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978-1-107-00167-1 - Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy

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

Excerpt

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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

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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."

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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.

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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

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object to the self-dealing inherent in the system and favor a nonpartisan districting process.

Alan Gerber considers the question of voter apathy, examining why voters turn out and how we might encourage them to do so. Reporting on an important methodological advance in the area, Gerber suggests the role that social pressure can play an important role in encouraging people to vote.

Finally, Edward Foley sketches a reform agenda for the next decade, a plan for “state of the art” election law by the year 2020 and describes its key features, including a state-of-the-art election infrastructure and a variety of good-governance reforms. Foley’s paper shows us just how much there is to do to improve our election system.

#### CONCLUSION

Bruce Cain, in his concluding essay, provides a broad overview of the basic questions the field faces in thinking about reform. Cain argues that most reform proposals can be classified as demanding “more democracy” or “less” and insists that the easy assumption that more democracy is better is mistaken. Instead, he shows that election reform inevitably involves a trade-off between important democratic values. Cain then maps the field along these dimensions, offering some concluding thoughts on the papers in this volume and what he calls “the promise of new election law institutionalism.”

It is our expectation that this volume will provide readers with a critical basis for appreciating and assessing the capacity and limits of race, reform, and regulation as the central organizing themes for understanding American democracy.

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## PART I

## Race and Politics

*Overview: How, If at All, Is Racial and Ethnic Stratification Changing, and What Should We Do about It?**Jennifer L. Hochschild*

These chapters on the politics of groups push the reader to consider a difficult but essential question: How, if at all, are old forms of racial and ethnic stratification changing? A broadly persuasive answer would have powerful implications ranging from constitutional design and electoral strategies to interpersonal relationships and private emotions. However, the question is not only difficult to answer for obvious empirical reasons, but also because, for scholars just as for the general public, one's own views inevitably shape what one considers to be legitimate evidence and appropriate evaluation of it. So the study of racial dynamics is exasperatingly circular, even with the best research and most impressive researchers.

Although my concerns about circularity lead me to raise questions about all three chapters, I want to begin by pointing out their quality. Each provides the reader with a clear thesis, well defended by relevant evidence and attentive to alternative arguments or weaknesses in the preferred one. Each chapter grows out of a commitment to the best values of liberal democracy – individual freedom and dignity, along with collective control by the citizenry over their governors – but commitments do not override careful analysis. Each chapter is a pleasure to read and teaches us something new and important.

My observations begin with a direct comparison of Pildes's and Karlan's respective evaluations of the United States' Voting Rights Act and its appropriate reforms. I then bring in Hutchings and his colleagues' analysis of American racial and ethnic groups' views of each other, which provides some of the essential background for adjudicating between Pildes's and Karlan's positions. Underpinning my discussion, and becoming more explicit in the conclusion, is an observation that is not new to me but is nevertheless important: People who identify as progressives are often deeply suspicious of attempts to alter current policies about or understandings of racial and ethnic stratification, whereas people who identify as conservatives are often most eager to see and promote modifications in current practices. There is something deeply ironic here – both in the difficulties of many on the left in recognizing

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what has changed and in the difficulties of many on the right in recognizing what has not.

SHOULD THE VOTING RIGHTS ACT BE CONTINUED, ADJUSTED,  
OR TRANSFORMED?

Richard Pildes argues that it is time for the “next generation” of voting rights legislation to take over from the several-times-renewed Voting Rights Act (VRA) of 1965. In his view, the VRA succeeded in its initial mission of “getting out in front” of white public officials’ strategies for disfranchising black voters, so much that it is now getting in the way of its own underlying purpose of voting equity. Section 5 of the VRA is both overinclusive – requiring oversight that is no longer necessary – and underinclusive – not capable of addressing current barriers to citizens’ exercise of their right to vote. Given politicians’ tendency to move in only one reform direction at a time, he urges Congress to largely scrap the old VRA and replace it with a new law that addresses more contemporary obstacles to voting, such as felon disfranchisement, outmoded voting technologies, and inefficient or deliberately ineffective electoral procedures. Although these contemporary obstacles may disproportionately affect people of color, they are not intrinsically about racial discrimination per se, so the underlying framework of the old VRA needs to be rethought rather than adjusted.

Pamela Karlan does not quite accuse Pildes of naïveté about continuing racial discrimination, but such a suggestion hovers around the edges of her essay. She points to persistent racial bloc voting, especially whites’ disproportionate rejection of Barack Obama’s presidential candidacy in locations covered by Section 5 of the VRA, as well as the possibility of discrimination in local elections and the distinctive barriers faced by Latinos and Native Americans. For these reasons, among others, the United States must maintain the old VRA. In fact (Pildes might agree here), “the government has an obligation to facilitate citizens’ exercise of the franchise” and to become even more vigilant against states and courts’ tendency to water down citizens’ voting rights, especially focusing on citizens of color given America’s history of racial stratification. Karlan’s most pointed argument is that the VRA does not only protect individuals’ right to vote – a protection that, in her view, we still need – but also gives minority groups “leverage in demanding accommodation of minority concerns.” Section 5 is what gives that leverage, and therefore it warrants continued support or even strengthening.

Pildes and Karlan agree on a lot of particular reforms and share an underlying commitment to equality of individual suffrage rights and equity among group rights. They share the goal of overturning the effects of centuries of discrimination against black Americans. Nevertheless, the tone of their chapters differs intriguingly. Karlan worries more about whites’ continuing preference for racial domination, or at least their indifference to its continuation. For example, if Section 5 were repealed, “the Democratic party might be tempted to spread concentrations of minority voters

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among several districts” to promote its highest priority – electing more Democrats – even if this would dilute blacks’ political influence. In another example, Karlen points out not only that Southern whites have historically “resist[ed] minority political aspirations,” but also that “this backlash phenomenon seems to be alive and well today.” Thus we must always remember that “[t]he past is never dead. It’s not even past.”

In contrast, Pildes implicitly asserts that the past *is* dead, or at least dying, and that our preoccupation with protecting minorities against the evils of twentieth-century-style discrimination is getting in the way of protecting them, and others, against twenty-first-century problems. To put my words into his mouth, racial and ethnic stratification is changing – decreasing in important ways while persisting or even worsening in others. If we cling too tightly to winning the last war, we jeopardize our chances of success in the next one. In his own words, “the voting rights issues we face today are no longer defined by the near-complete exclusion of black voters by a number of readily identifiable state and local governments. . . . If Congress is serious about protecting the right to vote, it is going to have to go beyond that model.” Many of the most serious barriers to voting “tend to impact not only racial minorities, but also the poor and the elderly generally;” thus Pildes calls for laws and policies that are uniform across states and have “universal terms that extend coverage to all voters.” In sum, with a few important exceptions, we no longer need laws targeted at specific racial or ethnic groups in particular locations because non-Anglos are often powerful enough to protect their own interests. Instead we need laws to protect newly recognized categories of powerless Americans, a majority of whom might even be white.

In my view, Pildes has the stronger argument; I see more change than continuity in the American racial order since the VRA was formulated and renewed. Some of that change has been for the better. With two exceptions (1976 and 1996), a higher proportion of whites voted for Barack Obama than for any of his Democratic party predecessors in the eleven elections since 1968 (Clayton 2010). Nine states, including three from the old Confederate South, switched from Republican in 2004 to Democratic in 2008, due to a combination of some white support, very strong black and Hispanic support, and changing proportions of groups in the voting public. To put it most simply, Americans have now shown that “a black candidate can win in the majority-white constituency that is the national presidential electorate” (Ansolabehere et al. 2010: 1409).

However, some of the change in the American racial order since the VRA was formulated has been for the worse. The proportion of young non-Anglo men involved with the criminal justice system has skyrocketed; when calculated in 2001, 17 percent of black and 8 percent of Hispanic men, compared with 3 percent of white men, had been incarcerated in a state or federal prison at least once (U.S. Department of Justice 2003) – and the numbers and disproportion have risen since then. Put another way, although blacks comprised 12 percent of the U.S. population in 2008, they accounted

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for 28 percent of all arrests (Bureau of Justice Statistics 2008: table 4.10.2008). Poor or poorly educated young black men are especially likely to be involved with the criminal justice system, and their families and communities are disproportionately harmed through indirect involvement (Western 2006; Clear 2007). Thus the old issue of felon disfranchisement has taken on new urgency as the prison population has soared in recent decades, and it now arguably has as much or more impact on racial disparity in political representation as do more conventional forms of discrimination against minority would-be voters. I leave it to the experts to answer questions about how exactly to shape voting rights laws to combat these new forms of racial and ethnic stratification. But I am convinced that the problems revealed since roughly 2000 represent broader and deeper challenges to liberal equality than do those persisting from the civil rights era (again, with pockets of exceptions). I urge analysts and activists alike to focus more on developing policies to fight new forms of political inequality than on retaining policies to protect against the old ones.

RACIAL ATTITUDES: THE ANSWERS YOU GET DEPEND  
ON THE QUESTIONS YOU ASK

One of the most important changes in racial and ethnic stratification in the United States over the past few decades has been the rise in immigration. Demographic projections show that the United States is on a course to become a majority non-Anglo country by the middle of the twenty-first century (if Hispanics are classified as non-white). I believe this to be historically unprecedented; never before has the majority group in a democratic polity permitted its elected officials to enact laws that will predictably make that group a minority. The United States could, of course, enact a new version of the 1924 Immigration Act in an effort to curtail immigration of the “wrong” kinds of people, but with each passing year since the 1965 Hart-Celler Act, the possibility of this occurring seems less likely.

As many readers also likely realize, the process of immigrant incorporation is difficult, often incomplete, and sometimes nonexistent. As I write, the state of Arizona proposes to implement a draconian law to identify and arrest illegal immigrants (it is appealing a court injunction against implementing most features of the law), and several other states may follow suit. More generally, relations between native-born and foreign-born residents, as well as among nationalities and pan-ethnic or racial groups, can be tense and full of conflict. In this political context, Vincent Hutchings and his colleagues’ National Ethnic Politics Survey (NEPS) offers very welcome evidence of the attitudes of Americans with varying racial and immigration statuses.

The NEPS has many virtues, starting with the fact that it is “the first multiracial and multiethnic national study of political and racial attitudes.” It includes large samples from five distinct groups (Caucasians, Hispanics, African Americans, Asian Americans, and Afro-Caribbeans). A slight majority of the Afro-Caribbeans

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and Hispanics, as well as three-quarters of the Asian-American respondents, were immigrants, as were roughly 5 percent of the black and European respondents. The list of questions is extensive and, unlike many surveys, includes an array of political items designed to test important theories within political science.

The chapter by Hutchings and his colleagues reinforces Karlan's view that twentieth-century-style discrimination is alive and well. More than 90 percent of black respondents believe that their group faces at least some discrimination, as do more than 80 percent of Hispanics and Afro-Caribbeans, 70 percent of Asian Americans, and even 40 percent of whites. The question is clearly very broad, but if we consider the responses in relation to one another rather than in absolute terms, all non-European groups report a great deal more discrimination than do non-Hispanic whites. Additional reports on this survey show that approximately one-quarter of (each) blacks and Latinos, compared with about 15 percent of each the other three groups, agree that whites want to keep blacks and Latinos, as a group, down. A majority of the members in every non-European group report that they have faced at least a little discrimination at some time in their life. And as the chapter shows, non-European groups are all more likely to see whites as zero-sum competitors for jobs or political influence than to see each other in the same light, although intergroup competition among non-Europeans is also robust.

Like a law or regulation, perceptions of mistreatment or competition can be overinclusive, underinclusive, both, or neither. But these 2004 results are drearily similar to results from many other surveys conducted in the previous several decades, and also to those of studies using matched testers or aggregate data analysis. The NEPS shows that it would be foolish – and no contributor to this volume is anywhere near that foolish – to argue that racial and ethnic stratification has disappeared in the United States or is on a certain path to extinction.

Nevertheless, the Hutchings et al. analysis would be stronger if the authors addressed the possibility that the degree or kind of racial and ethnic stratification is changing in the United States. I see several directions for development. First, the questions invite reports of illegitimate treatment or hostile relations, but there are no countervailing questions inviting reports of cooperative treatment or productive relations. Respondents can report the absence of discrimination or hostility, but they have no opportunity to express the presence of desirable interactions. Similarly, respondents are asked if “more good jobs (or influence in politics) for [another group] means fewer good jobs for people like me,” but not whether “more good jobs (political influence) for another group improves the chances that my group will attain good jobs (political influence).” Respondents can disagree with the idea of zero-sum competition, and generally a majority of them do (mean scores are below 0.5 in Table 3.1). Still, they have no place to report positive-sum perceptions.

Questions focused on successful racial or ethnic relations might, of course, reveal even deeper perceptions of maltreatment, and in any case, because these questions were seldom asked in earlier surveys, one would find it hard to track change over