior.³ This work has been important to legal scholars as background material for election

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1. DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* (1995).

2. SAMUEL ISSACHAROFF, ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (1998).

3. See HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM*, 1-8 (3d. ed. 1984) and GARY C. JACOBSON, *MONEY IN CONGRESSIONAL ELECTIONS*, 33-50 (1980).

law cases, and the scholars themselves have sometimes served as expert witnesses for the courts. Secondly, democratic theory provides a normative framework for thinking about concepts such as equity, representation, and influence, which find their way into legal scholarship and judicial decisions. A good example of this, which I will discuss in more detail later, is the way the debate over the meaning of corruption in campaign finance invokes ideas about deliberative and proceduralist approaches to democracy.⁴ Finally, there is a small body of political science literature which regards reform as an institutional design problem: given the goals—of democratic theory—and the likely behavior of actors under different rules—which come from empirical political science. It considers how laws should be reformed to achieve desired behavior and consequences.⁵

I have participated in this field as both a scholar and an expert witness, and in several types of election law cases. While the roles of expert witness and scholar in this field are distinct in some ways, they are linked in others. Scholarship gets incorporated into expert witness testimony and, in turn, expert witness testimony gets incorporated into scholarship. It is my observation that the mix of theory to empiricism varies in different types of election law cases as a consequence of the specific constitutional and statutory framework in which the case is embedded. In particular, I would distinguish two basic types as the voting/representation cases on the one hand, and the corruption/political association cases on the other. The voting/representation cases are primarily equal protection claims argued within the context of the Fourteenth Amendment or the Voting

4. See, e.g., Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFTSTRA L. REV. 301 (1989) (deliberative democracy is undermined by campaign contributions that intend to influence legislator's decisions because it forces legislators from their own ethical beliefs); Dennis Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AM. POL. SCI. REV. 369 (1993) (stating that contributions that strive to influence legislators' actions corrupt the legislators' judgment thus undermining both open discussion and competition of ideas which keeps democracy ethical); and Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, U. Chi. Legal F. vol. 1995, at 111 (focusing instead on the more commonly believed position of procedural democracy which favors compromise and consensus to achieve fairness in the democratic system).

5. Many of the most avid proponents of this school of institutionalism can be found in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* (Bernard Grofman & Donald Wittman eds., 1989).

Rights Act, while almost all the other cases are First Amendment challenges. This distinction between the two types of cases has important and well understood legal implications, but it also has important implications for the role that political science plays. In particular, the equal protection framework places political scientists into a primarily empirical role—verifying facts that help the court determine whether a violation exists or a challenge is justified. By comparison, the First Amendment framework opens up broad democratic theory questions, especially as they relate to determining compelling state purposes. As a result, it is sometimes hard to assess the value of proposed empirical tests because sometimes a test that validates one normative purpose might invalidate another.⁶

In the sections that follow, I want to discuss the variable relationship between political science and the law in two types of cases: voting/representation cases and corruption/political association cases. I will review the Fourteenth Amendment cases first, and suggest that, even though democratic theory has not played a major role in these court decisions, the implicit democratic theory questions are actually quite important. Then I will consider the First Amendment cases, arguing that the strict scrutiny framework leads the Court to consider normative and theoretical issues about what is or what is not essential for the purposes of a democratic state. Finally, I will come back to the definition of the field of election law itself and suggest potential benefits to both the legal scholars and political scientists if we thought of the field as political regulation rather than electoral law.

I. THE VOTING/REPRESENTATION CASES

The voting/representation cases encompass many specific legal and empirical issues, but, implicitly, two important democratic theory questions as well: 1) who should have the right to vote or, to put it another way, who can be denied the right to vote, and 2) what is

6. See Bruce E. Cain & Marc A. Levin, *Term Limits*, ANN. REV. POL. SCI. (forthcoming) (discussing the conflation of normative values and empirical knowledge). The same empirical finding about term limits can be viewed variously through the filter of different normative values. Thus, a finding that term limits weaken legislative expertise would be viewed as a bad development by “professionalists” (i.e., those who prefer a strong co-equal legislature) and a good development by “populists” (i.e., those who want the legislature to return to its amateur ideals).

the best meaning of an equal vote? The first issue, raised in such cases as *Kramer v. Union Free School District*⁷ and *Salyer Land Co. v. Tulare Lake Basin Water Storage District*⁸ concerns the equal right to a vote. In this area, the election law field has had more to say than political science per se. Political scientists have certainly written about and taken an interest in the progressive expansion of the franchise since the late nineteenth century in the United States and other western democracies.⁹ However, there is little in normative political science about the reasons why individuals could be justifiably excluded from the electorate. Democratic theory teaches that several types of representation are compatible with a democratic form of government. Equal individual representation—the implicit standard that courts have relied upon—is just one of a number of democratically acceptable possibilities. However, democratic theory to date has given very little guidance on the question of who should or should not be allowed to vote; it simply assumes that the franchise should be extended to the widest degree to all those who are mentally and emotionally competent to vote responsibly.¹⁰

The *Kramer* line of cases were dramatic from a democratic theory perspective because they raised provocative questions about whether some exclusions make sense given a particular governmental function. The conventional public choice theory is that governments produce public goods with diffuse and non-excludable benefits which cannot be provided by markets in an efficient fashion. The non-exclusivity of those goods creates the near universal right among competent adults to participate in elections that determine the level and type of desired public goods either indirectly, through the choice of representatives or directly, by initiative. In fact, however, the world is not so simple. The public sector does not exclusively provide pure public goods, and markets do not exclusively produce private goods. Sometimes, governments offer private goods and some

7. 395 U.S. 621 (1969).

8. 410 U.S. 719 (1973).

9. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* (1988) (providing a general theory of voter mobilization in the United States).

10. See, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956) (illustrating the prevailing democratic theory that the right to vote should be extended broadly).

private companies, such as utilities, produce essentially public goods. If a government is providing divisible benefits, then it may make more ethical sense to institute a governance scheme in which the franchise is limited to those who pay for and benefit from the service. This is an important institutional design question that arises out of case law and not political science literature. In this instance, the field of election law has enriched democratic theory.

The larger body of cases in this area deal with the meaning of an equal vote. These are fundamentally equal protection cases supplemented by statutory law, especially the Voting Rights Act of 1965. This area is partitioned into apportionment and vote dilution. In the apportionment cases, the United States Supreme Court has taken a strongly egalitarian position, arguing that individuals have the right to an equally weighted vote.¹¹ Democratic theory generally, and the Madisonian framework specifically, were on the losing side in the *Reynolds v. Sims* line of decisions. Democratic theory lost in the sense that the distinction between what is essential to a democratic form of government and what is compatible with it was blurred by the Court's reasoning. Prior to *Reynolds*, a judicious—as opposed to judicial—reading of democratic theory would not have said that equal individual representation was necessary in order for a society to qualify as a democracy, but rather it was one of several acceptable types of democratic representation. As for Madisonianism, its basic premise was that the popular will was best checked by institutions that were insulated from public opinion, similar to courts, or by the competition between representatives from various types of constituencies. The *Reynolds* cases elevated majoritarian principles over the prudentially cautious design of the Founding Fathers. Skepticism about the public whim has given way to reverence for the majority will.

11. See *Reynolds v. Sims*, 377 U.S. 533, 555-61 (1964); *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The only exceptions have been modest deviations at the state and local level in order to accommodate local government subdivisions and communities of interest. See, e.g., *Mahan v. Howell*, 410 U.S. 315, 328 (1973) (Virginia's 1971 reapportionment with 16% variation from the ideal district was not excessive because the district lines were drawn to preserve the "boundaries of political subdivisions.").

Although there was no study done at the time, I suspect that many, if not most, political scientists applauded the apportionment decisions for the same reasons that they were widely accepted by the public. First, the Jeffersonian populist impulse is stronger in American culture than our understanding of and respect for our Madisonian institutions. Second, the fact that rural areas had more representation than the more populous urban areas seemed appallingly undemocratic in a society that was increasingly based in the cities and suburbs.

Their political interests aside, political scientists had valid professional reasons to be concerned about the apportionment decisions. To begin with, the Court annointed one theory of representation over all others, despite a long and rich tradition of political theory that recognizes the value and democratic compatibility of many others—a tradition dismissed by the Court as representing trees not people. By choosing to protect one theory of representation, the Court altered structures of representative government that had been in place since the eighteenth century. In so doing, they deprived the American people of an entire class of institutional mechanisms for compromise which could be used to solve collective action problems. For example, when the San Francisco Bay area considered establishing a regional government to cope with problems of growth and traffic management, its lawyers informed the planners that they could not design a confederation which did not conform to the principle of one person, one vote.¹² Since the smaller cities were unwilling to join into any arrangement that would allow their suburban votes to be swamped by the more numerous votes of the larger, urban cities, the governance problem proved to be insurmountable. What the Bay Area cities wanted was to replicate the logic of the original compromise that induced smaller states to join the large state in the union at the founding of the country. In effect, the courts made it impossible for modern legislators to do what the Founding Fathers had been able to do. Hence, the second reason political scientists might have opposed this decision was to protect the right of states and local governments to adopt flexible solutions to their governance problems.

12. See BAY VISION 2020: THE COMMISSION REPORT (1991).

The other aspect of the apportionment cases that affected political science was the radical alteration of the political question doctrine. By declaring that apportionment was justiciable, the Court intruded into the political design process. In a number of areas, the courts have entered into political issues which were previously thought to be more properly decided in arenas outside the courts. Again, political scientists have been of two minds about this inference. On the one hand, we know that a lot of these questions have no simple, indisputable answer, and that the Court has limited tools to deal with these issues. On the other hand, the courts' interventions have had valuable political consequences, achieving outcomes which would have taken longer to achieve politically. Those who sympathize with what the courts were trying to do have had to weigh the short term gain of getting a desired outcome against the long term problem of "judicializing" politics and institutional design.

The best illustrations of this are vote dilution cases. The two kinds of vote dilution cases are the partisan gerrymandering and the racial cases. In the partisan cases, court intrusion has come to a standstill since *Davis v. Bandemer*¹³, in which the Court held that partisan gerrymandering was justiciable, but set the empirical bar at such a high level that even the infamous Burton gerrymander did not qualify.¹⁴ Some of us have argued for decreased judicial intervention, but I suspect that, in the end, the courts will take a more active role in partisan vote dilution cases. Redistricting research has illuminated the complexities of defining fairness in the redistricting process.¹⁵ The problem is that there are multiple values and multiple rankings of those values, and the pursuit of one value can frustrate the pursuit of another. Even if we narrow the fairness question to the

13. 478 U.S. 109 (1986).

14. See *Badman v. Eu*, 694 F. Supp. 664 (N.D. Cal.), *aff'd* 488 U.S. 1024 (1989).

15. See generally DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES (1992); BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE (1984) (developing the theme concerning the complexities of defining fairness in the redistricting process). See also Daniel H. Lowenstein & Jonathon Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 UCLA L. REV. 1 (1985); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 185 (1985) (examining the criteria proposed to guide districting decisions in the United States).

fair division of representation between the parties, we still have the complication that our single-member district system does not easily or naturally yield proportional results.¹⁶ This has led Lowenstein and Steinberg to argue that there are no manageable standards in this area.¹⁷ A number of determined, reform-minded political scientists and lawyers, among them Dan Polsby and Richard Niemi, continue to push for more aggressive court intervention by luring the Court with the promise of simple formalistic tests, especially compactness.¹⁸ The Court could easily succumb to this temptation. In sum, as compared to the *Kramer* line of cases, where political scientists were uninvolved, and the apportionment cases, where political scientists were mostly on the sidelines but generally supportive, the partisan vote dilution cases present a more polarized situation, with one faction of political scientists urging the Court to resist the temptation to intervene and the other urging the Court to dive right in. Those who want the Court to jump in are looking to the Court to remedy a problem that is hard to solve politically. Those who oppose judicial intervention either care more about the judicialization of politics or do not want the problem solved for political reasons.

Political scientists have also been partisans in the racial vote dilution cases. Of all the areas within election law, the racial vote dilution topic is the best example of the law driving the political science. First, the minority vote dilution case law has the most clearly defined empirical issues. A political scientist who gives expert witness testimony in this kind of case understands with a high degree of certainty what the court wants to know. *Thornburg v. Gingles*¹⁹ distilled the test for a violation of section 2 of the Voting Rights Act into a clear three-part exercise. That is not to say that *Gingles* removed all empirical controversy. There have been scholarly disputes about whether polarization is conclusively proven by bivariate

16. See DOUG RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS, 148-76 (1967).

17. See Lowenstein & Steinberg, *supra* note 15, at 52-54.

18. See Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 330-50 (1991); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts" and Voting Rights: Evaluating Election District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 536-59 (1993).

19. 478 U.S. 30, 53 (1986).

correlation, or whether cohesion can be measured separately from polarization.²⁰ But these are relatively technical matters—generally, we have a clear sense in voting rights cases of the value of a fact for the defendants versus the plaintiffs. That is not always the case in the right of association cases.

Apart from the greater clarity of the Court's empirical needs in this area, legal issues have driven the political science in this area in a second sense; namely, they have helped to contribute to a growing interest in minority voting behavior and representation issues. Most of the voting behavior literature in the fifties and sixties came out of the Columbia and Michigan traditions, focusing on the "American" voter in a highly aggregated sense.²¹ These studies tried to understand such questions as how voters got their information, how they became attached to political parties, and how they decided to vote. Their samples reflected the largely white make-up of the national electorate. However, by putting light on the issue of racial polarization, the Voting Rights Act litigation helped to make minority voting behavior a more salient topic. Now it is fairly common to find studies that over-sample nonwhite groups, and to read papers that explore the differences between nonwhite and white voters.²² The election law field can claim to have contributed to that refocusing of electoral behavior research.

The interaction between political science and legal scholars in the voting/representation area is one wherein the law has generally been more dominant than the political science. Partly due to the logic of equal protection cases and the constraints of how these cases are litigated, political scientists have in several instances ignored important developments in the law, such as the *Kramer* questions, or

20. See generally BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY, 98-103 (1992) (providing a good summary of these issues as they stood in the early nineties).

21. See generally PAUL LAZARFELD ET AL., THE PEOPLE'S CHOICE (1948) (providing an example of the Columbia school tradition); ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1964) (providing an example of the Michigan school tradition).

22. A pertinent example of this work is found in the Latino National Political Survey. See, e.g., RUDOLFO O. DE LA GARZA ET AL., LATINO VOICES: MEXICAN, PUERTO RICAN AND CUBAN PERSPECTIVES ON AMERICAN POLITICS (1992) (discussing the results and implications of the Latino National Political Survey undertaken between August 1989 and April 1990).

thought about court decisions in a narrow, short term, political perspective, like with the apportionment cases. One important function of the field of election law in the future is that it might serve to engage political scientists more seriously in what the courts are doing in areas that affect issues of representation.

II. SPEECH AND ASSOCIATIONAL RIGHTS CASES

There are several differences between the representation/voting rights and campaign finance/corruption cases which have important implications for the interactions between political scientists and legal scholars. The First Amendment framework, the primary legal tool in the campaign finance/corruption area, is less restrictive in the sense that its balancing logic raises more open-ended democratic theory and empirical questions than the equal protection logic of the voting/representation cases. "Balancing logic" refers to the Court's process of weighing the important state purposes of a law against its infringement upon individual rights. Defining important state purposes is both a normative and an empirical task. It is normative in the sense that one has to say why a law is important to the integrity or functioning of the democratic state, and it is empirical because one has to show that the law will accomplish that purpose.

Consider, for illustrative purposes, the Court's rationale for upholding contribution limits. Since the Court excludes equity as a proper justification for infringing upon what is essentially a right to speech, the Court focuses instead on corruption.²³ This rationale raises two political science questions. The normative, democratic theory issue is whether large, unlimited contributions corrupt the integrity of the majoritarian process. The answer requires first examining a theory of what is ideal in order to understand what might be corrupting in that context.²⁴ This is not the time or place to revisit in great detail the lively and extensive debate which has flourished on this issue, but suffice it to say that whether one thinks that a contribution is corrupting is very much affected by the theory of representation upon which the contribution is premised. As I have argued

23. See *Buckley v. Valeo*, 424 U.S. 1, 24-29 (1975).

24. See Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, LEGAL F., 111, 113-22 (1995) (criticizing the approaches taken by Daniel H. Lowenstein & Dennis F. Thompson to reform campaign finance).

elsewhere, those who analogize a campaign contribution to a bribe rely on the norms of trusteeship or deliberative representation.²⁵ Without a normative premise of that sort, it is much harder to argue that contribution limits serve the important state purpose of limiting corruption. If, instead, one takes a more pluralist approach and equates money with other resources, it is harder to see the important state purpose of limiting contributions when we do not limit the trading of other electoral resources, such as time or the promise of a bloc of votes.

There are also important empirical questions that arise in such cases. Does money change the outcome of elections or the behavior of representatives? Even if it is an important state purpose to limit the influence of contributors more than the influence of others in the electorate, is the influence of contributors a major problem? This query leads to elaborate statistical tests of the impact that contributions have on the outcomes of races, or the effects that receiving a large interest contribution have on the representatives' role-call voting.²⁶ It has been a source of no small amount of irritation and derision among journalists and some legal scholars that political scientists have not been able to conclusively prove the obvious: money corrupts.²⁷ Of course, proving the obvious is much harder than you think it is before you try to do it, but there is also a strong possibility that the obvious is not true. For instance, political scientists cannot show conclusively that those who receive more money from an interest group change their votes to accord with the interest group's wishes. Rather, political scientists have argued that contributions flow to those who are already supporters of the group's cause, perhaps in order to get more access to the member.²⁸ Similarly, it is

25. See *id.* at 114-22.

26. See John R. Wright, *Contributions, Lobbying and Committee Voting in the U.S. House of Representatives*, 84 AM. POL. SCI. REV. 417, 422-433 (1990); Laura Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052, 1060 (1986); James F. Herndon, *Access, Record and Competition as Influence on Interest Group Contributions to Congressional Campaigns*, 44 J. POL. 996, 1011 (1982); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. 797, 805-809 (1990).

27. See Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 329 (1989).

28. See generally FRANK M. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* (1992) (discussing the ambiguities of the evidence).

disappointing to some that our studies show that money has diminishing returns for incumbents.²⁹

This raises a second difference between this area and the previous one. Much of the empirical work in this area was developed in a purely academic context by political scientists who were not employed at the time as expert witnesses. Thus, there is no urgency to prove the particular result that reformers want to have proved. Other studies have carefully tracked the failure of laws at the federal, state, and local levels to achieve the goals set out by reformers.³⁰ There is a growing consensus that the system is not working well, but people mean different things in saying this. Hence, political scientists, like others, are split on the best possible policy direction to go, given the Court's positions. Professional norms in social science dictate that, if the data indicates a particular result, one lives with that result until another model can better explain it in the future. One of the unfortunate and worrisome byproducts of the election law-political science interaction is that the process of being an expert witness can polarize a scholarly debate and give incentives to stick to one side of an issue in order to maintain a consistent reputation for the courts or to please those who retain the expert. Fortunately, the pool of political scientists in the campaign finance area is large enough that the potentially polarizing effects of expert witness testimony on the field's scholarship are limited. However, this concern may be more relevant in smaller areas of election law such as the associational rights of political parties.

Much of the previous discussion about the campaign finance cases also applies to the party rights cases. These cases raise rich normative and empirical questions about the purpose and function of political parties. For the sake of simplicity, we can subsume them under the general issue of whether political parties have the right to set their own rules, including the nomination process. In the White Primary Cases, for instance, the central issue involved the right to exclude nonwhites from party primaries that effectively controlled

29. See generally GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS (1980) (providing the first evidence of diminishing returns).

30. See generally DAVID W. ADAMANY & GEORGE E. AGREE, POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA (1975) (discussing the objectives of legislative campaign finance reform and Frank Sorauf's critique thereof).

the selection of candidates who would eventually run in the general election.³¹ In *San Francisco County Democratic Central Committee v. Eu*³² and *Tashjian v. Republican Party of Connecticut*³³, the issue was whether the state legislature, as opposed to the state's party organizations, had the right to set party rules and nomination processes.³⁴ In *Timmons v. Twin Cities Area New Party*³⁵ the question was whether the state could prohibit a party from fielding fusion candidates.

As in the campaign finance cases, the Court has tried to balance important state interests against fundamental rights, raising both normative and empirical questions. The normative issue is not simply about organized group autonomy in the political process. It is also about the role that parties can play in a democracy. For a long time, many political scientists deplored the weakness of American political parties, and looked for ways to restore their strength.³⁶ Parties, in this view, are a means of aggregating the specific concerns of interest groups and voters into broader ideological themes and labels. This has a number of benefits: it eases the decision-making burden for voters, it causes people to see better the connection between issues, it creates more teamwork incentives in the legislature, and it limits the personality-driven politics of individual candidates.

What is interesting about these cases, as compared to apportionment cases, is that political scientists have not drifted fashionably with popular opinion on this question. The general political culture views with suspicion proposals to strengthen parties and regards parties with something between indifference and hostile opposition. Political scientists have played a prominent role in pushing legal

31. See *Nixon v. Herndon*, 273 U.S. 536, 539-40 (1927); *Smith v. Allwright*, 321 U.S. 649, 650-52; *Terry v. Adams*, 345 U.S. 461, 462-63 (1953).

32. 826 F. 2d 814 (9th Cir. 1987).

33. 479 U.S. 208 (1986).

34. See Daniel H. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1759 (1993).

35. 520 U.S. 351 (1997).

36. See AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT* URBANA (1954) with NELSON W. POLSBY, *THE CONSEQUENCES OF PARTY REFORM* (1983); *c.f.* MORRIS P. FIORINA, *THE DECLINE OF COLLECTIVE RESPONSIBILITY IN AMERICAN POLITICS*, 109 DAEDALUS 25, 26 (1980); and KAY LAWSON, *POLITICAL PARTIES AND DEMOCRACY IN THE UNITED STATES* (1968).

cases forward to achieve more rights for the parties.³⁷ At one level, their argument is that the important, anti-corruption purposes that led to the close regulation of parties in the Progressive Era must be traded off with other important state purposes, such as having a more informed, more easily motivated electorate, and legislative caucuses that provide team incentives to work together. But, at another level, one could say that the political scientists are doing what they did in the apportionment cases: using the courts to get what cannot be achieved by normal political means.

Looking at the party cases, the Court's decisions appear to be more confused and inconsistent than in the other election law areas. As Lowenstein has argued, the Court sometimes fails to perceive that it is being asked to adjudicate between two different sectors of a party, such as the party in the legislature and the party as an organization.³⁸ The Court has defended party autonomy against legislative control in *San Francisco County*,³⁹ but not against initiative action in California's blanket primary challenge.⁴⁰ It regards the preservation of the two party system as an important state purpose in *Timmons*, despite the fact that there is no evidence that such a defense is necessary or implied in the definition of a republican form of government. Of all the political law areas we have considered thus far, this is the one in which democratic theory could make the most positive contribution, even if, for instance, it did nothing more than help define what a party is more explicitly.

III. THE FIELD: ELECTION LAW OR POLITICAL REGULATION

Finally, I want to bring up an issue that receives scant attention. 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. But I sense that even the legal scholars are impatient with the boundaries of a field so narrowly defined. Frustration with the Court's treatment of a given problem has driven a

37. Note that Kay Lawson and other political scientists in Northern California supported *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814 (9th Cir. 1987).

38. See Lowenstein, *supra* note 34, at 1759.

39. 826 F.2d at 836.

40. See *California Dem. Party v. Jones*, 984 F. Supp. 1288, 1303 (E.D. Cal. 1997).

number of the legal scholars in this field to thinking about other kinds of institutional remedies. Thus, in the case of political representation, legal scholars like Guinier and Karlan have proposed changes in the electoral system to use semi-political regulation or political regulation as means of escaping the horrible dilemmas and political controversies that come with self-consciously apportioning political power and identity.⁴¹ In the case of campaign finance, Dan Lowenstein has proposed designing a system that uses the parties to aggregate and dilute out the corrupting effects of wealthy individual and interest group donations.⁴² The question we need to ask is whether the field is really election law per se or whether it is political regulation.

Labeling the field "political regulation" opens it up to more genuinely interdisciplinary research and frees scholars to think about problems in appropriate—as opposed to customary—ways. As I have indicated already, this field consists of elements of democratic theory, law, public policy, and empirical political science. When we think of regulation goals, we draw from democratic theory and constitutional principles. When we consider the behavior of political actors under existing institutions, we rely on empirical political science. When we propose reforms to bring behavior in line with goals, we are engaging in a specialized form of public policy-making concerned with institutions rather than policy programs. 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. Such an achievement would perhaps be the most important contribution this field can make in the end.

41. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 221-36 (1989) (examining limited and cumulative voting strategies as alternatives to single member districts to increase minority representation).

42. See Lowenstein, *supra* note 4, at 351.

