CAMBRIDGE STUDIES IN ELECTION LAW AND DEMOCRACY


# Race, Reform, and Regulation of the Electoral Process

## Recurring Puzzles in American Democracy

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

CAMBRIDGE

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## RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS

This book offers a critical reevaluation of three fundamental and interlocking themes in American democracy: the relationship between race and politics, the performance and reform of election systems, and the role of courts in regulating the political process. This edited volume features contributions from some of the leading voices in election law and social science. The authors address the recurring questions for American democracy and identify new challenges for the twenty-first century. They not only consider where current policy and scholarship are headed, but also suggest where they ought to go over the next two decades. The book thus provides intellectual guideposts for future scholarship and policy making in American democracy.

Guy-Uriel E. Charles is a Professor of Law at Duke Law School and the Co-Director of the Duke Center on Law, Race, and Politics. Professor Charles teaches and writes in the areas of constitutional law, civil procedure, election law, law and politics, and race. His articles have appeared in *Constitutional Commentary*, the *Michigan Law Review*, the *Michigan Journal of Race and Law*, the *Georgetown Law Journal*, the *Journal of Politics*, the *California Law Review*, the *North Carolina Law Review*, and others.

Heather K. Gerken is the J. Skelly Wright Professor of Law at Yale Law School, where she specializes in election law, constitutional law, and civil procedure. Professor Gerken is one of the country's leading experts on voting rights and election law, the role of groups in the democratic process, and the relationship between diversity and democracy. Her work has appeared in the *Harvard Law Review*, the *Yale Law Journal*, the *Stanford Law Journal*, the *Columbia Law Review*, *Political Theory*, and *Political Science Quarterly*. Her book, *The Democracy Index: Why Our Election System Is Failing and How to Fix It* (2009), discusses a proposal put into bills by then-Senators Barack Obama and Hillary Clinton and Congressman Steve Israel.

Michael S. Kang is an Associate Professor of Law at Emory University School of Law, where he teaches election law, business associations, and a seminar on law and democratic governance. His research focuses on issues of voting, race, election law, and political science. Professor Kang's articles have been published by the *Yale Law Journal*, *N.Y.U. Law Review*, and the *Michigan Law Review*, among others. He received his J.D. from the University of Chicago Law School and his Ph.D. in government from Harvard University.

**Cambridge Studies in Election Law and Democracy**

Recent developments have pushed elections scholarship in new directions. As a result, interdisciplinary work has flourished and political scientists and law professors have developed a more sophisticated sense of the relationship between law and politics. This series seeks to create an intellectual roadmap for the field, one that systematically examines the issues confronting both mature and emerging democracies. It will chart those new intellectual paths to spur interdisciplinary work, to identify productive ways in which scholars' research agendas connect to policy makers' reform agendas, and to disseminate this body of work to the growing audience interested in the intersection of law, politics, and democracy.

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# Preface

Fair elections are essential to our democracy. It is critical that current safeguards intended to ensure the integrity of the electoral process evolve to meet the challenges posed by rapid social and economic changes – from rising ethnic diversity and economic inequality to the growing scale of campaign funding. To ensure that our democratic institutions satisfy America's current needs, academic experts and policy practitioners must have a clear understanding of how our elections function, how the obstacles to informed participation are evolving, and how judicial and legislative reform can best foster healthy democracy. *Race, Reform, and Regulation of the Electoral Process* presents the best contemporary research on these questions and charts an agenda for the next generation of scholarship on elections and democracy.

The scholars who contributed to this volume are part of the Tobin Project network of leading academics and policy makers committed to cultivating transformative, interdisciplinary research to address the most important problems for the long-term health, prosperity, and stability of American democracy. This volume is a significant contribution toward that goal, and we are pleased to have played at least a small role in bringing the book to fruition.

The ideas presented here were first shared in February 2009 at a Tobin Project conference: "The Future of Election Law: Policy Challenges and a Research Agenda for Reform." This meeting brought together an extraordinary group of the leading scholars of democracy and elections across the disciplines of law, political science, public policy, and history; esteemed state and federal judges; senior state officials; and the general counsels for both John McCain's and Barack Obama's 2008 presidential campaigns. The research in this book benefited tremendously from the rich exchange of ideas across disciplinary and political boundaries at the conference. The meeting also helped foster the intellectually diverse community necessary to undertake the ambitious research goals laid out herein.

We consider this book to be not the end of a scholarly process, but rather a catalyst for further work and interdisciplinary collaboration. It is our belief that rigorous

research and scholarly consensus on an issue of great public importance – the integrity of our elections and democracy – can be a potent force in framing public dialogue and guiding policy reform. We look forward to the continued efforts of those currently engaged in this project and to further collaboration with those committed to achieving a better understanding of these issues.

We are grateful to the scholars, policy makers, practitioners, and donors who have participated in this project. Special thanks are due to Heather K. Gerken, a member of the Tobin Project's steering committee, and Guy-Uriel E. Charles, who together chaired the conference and galvanized the stellar group that contributed to *Race, Reform, and Regulation of the Electoral Process*; co-editor Michael S. Kang, who collaborated with Heather and Guy to formulate the intellectual framework of this volume; the American Law Institute for its generous co-sponsorship of this initiative; and Duke University Law School for providing space for the February 2009 meeting.

The Tobin Project
May 2010

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# Introduction

## The Future of Elections Scholarship

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

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

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

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

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

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

## RACE AND POLITICS

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

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

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

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

## COURTS AND THE REGULATION OF THE ELECTORAL PROCESS

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

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

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

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

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

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

## ELECTION PERFORMANCE AND REFORM

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

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

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