

2012

Election Law as Elective of Choice

Kirsten Nussbaumer

University of Minnesota Law School, nussb005@umn.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Kirsten Nussbaumer, *Election Law as Elective of Choice*, 56 St. Louis U. L.J. (2012).

Available at: <https://scholarship.law.slu.edu/lj/vol56/iss3/10>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

ELECTION LAW AS ELECTIVE OF CHOICE

KIRSTEN NUSSBAUMER*

Election Law is no longer a boutique course (if it ever was).¹ It is an elective, of course. But it is one that has become increasingly well-suited for teaching some of the fundamentals of the law-school curriculum, and not only in the classroom, but outside it too, in settings that are more directly oriented to practice.

I. ELECTION LAW AS FUNDAMENTAL IN THE LAW SCHOOL CLASSROOM

Modern Election Law as a stand-alone course and a self-consciously distinct field of scholarship is still quite young, dating only to the late twentieth-century. According to the self-reports of some of the pioneers in the field, Election Law courses (together with related courses that are based on somewhat different but overlapping subject-matter divisions such as Political Regulation, or Law of Democracy) were spurred in major part by the U.S. Supreme Court's "constitutionalization . . . of representation in the early 1960s."² Consequently, much of the associated scholarship at the turn of the century has positioned academic election law as a sort of critical auxiliary corps for the Supreme Court as the Justices continue to work out the legacy of

* Stanford University, M.A., J.D., Ph.D., kirsten_n@me.com. Many thanks to my research assistant Mandi Moutray for help with sources.

1. Not that I have any beef with the unabashedly boutique courses in the curriculum. Electives are elective for a reason.

2. Daniel H. Lowenstein, *Election Law as a Subject—A Subjective Account*, 32 LOY. L.A. L. REV. 1199, 1201 (1999) (stating that the key events in the growth of election law as an academic field were the Supreme Court's 1960s cases constitutionalizing representation, the Voting Rights Act of 1965, the 1974 amendments to the Federal Election Campaign Act, and related state campaign finance regulation); *see also* Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173, 1174 (1999) (stating that "the Warren Court began the process of making democracy the focal point of American constitutional law"). The first two modern casebooks were published as recently as 1995 and 1998. DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* (1995); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (1998); *cf.* Pamela S. Karlan, *Constitutional Law, the Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185 (1999) (relating the new stand-alone treatments of the field to the coverage of political law provided in general constitutional law casebooks).

the Warren Court's voting rights cases.³ With U.S. Supreme Court opinions as the focus of the field—and the fact that only a small percentage of law school graduates have ever been situated to play a role in developing federal judicial doctrine about elections—one might then suspect that election law as a start-up enterprise was indeed a pretty high-end boutique.

In fact, however, election law was conceived from the get-go, or at least by its “puberty” (as Richard Hasen was dating the field by 1999), in terms both pragmatic and sophisticated, with pedagogical purposes and an interdisciplinary mindset that might be fundamental for future lawyers whether or not they were ever to get near a vote dilution or campaign finance problem in practice.⁴ Even courses that were primarily a form of advanced constitutional law could be, and were, designed as an avenue for grappling with fundamental questions of democratic theory.⁵ According to Hasen's summary of a 1999 symposium on election law as a field, the stated pedagogical purposes of the course could be as wide-ranging as the enrichment of constitutional law, the elucidation of the law of the corporation, and encouragement of critical thinking as a means of challenging excessively cynical and partisan views about politics.⁶ Election law was born of two “parents, constitutional law and political science.”⁷ But election law was also, at least implicitly, a liberal art, maybe something of a “Civics for Lawyers.”

To my mind, these eclectic, interdisciplinary features of the subject are not only the high points of the field as terrain for scholarship. They are also the features that are most likely to make the Election Law course beneficial for students in the long-run (with our students imagined both from the perspective of their futures as practitioners and as members of a political community). These interdisciplinary nodes are, quite consciously, the emphasis of my own courses in Election Law.

Start with Election Law as a node between law and empirical political science. Realistically, the course cannot provide systematic training in social science methods due to the amount of time that is needed for the difficult legal materials (for example, the dense Supreme Court opinions on redistricting or

3. See, e.g., Richard L. Hasen, *Introduction: Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1100 (1999); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999).

4. Hasen, *supra* note 3, at 1095, 1097 (pegging the state of the field in 1999 as at “puberty,” and observing that “[a]ll of the participants [in the symposium on election law as a field] agree about one thing: the study of election law serves important pedagogical purposes”).

5. See Karlan & Pildes, *supra* note 2, at 1185 n.3.

6. Hasen, *supra* note 3, at 1097.

7. *Id.* at 1096.

campaign finance).⁸ The subject-matter of Election Law *is*, however, ideally suited for modest efforts to nudge law students toward a more empirical mentality that may help compensate for some of the cognitive limitations that can result from single-minded focus on doctrinal argument in the adversary context. This sort of empirical-mindedness is likely to be of use in many areas of legal practice, but Election Law is particularly effective at bringing the connections between the empirical and the legal to the fore.⁹ Legal reasoning in many election law cases is buttressed by the parties' introduction of empirical social science about the effects of a particular election rule; in other cases, the reasoning is haunted by concerns about the *lack* of empirical evidence for either side in the litigation (witness, for example, the unsettled questions about the relationships between voter identification laws, voter fraud, and burdens on the right to vote).¹⁰ Either category of cases (the ones that incorporate social science evidence and the ones that seem to turn on empirically unsupported premises) can be used in the classroom to encourage empiricism.

Often, when empirical matter first arises in the Election Law classroom, law school socialization seems to have made it instinctive for some students to approach their assessment of the empirical claim from the sole perspective of whether it will provide them another weapon in the rhetorical arsenal for a position to which they have already committed. I try to counterbalance this kind of results-oriented thinking by occasionally putting my students in non-adversarial roles (both in the context of a legislative staff simulation and in

8. The first time I taught Election Law to law students, I did assign a standard reading load of chapters from one of the excellent casebooks while also assigning, for almost every unit, relevant social science articles. This was overkill.

9. Empiricism has been a presence in election law for a long time, but it became all the more prominent after the 2000 presidential election made fact-intensive "nuts and bolts" questions of election administration into a subject of interest for legal scholars and political scientists. See Richard L. Hasen, *Introduction: Developments in Election Law*, 42 LOY. L.A. L. REV. 565, 566–67 (2009) (describing the field's about-face from the previous decade when fact-intensive regulatory questions were frequently derided as unfit subjects for Election Law to the post-*Bush v. Gore* world in which election mechanics are a major and respected subject of scholarship and teaching). In 1999, James Gardner put forward a skeptical view of what empirical political science has to offer election law, but even then he recognized the phenomenon of a growing political-science institutionalism that could serve as a fitting disciplinary partner. See James A. Gardner, *Stop Me Before I Quantify Again: The Role of Political Science in the Study of Election Law*, 32 L.A. L. REV. 1141, 1155–56 (1999).

10. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); Christopher S. Elmendorf, *Empirical Legitimacy and Election Law*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 117 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011); Richard L. Hasen, *After the Storm: The Uses, Normative Implications, and Unintended Consequences of Voting Reform Research in Post-Bush v. Gore Equal Protection Challenges*, in RETHINKING THE VOTE: THE POLITICS AND PROSPECT OF AMERICAN ELECTION REFORM 185 (Ann N. Crigler, Marion R. Just & Edward J. McCaffery eds., 2004).

everyday Socratic questioning about the court cases). The students are asked to imagine they are deliberating with others from their *own* firm, nonprofit, political party, or legislative office about the choice of appropriate means to meet broad ends that are already specified by a client or boss. The limited, but not unworthy, pedagogical goals of these exercises are to facilitate students' ability to go where the evidence leads them and to switch gears if the evidence takes them to an unexpected place, to have a better sense of when a legal question might implicate an empirical question, and to encourage them to have the confidence to consult empirical sources as supplements to the strictly legal materials.

Next, consider the interdisciplinary nodes where election law meets political theory, the liberal arts, and "civics for lawyers." These get as much attention in my Election Law courses as does the empirical. To an extent, this is not a matter of choice. Normative democratic theory, in particular, has been such a major import into the field that it is probably a central part of anyone's Election Law course. Much of the reasoning in the Supreme Court's twentieth-century election law cases can sound in democratic theory as much as it does in general constitutional-law doctrines like equal protection or the First Amendment. Yet the reasoning often seems under-theorized as compared to other areas of constitutional doctrine.¹¹ A substantial body of commentary then brings in insights from academic democratic theory as a primary tool for filling in the ellipses.¹²

An outsider to the field might then think that Election Law is a second-best (or worse) way to teach political theory. If we are going to talk about democratic theory, why go for the often complicated and inelegant court opinions rather than just assign Madison, Locke, or Arendt? I think the answer is that, in Election Law, we are engaged in a very special kind of political theory that is at the intersection between particular institutional design choices and the substance of democracy, that this kind of theory is important (whether or not one thinks it should appear quite so prominently in judicial opinions), and that it is a way of thinking that plays to the strengths of lawyers. It is one thing to develop a general theory about, say, the value of descriptive representation in the legislature. It is another thing for our students to become skilled at recognizing that a very concrete design choice (say, the choice

11. On Samuel Issacharoff and Richard Pildes's account, this incomplete, sometimes unsatisfying, nature of the reasoning of the cases is not to the Court's discredit, but is rather the result of functional necessity, and "[t]he Warren Court's need to create a vision of democracy *ex nihilo* from the constitutional order." Issacharoff & Pildes, *supra* note 2, at 1174. "[T]he Warren Court began the process of making democracy the focal point of American constitutional law" at a time when the "Court had little basis in text, history, or judicial precedent for developing a robust conception of democratic politics." *Id.*

12. See, e.g., Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002).

between at-large versus district-based city council elections in the context of racially-polarized voting in a community with a particular history) may entail a trade-off between descriptive and substantive representation, or (under somewhat different conditions) a trade-off between descriptive representation and thoroughgoing disempowerment of a minority.

The first exercise in general theory may be asking our law students to be political-theorists-lite. The second exercise appeals to the skills of a lawyer, where we may reasonably think they can develop a comparative advantage over the theorists and empiricists.¹³ Substantive democratic theory is in play, but it is a “gas-and-water-works” kind of theory that should require no apologies for its grounded character.¹⁴ This theory develops an appreciation for the substance of institutional design that our graduates may later put to use in drafting an instrument on behalf of clients and employers, or in their capacity as citizens, including in quite mundane settings such as, say, the adoption of decision rules for the local co-op.¹⁵

“Civics for lawyers” then becomes an important component of the exercise if we hope that our students will use their advantages in ways other than to simply work the angles of facially-neutral rules and institutions—angles that might not be equally well-understood by many of their fellow citizens.¹⁶ I suspect that my Election Law courses may make some of my students *more*, not less, cynical about the choices that we make about electoral rules and institutions. While some of them arrive on the first day of class as unmistakable political junkies, others will be learning for the first time just how thoroughgoing the partisan calculus can be for each ostensibly technical issue. It does not bother me in the least if these students are becoming more cynical along the way for reasons that are justified by the realities on the ground—so long as we are also giving them a chance to consider at each juncture how we might redesign electoral rules and institutions from the

13. For at least those of us who also teach Civil Procedure, this focus on our students’ ability to recognize, evaluate, and manipulate “the substance of procedure” in its most concrete and textual detail will feel quite familiar.

14. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 239–40 (1997) (touting a “gas-and-water-works” political theory in which pedestrian questions of institutional design are taken seriously, and criticizing mainstream political theory for pursuit of ideal theory at the cost of “detachment from institutional analysis”).

15. I use the word “citizen” loosely and advisedly to refer to any person acting in a capacity of political membership.

16. See, e.g., Joshua Fougere, Stephen Ansolabehere & Nathaniel Persily, *Partisanship, Public Opinion, and Redistricting*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS*, *supra* note 10, at 227, 229–31 (describing the public’s lack of understanding about the redistricting process).

perspectives of political equality, accountable government, or other public-interest values that are of importance to them.¹⁷

Finally, history might be considered an important interdisciplinary node for an Election Law course. Historical context is most obviously of importance for ensuring that students without a strong history background can understand something about why race is so central to election law. To this end, valuable materials on U.S. histories of enfranchisement and disenfranchisement have always been a part of the Election Law canon.¹⁸ Historical (human-centered) narratives are also a useful supplement for those students who may otherwise have difficulty grasping the high substantive stakes of the arcana of election law.¹⁹

I will admit that, in some respects, the node between history and election law strikes me as the weakest interdisciplinary link. For this reason, I supplement some of the assigned readings throughout the course with (very short) lectures designed to provide more historical context (not history offered as a direct source of normative values, but rather, history oriented towards understanding and explanation).

For example, to an important extent, I think that fuller historical understanding may make it difficult to view the Warren Court's entrance into the political thicket as the point at which U.S. democracy became constitutionalized (an impression one can easily get from the sometimes exclusive scholarly focus on the modern U.S. Supreme Court cases). To me,

17. On the defense of education generally as a liberal art or civics, see MARTHA C. NUSSBAUM, *NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES* (2010). My thinking on the liberal-arts aspect of law school as including a component of training for citizen values is influenced by Nussbaum's work, but obviously liberal arts in the context of professional training will have to have a specialized character, requiring us to think about what it might mean for a lawyer to be a good citizen.

18. See, e.g., Roy A. Schotland, *And for the Student? The Seven Striking Strengths of "Ballots, Bucks, Maps & the Law"*, 32 LOY. L.A. L. REV. 1227, 1227–29 (1999) (treating Election Law as education in the history of race). I find the two pioneering casebooks to be very useful on this score. (I cannot yet speak to the other casebooks, but look forward to getting to know the forthcoming casebook by Guy Charles and James Gardner, as well as another recent arrival, MICHAEL DIMINO, BRADLEY SMITH & MICHAEL SOLIMINE, *VOTING RIGHTS AND ELECTION LAW* (2010)). Thanks to tips from others, I have shown films about enfranchisement politics to my classes. E.g., *Eyes on the Prize: Bridge to Freedom: 1965* (PBS television broadcast Feb. 25, 1987) (for the struggle for African-American voting rights); *IRON-JAWED ANGELS* (HBO Films 2004) (for the struggle over women's suffrage). In Missouri, I added local interest through the teaching of the (St. Louis-litigated) women's suffrage case of *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875).

19. An example that I assign is STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY* (2007). For *Bush v. Gore* and election recount mechanics, I have recommended, but not required, viewing of the film *RECOUNT* (HBO Films 2008), and reading of JAY WEINER, *THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT* (2010).

there was already a significant component of election law that was constitutional law, but it was a constitutional tradition (or set of traditions) rooted in Congress or in the constitutions, judiciaries, and legislatures of the states.²⁰ It was thus inconspicuous in federal-court-centered law schools and legal scholarship. With a broader historical perspective, the question of constitutionalization of election law becomes much more cleanly separated from the question of (federal) judicialization.

This point about the potential distortions of an excessive focus on the federal case law, however, brings me to the latest trends in election law scholarship. Much of this new scholarship, especially the so-called “new institutionalism,” is in fact pushing strongly toward greater emphasis on legislatures, administrative agencies, mechanisms of direct democracy, and other political actors (whether or not this scholarship makes use of historical methodologies).²¹ The movement is not toward abandoning the study of federal courts, but rather toward the study of the full range of institutions that might be relevant to election law, with an emphasis on understanding the interactions between these different institutions. In pursuit of these ends, the scholarship pushes yet further towards interdisciplinarity.²²

While interdisciplinary scholarship is, at least in casual discourse, sometimes viewed as an intellectual luxury good that might not be that important for those of our students who are not headed for academia or government service, it is, in my opinion, precisely the direction that Election Law courses should continue to go in order to be of most use to our students.

20. A nice example of the historical perspective that I have in mind, that is, historical scholarship that engages with aspects of the constitutional tradition of election law in which the center of gravity is outside the federal courts, is JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* (2007). On election law in state constitutions, see, for example, James A. Gardner, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881 (2006).

21. A good way to see this institutional shift is to survey the essays in a new edited volume, *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS*, *supra* note 10. For some of these authors, the shift is not merely for descriptive or explanatory purposes, it is also a normative shift in thinking about which institutions might best be entrusted with election reform. See, e.g., Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang, *Introduction: The Future of Elections Scholarship*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS*, *supra* note 10, at 1–2 (suggesting that “we may find that courts should play a less central role in regulating politics”); Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS*, *supra* note 10, at 86, 96 (suggesting that “political science might find a better genetic partner [than constitutional law] to sire the second generation of election law scholarship” and further suggesting that that partner should be administrative law).

22. Again, an easy way to see the shift is to review the scope of the contributions to *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS*, *supra* note 10.

At least if this interdisciplinarity continues to be of the variety that de-emphasizes the study of federal courts and judicial doctrine in isolation, our Election Law will be a field that is better-equipped to teach students skills of statutory interpretation.²³ And it will be a field that does a better job of instilling in our students a more complete sense of their options—that they can and should consider judicial, administrative, legislative, and civil-society strategies as substitutes or complements on behalf of their clients, and perhaps also, on behalf of their own interests as citizens.²⁴

II. ELECTION LAW AS FUNDAMENTAL FOR PRACTICE

In both my Election Law and Legislation courses, I remark in the first class that one of my goals for the students is that they become more aware of the ways in which a lawyer may put specifically legal skills to use in legislative and administrative settings. Even the future litigators among them should cultivate a flexible mindset with which they can recognize circumstances in which their client may be better served by a turn to a legislature or agency rather than to the courts. Other students may want to explore truly legislative careers in which they use their training in law and the courts for the primary purpose of assessing and drafting legislation or agency regulations.

The first time I offered these comments to my Legislation class (for a course at the University of Minnesota that included a significant election law component), some of the students descended on my office afterwards to ask for more specifics about where they might go to find out about legislative career paths. (Some of them had a strong prior interest in the electoral process, while others were apparently motivated by a more general concern about the need to expand their options in a potentially difficult job market.) Their questions led me to create an election-law-focused legislative externship with Minnesota's elected Secretary of State, Mark Ritchie (of the Democratic-Farmer-Labor Party).

This externship program was—thanks to the exemplary care of Secretary Ritchie and his staff—a very successful experience for the students, and it was one that convinced me that election law may be the ideal subject for law-

23. Of course, the field has long had an emphasis on our most important statute, the Voting Rights Act ("VRA"). Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)). But the VRA is in many respects a framework statute or "common-law statute" for which (of necessity) the federal courts have been especially prominent in working out its meaning, and have done so in ways that may not call upon the full range of statutory-interpretation skills.

24. Cf. Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1119 (1999) (urging that Election Law be re-labeled "Political Regulation" to encourage thinking about problems that might be better resolved by pathways other than litigation).

school training in fundamentals outside the classroom as well as inside it. The students could get excited about the broad (often perhaps too abstract) institutional themes of the Election Law and Legislation courses because they were witnessing these themes in vivid action, often from the insider perspective.²⁵ Of course, only a small percentage of the modest number of students who will go on to legislative careers are likely to specialize in election law. Nonetheless, I came away thinking that election law may be a superior vantage point for learning about the legislative process generally because it is a subject that tunes students into the electoral dynamics and the substance of procedure that are characteristic of all legislation.

The Secretary of State externship (unbeknownst to me at the time) may have been part of a larger trend in academia towards practicums in election law. Certainly, many faculty members (including some of us who are so-called doctrinal faculty as well as clinical faculty) are offering students new experiences with election law in action.²⁶ While some of these professors no doubt have more experience than I do, I will say a bit about the nuts-and-bolts of the Minnesota externship because I happen to be familiar with it and because I believe some of its features may be replicable in other states.

25. For example, the student-externs could learn from Minnesota's legislative efforts to come into compliance with a new federal law, the Military and Overseas Voter Empowerment Act ("MOVE"), Pub. L. No. 111-84, § 575, 123 Stat. 2190, 2318 (2009), about (i) the interplay between the government branches when administrators are expected to play a role in setting the state legislative agenda and shaping the content of state legislation; (ii) the ways in which new federal legislation could effectively set the state legislative agenda yet also leave substantial room for states to make very different implementation choices; (iii) the interests of state actors and intergovernmental lobbies in shaping federal and state legislation; (iv) the diffusion of ideas among state and local actors from different states; (v) the importance of local government; and, not least, (vi) the mix of public-interest argumentation and factional electoral calculation that seems to accompany every election-reform proposal.

26. For example, Nathaniel Persily at Columbia Law School has developed a course in which his students learn to use redistricting software in order to draw proposed congressional district lines. *Columbia Law School Project to Draw Congressional Maps for Redistricting Goes Live*, COLUM. UNIV., http://www.law.columbia.edu/media_inquiries/news_events/2011/march/2011/gerrymander-persily (last visited Feb. 18, 2012). At the Moritz College of Law at Ohio State, there is a legislation clinic that is sometimes focused on election-law issues such as campaign finance, term limits, and direct democracy. See Terri L. Enns, *Clinical Professor of Law*, ELECTION L. MORITZ, <http://moritzlaw.osu.edu/electionlaw/faculty/enns.php> (last visited Feb. 18, 2012). At the College of William and Mary, the Election Law Program (a joint venture with the National Center for State Courts) works with a law student group, the Election Law Society, on a program in which law students train undergraduates from six schools to serve as poll-workers (with funding from a Help America Vote Act grant). See *Election Law Program*, COLL. WM. & MARY, <http://law.wm.edu/academics/intellectuallife/researchcenters/electionlaw/index.php> (last visited Feb. 18, 2012); *W&M Law Students Receive Federal Grant for Tidewater Roots Poll Project*, COLL. WM. & MARY (June 29, 2010), <http://law.wm.edu/news/stories/2010/wm-law-students-receive-federal-grant-for-tidewater-roots-poll-project.php>.

The externs were selected out of my general survey course on Legislation and thus they began their work with a background in statutory interpretation, legislative procedure, and election law. I also assigned them background reading on election administration prior to their official start date with Secretary Ritchie.²⁷ The students worked in teams of two in the office of the Secretary of State under the supervision of both the Secretary and his legal staff. We also had regular group meetings at the law school (meetings which Secretary Ritchie usually joined) in which students presented progress reports and all participants offered feedback on the projects as they unfolded.²⁸ The students' primary goal was to create work that might be of short-term use to the Office of the Secretary of State, but their own educational interests were often at the foreground thanks to the generous supervision they received on site. Students were also required to keep (confidential) journals to reflect upon what they were learning.

The students' projects were chosen by the Secretary and his staff in consultation with University of Minnesota faculty. Given that the externship was only worth two course units (as opposed to the much larger number of units that might be earned for a clinic), the projects necessarily emphasized policy research over time-intensive legislative drafting. For example, one student team conducted a survey of legislation and bills for implementing the federal MOVE Act²⁹ in other states in order to prep Minnesota officials as they set about fashioning the state's own legislation. The students created a chart with side-by-side comparisons of the different approaches, and offered recommendations about which policies might work best in Minnesota. Their research was highly interdisciplinary, including the reading of empirical social science research and interviews with relevant political science experts. Effectively, the students were policy consultants with the lawyerly chops to read statutory texts, acting on behalf of a client conceived to be the Office of the Secretary of State.

27. This reading included STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, *FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES* (2007), and Jocelyn Benson's scholarship on secretaries of state, JOCELYN F. BENSON, *STATE SECRETARIES OF STATE* (2010).

28. Nothing about the externship felt like work to me. In part, this was because we had on board as full faculty partners two other Minnesota faculty (William McGeeveran and Carol Chomsky, both of whom have expertise in legislative process and statutory interpretation). Initially, I sought out participation of other faculty for extrinsic reasons (because I wanted the possibility of long-term continuity past my two-year fellowship at Minnesota). But I would now recommend collective faculty supervision on the intrinsic grounds that it gives the group meetings more of a law-firm character, and, more speculatively because, for the long-run, it may protect against individual political agendas.

29. Pub. L. No. 111-84, § 575, 123 Stat. 2190, 2318 (2009).

Obviously, it was vital that the students' projects be carefully crafted to avoid any reality or appearance of a partisan cast (a problem that might not be a concern in a practicum that works with a non-elected government office or even in many elected offices that deal with non-electoral matters). In choosing the student projects, the goal was to create an experience in which a Federalist Society member could be as comfortable as a member of the American Constitution Society, a Democrat as much as a Republican. This was a success (something that might not be as easy to pull off in a state where there is less of a 'good-government' civil-service tradition than there is in Minnesota).³⁰

The only downside of working with an elected official on election law (of which I am aware) is that neither the university nor the Office of the Secretary of State could be certain much in advance of the semester's start whether the externship could actually take place since it was contingent on either the Secretary winning re-election or a new Secretary wanting to continue with the program. For other faculty who may be considering such a program in other places, it might be possible to institutionalize their university's relationship to the Office of the Secretary of State through legislation that would not be tied to a specific official. However, given the importance of working with individuals who are especially motivated and competent, it might be better to create continuity for an election law externship or practicum by conceiving of the law school course as a more general consulting group that is available for different organizational clients in different years (with nonprofit as well as governmental clients).

What if this taste of election law in action leads more students to want careers that may be hard to come by? Some law school administrators might (depending on their particular state environment) want to look into collaborating with their state legislature to create or augment civil-service positions for lawyers in election administration or legislative drafting generally.³¹ Nobody could call that boutique.

30. Even in Minnesota, it was not clear in advance of the externship how easy it would be to avoid any suspicion of bias. Minnesota had already had ample controversy about the contested senatorial election between Al Franken and Norm Coleman. Secretary Ritchie had spoken to my Legislation class as a whole about his role in the Franken-Coleman recount. As one would expect, there were students who had divergent views about the election and the role of partisanship in its resolution. But, as it turned out, the Secretary and his staff were so professional and intently focused on the externs' learning that any partisan fears were apparently put to rest.

31. Cf. Bruce E. Cain, *More or Less: Searching for Regulatory Balance*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS, *supra* note 10, at 263, 278 (proposing that the federal government create public lobbyists along the model of public defenders or take steps to bolster the nonpartisan standing and professionalism of congressional staff); *Congress Needs a Clerkship Program*, CONG. CLERKSHIP INITIATIVE, www.congressionalclerkship.com (last visited Feb. 18, 2012) (describing a proposal by the Dean of Stanford Law School and others to create congressional clerkships modeled on federal judicial clerkships).

