

2012

Election Law: Too Big to Fail?

Chad Flanders

Saint Louis University School of Law, cflande2@slu.edu

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



Part of the [Law Commons](#)

Recommended Citation

Chad Flanders, *Election Law: Too Big to Fail?*, 56 St. Louis U. L.J. (2012).

Available at: <https://scholarship.law.slu.edu/lj/vol56/iss3/13>

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: TOO BIG TO FAIL?

CHAD FLANDERS*

There's no question that election law is now a huge growth field. We have passed well beyond the early questions about legitimacy—does election law deserve to be its own field of study?¹—and into a period of unparalleled theoretical and practical flowering. There is no shortage of election law articles in journals (and, of course, there is a journal dedicated to election law²). There is also, it seems, no shortage of cases to be litigated, and no shortage of casebooks with which to study them.³ There is just a lot of *stuff* going on in election law.

Too much stuff, I fear. Or at least too much stuff for the beginning teacher to master and then be expected to transmit to his or her students. *Metaphors* of growth certainly seem to abound in election law. Rick Hasen likens the growth of election law to the stages of a person's life; we have passed from birth to puberty and now may be entering middle age.⁴ Heather Gerken recently has compared election law to a nation, and urges openly (and admittedly “bombastically”) that election law should have “imperial aims.”⁵ But might we worry, too, about imperial overreach? Or might we worry about starting out as the young hip teenage Elvis, only to turn into the bloated,

* Assistant Professor of Law, Saint Louis University School of Law. I thank Christopher Jones for extremely helpful comments on a previous draft. Christopher Bradley and Jud Matthews saved me from several mistakes; alas, I have not avoided the rest of them.

1. Symposium, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999).

2. The *Election Law Journal: Rules, Politics, and Policy* will be publishing its eleventh volume in 2012 and is available online at <http://www.liebertonline.com/elj>.

3. There are currently no less than three major Election Law casebooks in print, and at least two more on the way. DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* (4th ed. 2008); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* (3d ed. 2007); MICHAEL DIMINO, BRADLEY SMITH & MICHAEL SOLIMINE, *VOTING RIGHTS AND ELECTION LAW* (2010).

4. Richard L. Hasen, *Introduction: Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1103 (1999).

5. Heather K. Gerken, *Keynote Address: What Election Law Has to Say About Constitutional Law*, 44 IND. L. REV. 7, 9 (2010).

middle-aged Elvis?⁶ The preface to the third edition of the great Isacharoff-Pildes-Karlan casebook (the one I used when I took Election Law in law school,⁷ and which I use in teaching Election Law) says that, “[c]asebooks, like most of us, tend to get fatter as they age.”⁸ Could election law stand to lose some weight, slim down a bit? Does it need to become something more *manageable*?

This last question especially should concern those of us who teach Election Law. What are we supposed to teach when there is so much stuff out there *to* teach? Or more pointedly, what can we cut without feeling guilty about it? This is a question I did not squarely face when I first taught Election Law as a two-credit seminar.

Instead, I thought I could have it all. *Citizens United* was coming out,⁹ so I could not cut campaign finance: that seemed tantamount to professorial misconduct. Instead, I spent three weeks on it. As a result, the Voting Rights Act (“VRA”)¹⁰ got short shrift: I can’t blame my students if they end up thinking that nothing really happened with the VRA after 1982. My coverage of *Bush v. Gore*¹¹ was also compressed to the space of a little under one class, although I now think (for reasons I articulate later in this Essay) that this wasn’t such a bad thing.

I want, in this Essay, to think a little out loud about what topics in election law are those we really *must* teach, and what other topics we can get away with not teaching, or at least not teaching as thoroughly. What is the story about election law that we ought to tell our students, and in that story, what are the bits we can leave out? In a word (or a couple of words), I want to draw a rough-and-ready distinction between the *core* of Election Law and its *periphery*. What needs to be kept in Election Law, and what can be safely farmed out to other classes or to other seminars on election law topics (or to an independent study)? This is an important question not just for those who teach Election Law, but for law professors generally. As Election Law grows in

6. See, e.g., Phil Arnold, *Voting for the Elvis Stamp*, ELVISBLOG.NET (June 15, 2008, 8:05 AM), http://www.elvisblog.net/blog/_archives/2008/6/14/3743972.html. In 1992, voters got to choose between paintings of “Young Elvis” and “Old Elvis” for a commemorative United States Postage Stamp—although the appellation of “Old Elvis” was not without controversy. See *id.* (“Elvis was only 38 in the Aloha shot, so ‘Old Elvis’ was not really fair. However, some folks were even meaner and called it the ‘Fat Elvis.’ That was totally outrageous, because Elvis trained and dieted for months before that show, and he was in terrific shape.”).

7. As another minor measure of Election Law’s size, I took Election Law *twice* in law school (from Owen Fiss and Pamela Karlan), and almost took it a third time (from Heather Gerken).

8. ISSACHAROFF, KARLAN & PILDES, *supra* note 3, at v.

9. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

10. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

11. 531 U.S. 98 (2000) (*per curiam*).

popularity, the legal academy should have a clear idea of what exactly the class is about.

Election law, unlike certain banks or the American economy in general, isn't going to fail anytime soon. But it can lose its focus and drift by becoming too big. Like any celebrity, it can face the risk of wanting to become too many things to too many people. As election law grows older and matures as a subject, it ought to take stock and reflect on what is really central to it as a field of study, and why.¹²

I. ELECTION LAW: THE CORE

I think there are three issues that every Election Law teacher *must* cover; issues that form the “core” of election law. They are topics that show how election law is unique, and how there are features of election law that the student cannot get anywhere else. These topics are the reason that Election Law merits being a separate class (and the structure of the major casebooks reflects this focus).

I treat these three issues, below, as themes that should form the framework of any Election Law class. How a particular professor teaches these themes—what cases and methods he or she uses—will differ. But I hope to have captured something like a consensus on what the broad sweep of Election Law should be about: a story not just about individual rights, but also about the aggregation of those rights, and the role political parties play in helping voters and promoting candidates (as well as making the machinery of elections possible). Again, I hope that what I say in this Part will be relatively uncontroversial, and certainly at the level of abstraction at which I work. I want to leave it open to different professors to tell the broad story of election law in different ways, to give different emphases to the same recurring (and enduring) themes.

What will be more controversial is the suggestion that what lies outside of these three topics should be treated as “electives”—things that an Election Law class might cover, but does not need to. Indeed, what lies outside the core might be better covered in another class or (possibly best of all) in a seminar

12. A few more caveats before I begin. As someone who does not practice election law, my interests in the subject tend to be more theoretical. I cannot, and probably could not, teach a wholly “skills-oriented” Election Law course (which is not to say that I do not want my students to know, and know well, the black letter law of elections). Further, I also come at teaching with a firm preference for depth over breadth. For those who prefer the latter approach, my emphasis on focusing on three election law themes in great detail might fall on deaf ears.

Finally, I have only taught Election Law as a two hour seminar, so my concerns about “fitting it all in” may be due to the constraints of that format. Those who teach Election Law as a class truly may be able to have it all.

dedicated solely to the topic. But this latter point is an argument I leave for the next section of this Essay.

What then are the core topics of election law, topics that an introductory class on election law simply *must* cover? I think there are three: participation, representation, and political parties. But these are general labels. What do I mean by them?

A. *Participation*

Participation is to my mind the *key* value in election law. The recent, and salutary, focus on the structure of election laws has to a certain degree obscured this fact.¹³ It is true that each person's vote must, to have an impact, be aggregated with the votes of others. And there are of course all sorts of ways in which that aggregation can be frustrated, so that the value of one person's vote is diluted, as I detail below. But this debate never gets off the ground if there is not first the *participation* of the individual voter. No votes in groups (of any kind) unless there are first individual votes.

The right to participate in elections also has the nice feature of being an exciting historical story to tell. The story of who gets the vote goes through any number of oppressed groups: women,¹⁴ African-Americans,¹⁵ the poor,¹⁶ and the young.¹⁷ It's a way of telling law's sad and heroic story all at once: the slow (sometimes painfully slow) march to inclusion and equal rights for all groups. And along the way, it hits on how important, even symbolically, just having access to the vote is. Even if the vote isn't for the winning candidate, and even if structural features prevent a favored candidate from getting a fair shot, just the mere fact of being able to vote represents a triumph. It is a measure of one's inclusion in the community, a clear signal that "one has arrived" as a citizen. What better way to start off a class on election law, and to really sell the importance of the subject, than with that history?

But as recent litigation and legislation in the area of photo identification attests, there is still an ongoing debate about how far this inclusion should go.¹⁸

13. For a good overview of the individual rights-structures debate in election law, see Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 649–70 (2007).

14. U.S. CONST. amend. XIX; *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

15. U.S. CONST. amend. XXV; *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

16. U.S. CONST. amend. XXIV; *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

17. U.S. CONST. amend. XXVI; *Oregon v. Mitchell*, 400 U.S. 112 (1970).

18. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (finding Indiana's voter identification law constitutional); *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006) (finding Missouri's voter identification law unconstitutional); Chad Flanders & Jamie Rodriguez, *Voter ID: Still Wrong After All These Years*, ST. LOUIS BEACON (Apr. 17, 2011, 10:54 PM), <http://stlbeacon.org/voices/in-the-news/109685-critique-of-voter-id-bill-flanders-rodriquez> (discussing the history of voter ID law in Missouri as Missouri legislature debates constitutional amendment to supersede *Weinschenk*).

Can states require that voters have not simply some form of identification, but photo identification? The cases here invite comparison with the poll tax, and yet the analogy is not quite exact: students, in my experience, wrestle with to what extent the state has an affirmative obligation to help voters vote, and to what extent the burden falls on the voters themselves. Should the state automatically register voters? Should it bus voters to the polls? How far does the state's guarantee of the right to participate go?¹⁹ The concerns that motivated the historic struggles for the right to participate show no signs of going away.²⁰

B. Representation and Aggregation

But the right to participate in an election is not the whole story. People care about what happens to their ballots after they have made the (at least symbolically important) act of casting a ballot. People want their vote to count, and ultimately, they want their candidate to win: we want the *right* person in office, representing us. But there are many things that can get in the way of this. One way a person's vote might not really count is if they vote for a bad candidate, a real loser: by voting for him or her, they are throwing their vote away because they are voting for a candidate who cannot possibly win, and does not deserve to win. This type of result should not worry us too much. There are other reasons why votes might not matter, though, that ought to concern us and which form the basis of the next chapter of the election law story.

Consider the ways in which votes that are cast can be worth less than other votes. If districts are unequally populated, but each district gets one representative, some voters will get more bang (in the form of greater representation) for their buck. We might be all equal at the voting booth across the state, but voters in larger districts will have a diluted vote. This of course was the problem before the great redistricting ("one person, one vote") decisions changed everything.²¹ By making districts equal, every vote was roughly worth the same across districts, thus each person casting a vote would

19. See Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289 (2011); Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L. REV. 29 (2011); see also Chad Flanders, *Spelling Murkowski: The Next Act, A Reply to Fishkin and Levitt*, 28 ALASKA L. REV. 49 (2011) (discussing various Alaska cases involving assistance to voters).

20. Also of note here is the legislative movement afoot in many states (and to a lesser extent, at the federal level) to reenfranchise ex-felons. See generally Pamela Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN L. REV. 1147 (2004).

21. *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

be casting an equally weighted vote.²² No Election Law class can or should get away without teaching the one person, one vote cases.²³

Or take the case where votes are nearly worthless. Suppose that district lines are drawn along racial lines to favor the majority race, and that voting is polarized by race. A district that has majority whites will always have its favored (white) candidate win. The minority will never win, even if they all vote the same way. There aren't any barriers to the minority group actually voting, but there are real barriers to their vote *matter*ing. The minority group can go through the motions of voting, but their votes will never be able to be votes for a winning candidate. We say something very similar, though not identical, about districts that are drawn along partisan lines.²⁴

It was problems like these that led to the realization that voting cannot be considered purely an individual right. You can cast your ballot, but if that ballot isn't capable of combining with other ballots to actually *win* an election, then your individual right isn't worth much. And this is the problem (for instance) with gerrymandering, either political or racial. When lines are drawn so as to effectively make it impossible for a certain voting group to win, then the right to vote of the individuals that make up those groups are rendered practically meaningless.

In short, one can lose one's vote in ways other than being blocked access to the polling place. This is the key lesson of the second part of the election law story, one which follows fast upon the first story. It turns out that voting at the ballot box isn't all that matters, and that you can lose your vote in all sorts of ways. One can be *effectively* disenfranchised if certain structural barriers are in place that make your vote not count, or not count as much. And this means that to guarantee the right to vote, we can't just think about individuals voting; we have to think more broadly, about the structure of the system they are voting *in*. To know what the right to vote means, practically speaking, students need to know about the obstacles not just to participating in the process, but also to aggregating one's vote.

C. *Parties*

But there is a third, important mediating factor between voters voting and candidates being elected, and that is the political party, which forms the final part of the election law story as I see it. Parties in American politics are the mechanism by which voters are acquainted with their possible future

22. *Wesberry*, 376 U.S. at 7–8; *Reynolds*, 377 U.S. at 568.

23. See Joey Fishkin's excellent attempt to untangle the meaning of "one person, one vote." Joseph Fishkin, *Weightless Votes*, 121 *YALE L.J.* (forthcoming 2012).

24. See *Davis v. Bandemer*, 478 U.S. 109, 139–40 (1986).

representatives.²⁵ They also supply the mechanism—the primaries—through which voters first actually choose their representatives.²⁶ It is hard to imagine American politics without parties, even though there wasn't really a place for them in the early design of the Republic.²⁷ But now parties are indispensable to understanding the American political process, and students need to see how they are in fact indispensable.

Students need, especially, to see the neat conceptual space parties occupy in American constitutional law. Parties are groups, but they aren't just any kind of group. They are, perhaps unique to associations, partly private and partly governmental. They allow private citizens to gather together and to select someone who will represent them. But in doing this, they form a crucial part of the overall mechanism the government has for filling its offices. This is the lesson of the *White Primary Cases*, although even now that message is ambiguous.²⁸ The *White Primary Cases* viewed from one angle look like *sui generis* set of cases: they are another instance of the court aggressively intervening to stop racial injustice, even when the presence of state action was debatable.²⁹ But they also stand for the idea that parties are quasi-governmental entities, even if they remain private entities all the same.³⁰ They do the hard work of translating the various desires of voters into a candidate. They give voters a focus that they might otherwise not have.

In a way, the study of political parties is the least “law-like” subject of the suggested topics. The most important historical cases about parties are the *White Primary Cases*, and the ongoing relevance of these cases to election law is less than transparent.³¹ Still, the dynamic of party politics is vital for understanding election law: how parties choose candidates, how they police membership, and how the state can regulate how parties run things.³² On these issues, there is no shortage of interesting cases.³³

25. See Chad Flanders, *What Do We Want in a Presidential Primary?: An Election Law Perspective*, 44 U. MICH. J.L. REFORM 901, 922 (2011).

26. *Id.*

27. BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 17 (2005).

28. See Chad Flanders, *White Primary Cases*, in OXFORD ENCYCLOPEDIA OF AMERICAN POLITICAL, POLICY, AND LEGAL HISTORY (forthcoming 2012).

29. Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 757 (2001).

30. *Id.* at 758.

31. *But see* Brief for Petitioner at 34–35, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (No. 10-553).

32. Flanders, *supra* note 25, at 922.

33. For a good discussion and citations to recent cases, see Robert Wiygul, *Private Rights or Democratic Virtues? Justice Scalia and the Associational Rights of Political Parties* (2007) (unpublished manuscript) (on file with author).

All three of these subjects are, I think, essential for understanding American election law, and for understanding election law's story. A class on election law that didn't talk about all three in some depth just wouldn't be a class on election law. And although the subjects could be treated in other classes, they cannot be treated as well, or in the same way. Take for example a Constitutional Law class. Part of the problem is that one has only so much time to talk about *anything*, let alone the one person, one vote cases. But further, the narrative of a Constitutional Law class isn't quite the same as the narrative of an Election Law class. The formal right to vote fits best with that paradigm: we are talking about including formerly excluded groups within the circle of citizens by giving them the rights they are owed.

But the narrative of election law doesn't—can't—end with the individual right to vote. We have to aggregate those votes, and we have to figure out how to go about designing institutions, private and public, to make this aggregation possible and fair. This part of the narrative is obscured by an individual rights focus, one that an ordinary Constitutional Law class might encourage. This may show that election law has some lessons to teach constitutional law, how it too needs to focus more on questions of institutional design and the role of groups.³⁴ But for me, it shows almost the opposite: it shows the uniqueness of election law, how the election law story isn't a constitutional law story, isn't a statutory story, and isn't a story about political theory. It is, in a way, a story about all three that is not reducible to any of the three.

II. WHAT ELECTION LAW *ISN'T*, OR *ISN'T* NECESSARILY

If the previous Part was about what every Election Law class really ought to cover, this Part is about what Election Law doesn't have to cover, and perhaps maybe even shouldn't cover. Every class has time constraints, but this may be no truer than in Election Law. Not only are there a variety of disparate things that fall under the heading of election law, but Election Law also is unusually susceptible to the temptation to “go interdisciplinary.” After all, not only lawyers study elections and campaigns: so too do political scientists, historians, psychologists,³⁵ sociologists and (to a lesser extent) philosophers. Election Law doesn't have to be solely about the law. It can be about many other things besides.

But we should strongly resist the temptation to make Election Law *all* things to all people. Instead, there are some things we should think of as possibly dispensable to Election Law. By listing them, I don't mean that they

34. Gerken, *supra* note 5, at 9.

35. E.g., Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679 (2010).

shouldn't be taught, but that we should be careful: some things we can safely leave to other classes, and other things we may only want to briefly mention. This will give us more time to spend on the things that really matter to the subject, based firmly in the three broad themes I listed in Part I. In any event, this list will certainly be much more controversial than the list of things that I think ought to be included.

One key caveat: I say below that campaign finance and the Voting Rights Act (at least *all* of it, the entire history) are optional topics to cover in an Election Law class. However, if one didn't cover *either* of these subjects, I think the course would be sadly deficient. My advice is to pick one of them, go into it in a lot of detail, and leave the other for another day.

A. Campaign Finance

Campaign finance is, I think, a core First Amendment class, but it is not at the core of Election Law. The key questions about whether money is speech or whether it is property fit pretty neatly into the cares and concerns of free speech jurisprudence. So I tend to think now that campaign finance should be taught there, and not in Election Law.

This also fits with how the Supreme Court has come to see things.³⁶ I talked in the previous part about the narrative of various classes, say of Constitutional Law or Election Law. I think campaign spending is presently, and will be for the foreseeable future, part of the narrative of First Amendment law, so Election Law professors need not feel too much guilt for saying to students: "If you want to talk about campaign finance, you should take a class on the First Amendment."

A good measure of the swallowing up of campaign finance law by the First Amendment is *Citizens United*.³⁷ Only briefly, and only in Justice Stevens's dissent, is there floated the idea that spending in an election is a "distinctive" subject matter, bound by its own rules, and not easily assimilated into normal First Amendment jurisprudence.³⁸ The majority was not persuaded: this was not an election law case for them; this was a speech case.

Things could have been different, and here I may be following the drift of the Supreme Court's jurisprudence rather than what I think normatively *ought* to be the case about *where* election law belongs. Some have argued (for example, Richard Pildes and Frederic Schauer³⁹) that the first amendment in election law *should* have a different meaning than in other areas, but their argument has not carried the day. Rather, spending for campaigns has become

36. See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

37. *Id.*

38. *Id.* at 929–30 (Stevens, J., dissenting).

39. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

even more assimilated to ordinary political speech; it is not treated as something *sui generis*, so that it is either subject to more or less in the way of regulation. As a result, campaign finance's home is, and will be for the foreseeable future, in the First Amendment.

Of course, the First Amendment professor at one's school may feel differently! If campaign finance is *not* taught—at all—as part of your law school's First Amendment class, then you probably have an affirmative obligation to cover it in Election Law. But this should be a matter of negotiation between the professors of both classes, and whatever result you reach should be communicated to students—either on the first day of class or (ideally) in the course description.

B. *Bush v. Gore*

Partly for reasons stemming from my own experience teaching the case, and partly due to my reading of Rick Hasen's contribution to this issue,⁴⁰ I no longer feel *Bush v. Gore*⁴¹ is an essential Election Law case. There is, first, the simple fact that the *actual* case of *Bush v. Gore* doesn't exist, as far as the United States Supreme Court is concerned. They haven't cited it, and probably prefer that it would just go away.⁴² Moreover, and let's face it, the opinion itself is difficult to understand, poorly written, and difficult to teach. I am no longer convinced that it is worth the effort. Further, as Hasen notes in his piece, the case itself is now at best a distant memory to today's students.⁴³ Unless and until *Bush* comes back to life, it can probably be safely passed over or only mentioned. We owe the case a huge debt for bringing election law to the mainstream. But that doesn't mean we *have* to teach it, although we should mention it.

To borrow a comparison from Joey Fishkin,⁴⁴ *Bush v. Gore* may be election law's *Marbury v. Madison*,⁴⁵ a case that basically created or solidified the discipline, but which is confusing, hard to follow, and at the end of the day a potentially misleading guide to understanding the subject it legitimated. Just as many Constitutional Law books have taken as their starting point something *other* than *Marbury*,⁴⁶ so too should we Election Law scholars not feel bound

40. Richard L. Hasen, *Teaching Bush v. Gore as History*, 56 ST. LOUIS U. L.J. 665 (2011).

41. 531 U.S. 98 (2000) (per curiam).

42. Hasen, *supra* note 40, at 671; Chad Flanders, *Please Don't Cite This Case! The Precedential Value of Bush v. Gore*, 116 YALE L. J. POCKET PART 141, 144 (2006), <http://www.thepocketpart.org/images/pdfs/75.pdf>.

43. Hasen, *supra* note 40, at 667.

44. E-mail from Joseph Fishkin (Sept. 27, 2011, 5:58 PM CST) (on file with author).

45. 5 U.S. (1 Cranch) 137 (1803).

46. See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISION-MAKING (5th ed. 2010).

to the case that arguably “made” our discipline. We should let other cases be our touchstones.

C. *The Voting Rights Act (all of it)*

This is a tough one. The *history* of the VRA, especially the early history, is vital and indispensable to the understanding of election law—especially the intersection of election law and race. It certainly fits in one or more of the themes I listed in Part I of this Essay. And the subsequent changes to the VRA, both legislative and judicial, are equally important. There are concepts here—dilution, preclearance—that every Election Law student really has to know. But the story of the VRA is long, complex, and winding; and here, especially, there is just *too much* going on. The sheer number of pages—over 300—in the casebook I used⁴⁷ when I was in law school testifies that choices simply have to be made in teaching the VRA. It would be impossible to do that much in one class, and so a person teaching a one semester Election Law class is going to end up cutting a lot. For this reason, I think the Voting Rights Act is a great, great candidate for a seminar, but one needn’t feel obligated to do the whole history of the VRA in an Election Law class.

Here, too, we might worry about the direction the Supreme Court might take with the VRA and whether this should change how much we emphasize the VRA in our Election Law classes. Justice Roberts’s opinion in *NAMUDNO* was widely denounced as inconsistent and a dodge;⁴⁸ Justice Thomas, although possibly wrong, was at least honest about the future of the VRA.⁴⁹ But now more and more scholars are wondering about the continued necessity of the VRA, and whether this raises constitutional questions.⁵⁰ So the VRA may be a “hot topic” soon enough. But again, this might further make the case that the VRA should be the subject of a seminar all to itself.

So what of the VRA should one teach—does one *have* to teach—in an Election Law class? Not necessarily *Katzenbach*,⁵¹ which could probably be skimmed or summarized. *Allen*⁵² seems to me absolutely essential, as do *Beer*⁵³ and *Gingles*.⁵⁴ (These, in fact, are the cases highlighted in the

47. ISSACHAROFF, KARLAN & PILDES., *supra* note 3.

48. *E.g.*, Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 181–83.

49. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2519 (2009) (Thomas, J., concurring in part and dissenting in part) (stating § 5 of the Voting Rights Act “can no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment”).

50. *E.g.*, Hasen, *supra* note 48, at 197.

51. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

52. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

53. *Beer v. United States*, 425 U.S. 130 (1976).

54. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Lowenstein casebook, which I think gives a manageable selection of the cases on the VRA.⁵⁵) But beyond these? I am not sure too much more is *necessary*, especially if you are spending a lot of time on campaign finance. They give students the important points in the history of the evolution of the VRA, and the struggle to make it relevant for changing circumstances as well as fit nicely into the representation part of the election law story that I sketched in Part I.

D. Political Science, Philosophy, etc.

Interdisciplinary work is the great temptation in law scholarship and teaching, and not just in election law. But it is a temptation that we might be better off resisting. Most often, I fear, it turns out to be just a watered down version of the other discipline, as phrases such as “law office history” might connote. This is why, when I wanted someone to talk to my class about efforts to reform the presidential primary system—something that was more legislative than law-like, although we did read some cases about Congress’s power to legislate in the area of the primaries—I invited a political science professor to come in. This was, in part, due to my own interests (I was writing a paper on the topic at the time⁵⁶). In retrospect, I wonder if the time might have been better spent doing a little more work on the Voting Rights Act.⁵⁷ It was a good experience for me and for my students, but it ended up fitting oddly with the rest of the class. The students, naturally enough, wanted to talk about the legal issues involved with regulating the presidential primaries.

So although there are certainly important and vital interactions between law and other disciplines when it comes to election law, they may not need to be covered in an Election Law class. It suffices that the students learn the law on the books about elections, and to see how interesting the legal questions are, without going into elaborate theories of, say, deliberative democracy or the legislative process. Let these topics creep in at the margins, if at all. There are enough problems internal to the law of elections that should keep students busy, excited, and motivated. If students are interested in the interaction of other disciplines with election law, then they should be encouraged to seek guidance from those who teach in those disciplines.⁵⁸

55. LOWENSTEIN, HASEN & TOKAJI, *supra* note 3.

56. Flanders, *supra* note 25.

57. My other guest speaker, much more consistent with the law-like focus of my class, was an advocate for electing judges in Missouri.

58. This conclusion is partly based on my own lack of expertise in the disciplines that might be relevant to Election Law (such as history and political science). If one has training in another discipline, then your ability to import lessons from other disciplines will be much, much greater than my own, and you should of course exploit that expertise.

CONCLUSION

Election law is big, but it risks getting too big. As part of the maturing of the subject matter, we ought to be thinking about what sorts of things are central to it, and what are at the outer limits and possibly dispensable as part of a basic Election Law class. What do we want to claim as uniquely *ours*, safe from the predatory hands of other professors and disciplines? This is a question election law needs to face as it grows bigger and—hopefully—matures with age.

Of course, what is central at any given time will change: this is the nature of law as a constantly shifting discipline, responsive to changes in the political and cultural landscape. My suggestions about what is at the periphery of election law were dictated, to a significant degree, by the direction of the Court—and the Court’s direction could of course change. But my understanding of the core was, at bottom, normative. I really think participation, representation, and political parties are at the heart of what we should be teaching our students. These are the required subjects, the “fundamental themes,” of election law, and I have tried to explain why they are in the first Part of my Essay. No Election Law course can get away without spending significant time on each of them, although different professors will tweak those themes in different ways.

What the “electives” of Election Law are, or should be, will be up to the individual teacher. These may involve several of the subjects I listed in the second Part of this Essay. Again, I did not mean to suggest that these are subjects Election Law teachers *shouldn’t* teach. Not in the least! Rather, I mean to console the Election Law teacher who thinks that he or she *has* to cover them all and in depth. One can skip *Bush v. Gore* and campaign finance without feeling guilty. One can limit (but not eliminate) discussion of the Voting Rights Act. It is advice I wish I had been given before I taught my first Election Law course.

