

## KEYNOTE ADDRESS: WHAT ELECTION LAW HAS TO SAY TO CONSTITUTIONAL LAW

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### INTRODUCTION

This Address briefly reexamines the relationship between election law and constitutional law. For those unfamiliar with the history of this relationship, allow me to offer a tongue-in-cheek sketch. Election law is a young field. It was not formally declared its own field of study until 1999,<sup>1</sup> though its roots date back earlier. While there were a handful of scholars writing systematically about the subject before 1990,<sup>2</sup> the field came into its own during the early 1990s as a group of dynamic young scholars entered the field and made a name for themselves.

In the early days, election law looked a bit like a faraway outpost of constitutional law. Constitutional law dominated our collective imagination, and many in the field dutifully translated the pristine mandates of equal protection and the First Amendment into the Wild West atmosphere that we call politics. Much was made of the relationship between the Supreme Court's affirmative action discourse and its racial gerrymandering decisions, or the Court's campaign finance decisions and the rest of the First Amendment.

Eventually, election law scholars declared their independence from constitutional law in a bloodless revolution. Building on the early and prescient work of Rick Pildes and several others,<sup>3</sup> election law scholars—myself

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1. Symposium, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1095 (1999); see also Richard L. Hasen, *Election Law at Puberty: Optimism and Words of Caution*, 32 LOY. L.A. L. REV. 1095, 1095 (1999) (“no one can seriously question whether election law is a subject in its own right”).

2. Dan Lowenstein was the leading example. For accounts of Lowenstein's early contributions, see Symposium, *The Past, the Present, and the Future of Election Law: A Symposium Honoring the Works of Daniel Hays Lowenstein* (Jan. 29, 2010), <http://www.law.ucla.edu/home/Calendar/Detail.aspx?recordid=4398>.

3. See, e.g., C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 1-3 (1998); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1754-55 (1999); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1837 (1992); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1202-04 (1996); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2506-09 (1997) [hereinafter Pildes, *Principled Limitations*]; Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1805-08 (1999); see also sources cited *infra* note 20 (collecting sources from the *Shaw* literature).

included—insisted that there was something special about the regulation of politics that required a different type of jurisprudence.<sup>4</sup> Scholars insisted that constitutional mandates could not be witlessly applied across domains. As Pamela Karlan correctly predicted, election law was “leaving constitutional law’s empire.”<sup>5</sup> Some of the intellectual work was done during the 1990s by election law scholars reacting to the *Shaw* cases.<sup>6</sup> *Bush v. Gore*<sup>7</sup> provided an additional push in that direction because the case attracted top constitutional law scholars to the newly developed field. The fact that the best constitutional law scholars in the country were suddenly writing within the field was a signal of the field’s legitimacy and prestige. But, in a typical example of “boundary policing,”<sup>8</sup> scholars who had mastered election law’s details sometimes thought that mainstream constitutional law scholars were missing what made election law distinctive.

Our formal Declaration of Independence was Rick Pildes’s 2004 Harvard Foreword.<sup>9</sup> Even as democratic politics have become “constitutionalized,” declared Pildes, constitutional law simply lacked an appropriate framework for regulating politics.<sup>10</sup> He argued that “[c]onstitutional lawyers are trained to think in terms of rights and equality” whereas “politics involves, at its core, . . . the organization of power.”<sup>11</sup> He thus insisted that even though the Supreme Court’s election law jurisprudence was anchored in the Constitution, it should leave behind “[u]nderstandings of rights or equality worked out in other domains of constitutional law” because they were simply a bad fit for the regulation of politics.<sup>12</sup>

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4. See, e.g., Heather K. Gerken, *Election Law Exceptionalism? A Bird’s Eye View of the Symposium*, 82 B.U. L. REV. 737 (2002). Some scholars remain skeptical of the idea, however. See, e.g., Daniel A. Farber, *Implementing Equality*, 3 ELECTION L.J. 371, 381-83 (2004) (reviewing RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (2003)); Nathaniel Persily, *The Search for Comprehensive Descriptions and Prescriptions in Election Law*, 35 CONN. L. REV. 1509, 1515-17 (2003).

5. Pamela S. Karlan, *Constitutional Law, The Political Process, and the Bondage of Discipline*, 32 LOY. L.A. L. REV. 1185, 1187 (1999). Karlan was equally prescient, in my view, when she insisted that “[i]t would be unfortunate for everyone concerned if legal regulation of the political process were to hive off completely from constitutional law and the two bodies were to evolve separately to the point where there is little possibility of continued cross-fertilization.” *Id.* at 1188.

6. See *infra* notes 20-26 and accompanying text.

7. 531 U.S. 98 (2000).

8. I borrow the idea from Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 87-88 (1997).

9. Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) [hereinafter Pildes, *Foreword*].

10. *Id.* at 39. For an empirical account of the dramatic increase in election litigation, see Richard L. Hasen, *Introduction: Developments in Election Law*, 42 LOY. L.A. L. REV. 565 (2009).

11. Pildes, *Foreword*, *supra* note 9, at 40.

12. *Id.*

The notion of election law's exceptionalism has by now become conventional wisdom among scholars in the field. We understand ourselves to be an independent intellectual terrain, not a mere constitutional law outpost. If scholars are divided between lumpers and splitters—those who see connections across subject areas and those who think contextual differences matter most—then we have written about the relationship between election law and constitutional law largely in the cadence of the splitter.

I want to call for a bit more lumping. That is not because I disagree with the notion that mainstream constitutional theory translates unevenly into the field of politics. To the contrary, I firmly believe in election law's exceptionalism. But I think that portions of constitutional law are exceptional as well. Much of constitutional law, after all, involves “the organization of power.”<sup>13</sup> There may be more opportunities for intellectual arbitrage than people have typically imagined.

Put more bombastically, during the next stage of the field's development, I think we ought to have imperial aims.<sup>14</sup> Election law scholars should do more than declare our independence from constitutional law; we should colonize it. There are lessons to be drawn from election law, sensibilities that permeate the field that are not as prevalent elsewhere, a distinctive perspective that might help reframe conventional constitutional law debates. Election law scholars, for instance, tend to focus on groups and aggregation rather than on individuals and rights, which are the conventional topics of inquiry for most constitutional law scholars.<sup>15</sup> Both constitutional law and election law are concerned with the fate of the “discrete and insular minorities” of *Carolene Products*'s Footnote Four.<sup>16</sup> But election law scholars devote a good deal more attention than their constitutional law counterparts to the democracy-reinforcement prong of *Carolene Products*'s famous footnote. And unlike their constitutional law counterparts, election law scholars spend a good deal of time thinking about the relationship *between* Footnote Four's two prongs—between democracy reinforcement and the fate of discrete and insular minorities. They have even imagined that political empowerment plays as important a role as judicially enforceable rights in promoting equality. Similarly, election law scholars tend to view governments through the lens of politics. They thus eschew the type of formal accounts of state actors we see in much of constitutional law. Instead, election law scholars imagine institutions as a collection of political actors, something that pushes them to look beyond institutional roles and to treat a

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13. *Id.*

14. I hope readers will forgive the territorial analogy. I had thought to begin with Rick Hasen's observation that election law has two “very different parents, constitutional law and political science.” Hasen, *supra* note 1, at 1095. Just play out the metaphor, though, and you will realize that the Oedipal implications are just a bit too much for a respectable law review.

15. Perhaps this is to our detriment. See, e.g., Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. (forthcoming 2011).

16. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

governing body as a “they,” not an “it.”<sup>17</sup>

I do not want to make the foolish claim that election law scholars have a monopoly over the insights and sensibilities described below. But these insights and sensibilities constitute the dominant melody in election law, while elsewhere they tend to sound as a minor theme. For that reason, perhaps it is time to translate election law’s insights into the domain of constitutional law. Here, I will offer several examples of what this might look like in practice.

### I. ELECTION LAW AND EQUAL PROTECTION

My first example is equal protection. As with traditional constitutional law, the question of racial equality has dominated much of the debate within the field. But election law scholars have developed a distinctive set of insights about equality and identity, many of which may be relevant to conventional constitutional law debates. Here, then, I will try to give you a sense of what the election law empire building might look like going forward.<sup>18</sup> In my view, the key insight that election law affords us is that the path to equality does not move straight from civil inclusion to full integration, but instead requires an intermediary stage: political empowerment.<sup>19</sup>

#### A. Race and Politics

During the last two decades of intense litigation over the constitutionality of the Voting Rights Act and the districts it has produced, election law scholars have regularly pointed out that Fourteenth Amendment mandates should not be mindlessly applied to the arena of politics.<sup>20</sup> Many of these arguments were developed in response to the Supreme Court’s *Shaw* jurisprudence, where the Court struck down bizarrely shaped majority-minority districts for being unduly race-conscious, condemning them as “segregate[d]” and a form of “political

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17. See *infra* text accompanying notes 54-61. The reference, of course, is to Kenneth Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

18. Empire building in this area has become an academic obsession of mine. See, e.g., Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007) [hereinafter Gerken, *Domains of Equal Protection*]; Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) [hereinafter Gerken, *Second-Order Diversity*]; Heather K. Gerken, *The Foreword: Federalism All the Way Down*, 123 HARV. L. REV. (forthcoming 2010) [hereinafter Gerken, *Federalism All the Way Down*].

19. See Gerken, *Federalism All the Way Down*, *supra* note 18.

20. See generally T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1993); Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harms in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47 (1996); Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245; Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993); Pildes, *Principled Limitations*, *supra* note 3.

apartheid.”<sup>21</sup>

Scholars challenged the Court’s decision to import conventional equal protection analysis into the districting context by arguing that politics is different and thereby building the case for election law’s exceptionalism. The most interesting arguments centered on the ways in which majority-minority districts might have dynamically integrative effects, furthering rather than undermining the long-term goals of the Fourteenth Amendment. Without delving into the merits of the arguments, let me give you three examples of the kinds of arguments scholars have made in their efforts to distinguish race-conscious districting from the other forms of race-conscious decisionmaking.

The first example goes to the material benefits associated with majority-minority districts. Many scholars have argued that having the representatives of racial minorities at the political table to lend their “voice” or “perspective” results in more enlightened laws. But election scholars have drawn upon a more muscular conception of the role that minority representation plays in politics.

Pamela Karlan and Samuel Issacharoff, for instance, have argued that economic progress for African-Americans has turned not on the vindication of civil rights (the conventional model in constitutional law), but on business set-asides, affirmative action, and government employment.<sup>22</sup> In their view, those programs came about precisely because blacks and Latinos were able to elect their candidates of choice in districts drawn in a race-conscious fashion. “[T]he creation of a black middle class,” they write, “has depended on the vigilance of a black political class.”<sup>23</sup> One might even argue that this is the story of integration for white ethnics as well, as Justice Souter argued in his dissent in *Bush v. Vera*, another voting rights case.<sup>24</sup> In Souter’s view, the Lithuanian and Polish wards in Chicago and the Irish and Italian political machines in Boston helped integrate ethnic groups into the system.<sup>25</sup> In his words, it “allowed ethnically identified voters and their preferred candidates to enter the mainstream of American politics and to attain a level of political power in American democracy,” something that ultimately “cooled” ethnicity’s “talismanic force.”<sup>26</sup>

Note the relationship between political power and integration on this view. Political power did not just facilitate economic integration. Politics exerted a gravitational pull on outsiders, bringing them into politics and making them feel part of it. Majority-minority districts gave racial minorities (and before them, white ethnics) a stake in the system. It afforded them the status of insiders even as it recognized their distinctive outsider identities.

The second argument is mostly mine.<sup>27</sup> Building on the work of Pamela

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21. *Shaw v. Reno*, 509 U.S. 630, 647, 658 (1993).

22. Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 49 (2003).

23. *Id.*

24. *Bush v. Vera*, 517 U.S. 952, 1054 (1996) (Souter, J., dissenting).

25. *Id.* at 1060.

26. *Id.* at 1074-75 (citations omitted).

27. See Gerken, *Second-Order Diversity*, *supra* note 18.

Karlan<sup>28</sup> as well as Anne Phillips's observation that "[p]olitics is not just about self-interest, but also about self-image,"<sup>29</sup> I have argued that majority-minority districts might generate constitutive and expressive benefits that further the integrative ideal—that power and identity might be more closely tied than we typically assume. The grand insight of the Voting Rights Act, in my view, is that creating statistically "integrated" districts would relentlessly reproduce in every district the same inequalities racial minorities experience almost everywhere else. Majority-minority districts, in contrast, turn the tables, allowing the usual losers to win and the usual winners to lose. Where voting is racially polarized—where whites and non-whites consistently prefer different candidates at the polls—creating districts that mirror the underlying statewide population would condemn racial minorities to lose (or, at best, to influence) every contest. Majority-minority districts give racial minorities a chance to enjoy the same type of participatory experience—the sense of efficacy or agency associated with being in charge—that is usually reserved for members of the majority. It is not difficult to imagine why racial minorities would desire a chance to be in charge for reasons that have nothing to do with political outcomes or the distribution of tangible goods. If racial minorities have a sense that members of the majority have been able to elect a champion, someone fighting on their behalf, they might relish the chance to elect a champion of their own for purely dignitary reasons.

Michael Kang suggests that majority-minority districts may be integrative in a third, even more counterintuitive, fashion.<sup>30</sup> He argues that such districts ultimately reduce racial bloc voting because they temporarily pull race out of the political discussion and thereby help fracture, rather than reify, racial categories—just the opposite of most predictions.<sup>31</sup> Kang points out that where voting is racially polarized, racial minorities have every incentive to vote monolithically, as that is their only hope of electing a candidate of choice. The result, writes Kang, is that race becomes a "conversation stopper" as "[p]olitics . . . freeze along the historically dominant axis of race, removing incentives for political leaders to challenge the public with new choices and understandings inconsistent with the entrenched racial alignment."<sup>32</sup>

Kang argues that the solution to this problem is majority-minority districts.<sup>33</sup> In such districts, Kang points out, it is all but a given that the candidate of choice for the minority group will win the general election. As a result, minority voters

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28. Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 Hous. L. Rev. 289, 307 (1997) (targeting majority-black districts but not majority-white districts suggests that "whites somehow are injured by being placed in racially integrated settings in which they do not constitute the dominant group"); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. Chi. Legal F. 83, 94-95 (suggesting that *Shaw* grew out of a fear of "the prospect of African-American control").

29. ANNE PHILLIPS, *THE POLITICS OF PRESENCE* 79 (1995).

30. Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008).

31. *Id.* at 787.

32. *Id.* at 778.

33. *Id.* at 778-84.

can enjoy the luxury of division and debate during the primary.<sup>34</sup> Rather than coalescing behind a single candidate, racial minorities are able to engage in the usual stuff of pluralist politics, something that will in the long run break down racial categories. Majority-minority districts, then, create not just statistically integrated legislatures, but a genuinely integrated polity.

All three of these arguments grew out of the peculiar sensibility of election scholars.<sup>35</sup> As Karlan has observed, the dominant story about race told in constitutional law circles depicts racial minorities as “objects of judicial solicitude, rather than as efficacious political actors in their own right.”<sup>36</sup> Constitutional law scholars often tell precisely that story when they are talking about race and elections. For instance, they fold majority-minority districts into whatever variant of that conventional story they prefer. Liberals tend to view majority-minority districts as a race-conscious strategy for integrating the legislature, much as they view affirmative action as a strategy for integrating universities. Conservatives generally see them as yet another example of what they think of as hand-outs, akin to affirmative action or minority business set-asides.

Election law scholars, in sharp contrast, see majority-minority districting as a tool of empowerment, something that pushes society toward a deeper, more robust form of racial integration. Election law scholars are not imposing a vision of race on politics; they are imposing a vision of politics on race. They see racial minorities as they see other groups in the political system—as “efficacious political actors” rather than “objects of judicial solicitude”—and thus tell a distinctive story about race and districting.<sup>37</sup> Karlan and Issacharoff’s electoral tale does exactly that, showing the ways that political empowerment allows racial minorities to protect themselves instead of looking to the courts for protection. Similarly, the notion of “turning the tables” suggests that racial minorities need not be protected from the rough-and-tumble of politics to succeed; they simply need the same type of voting power that whites routinely enjoy.

While many constitutional law scholars argue that race is a semi-fluid category,<sup>38</sup> shaped by interactions between individuals and the world around them, they can be exasperatingly vague about which institutional mechanisms shape racial identity and how. For scholars of the political process, thinking

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34. *See id.* at 798.

35. The next two paragraphs draw upon Gerken, *Domains of Equal Protection*, *supra* note 18.

36. Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1332 (2005).

37. *Id.*

38. *See, e.g.*, K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 78–80 (1996); Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE* 38, 48 (Wendy Brown & Janet Halley eds., 2002); *see also* MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW* 50–51 (1997); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 99 (2000); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 183–91 (1990).

about the relationship between institutions and identity seems to come more naturally. The notion of “turning the tables,” for instance, requires us to think of identity formation in the context of actual institutional arrangements—where there are a consistent set of winners and losers—rather than imagining it solely in individual or group-based terms. Accordingly, Kang’s work on districts and racial identity draws upon substantial political science work about the way elections make questions salient and frame issues for voters. Because election scholars are familiar with the gravitational pull power exerts on outsiders, the role that politics plays in driving a debate, and the ways in which power and identity connect in the context of politics and governance, they have been able to leverage those insights in order to offer a distinctive view on racial equality.

Lest you think that election scholars have invoked election law’s exceptionalism only to muster arguments in favor of majority-minority districts, consider the work on the other side of this debate. For example, precisely because districts are drawn to elect a legislature, election law scholars are exquisitely aware of the trade-offs involved in race-conscious districting. Rick Pildes and Sam Issacharoff, for instance, have repeatedly argued that majority-minority districts can pack minority (and, often, Democratic) voters and thereby reduce the power racial minorities wield at the legislative level.<sup>39</sup> They argue that because representatives of racial minorities have favored reducing the percentage of black and Latino voters in a district, as in *Georgia v. Ashcroft*,<sup>40</sup> courts should not second-guess those political deals in the name of equality but instead should let members of those groups do what other groups do in a healthy democracy: negotiate the best political deal possible.<sup>41</sup>

Note that even while Pildes and Issacharoff take a different policy position than others in the field, their argument exhibits substantial continuity with the arguments above. It turns on a vision of equality that involves empowering racial minorities to protect themselves rather than turning to the courts for assistance.<sup>42</sup>

### *B. Empire Building and Equality*

So now we turn to the possibility of empire building. Although election law scholars have written about this concept in the context of political regulation, their insights are relevant to conventional constitutional law analysis as well. These insights may not translate directly; context does matter, after all. But at the very least this work raises a set of questions worth exploring in constitutional

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39. See, e.g., Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1716-20 (2004); Pildes, *Foreword*, *supra* note 9, at 88-99.

40. 539 U.S. 461, 469-70 (2003) (“as the black voting age population in a district increase[s] beyond what [is] necessary [to elect officials of choice] . . . you diminish the power of African-Americans overall”). Making the case for the other side is Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004).

41. See Issacharoff, *supra* note 39, at 1728.

42. For further analysis, see Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708 (2006).



law. After all, electoral districts are not the only place where racial minorities dominate. They will sometimes constitute majorities on city councils, school boards, juries, and the like. But while majority-dominated electoral districts are a widely accepted strategy for promoting integration in the electoral context, the opposite is true in most of constitutional law.<sup>43</sup> Indeed, setting federalism aside, we do not have an account about the benefits of minority rule for the institutions where racial minorities have some chance of ruling (institutions that are smaller than states, which are generally too big for racial minorities to dominate). To the contrary, we generally treat local institutions dominated by racial minorities with suspicion, something that matters a great deal for how constitutional law regulates them. It seems to me that introducing the sensibilities of election scholars to the questions of minority governance in constitutional law might provide a usefully fresh perspective. At the very least, it might help us develop a more coherent account of whether minority-dominated governance matters in those other areas and why.

Our skepticism about minority-dominated institutions outside of federalism runs so deep that it is inscribed in our very vocabulary. We have a firm sense of what “integration” or “diversity” looks like—we value institutions that look like the community from which they are drawn, that “look like America,” to use Bill Clinton’s favorite phrase. We thus use the term “diversity” to describe decision-making bodies that statistically mirror the underlying population—if blacks are twenty-five percent of the population, they should be twenty-five percent of the decision-making body—and often deem institutions “integrated” even when they contain only a token number of minorities. As a result of the talismanic significance of *Brown*,<sup>44</sup> we are deeply skeptical of institutions that depart from this vision of integration. When racial minorities constitute statistical majorities in an institution, we often call those institutions “segregated” and condemn them as such.

Consider, for instance, the Court’s race jurisprudence. In *City of Richmond v. J.A. Croson Co.*,<sup>45</sup> the Court relied on the great John Hart Ely to hold that a minority set-aside program was *more* constitutionally suspect because it had been enacted by a black-majority city council.<sup>46</sup> Lest you think only the colorblindness camp views minority-dominated institutions with hostility, keep in mind the terminology used by every Justice who wrote in the recent school desegregation case, *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>47</sup> They all condemned heterogeneous schools where minorities dominated as “segregated.”

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43. For further exploration, see Gerken, *Domains of Equal Protection*, *supra* note 18; Gerken, *Federalism All the Way Down*, *supra* note 18; Gerken, *Second-Order Diversity*, *supra* note 18. The next few paragraphs that follow are drawn from Gerken, *Federalism All the Way Down*, *supra* note 18.

44. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

45. 488 U.S. 469 (1989).

46. *Id.* at 495-96.

47. 551 U.S. 701 (2007).

Setting aside the merits of these decisions, it is odd that we so quickly affix the dreaded label “segregation” to institutions where racial minorities dominate. Critical distinctions get lost when we cast these issues as debates about integration versus segregation. The most obvious is that these institutions may be different from the racial enclaves of Jim Crow. The less obvious is that viewed through the lens of election law, we might imagine these institutions as sites for empowering racial minorities rather than oppressing them, for integrating racial minorities rather than segregating them.

You might wonder, of course, why anyone would quarrel with the notion that democratic bodies should “look like America” unless, of course, you happen to be an election law scholar. As members of my academic tribe would be quick to point out, the oddity of this theory for “empowering” racial minorities is that it relentlessly reproduces the same inequalities on governance bodies that racial minorities experience nearly everywhere else. It is as if we imagine that the path of integration moves straight from civic inclusion to full integration. We miss the possibility that there is an intermediary stage along the path to integration: political empowerment.<sup>48</sup>

It should be possible to believe in, even revere, the work of the Civil Rights Movement and still wonder about these questions. Civic inclusion was the hardest fight. But it turns out that discrimination is a protean monster and more resistant to change than one might think. It may require new, even unexpected tools before we reach genuine integration. As a voting rights scholar, I find it hard not to imagine political empowerment being one of those tools.

If we place minority-dominated institutions in the same category as majority-minority districts, it is possible to imagine all three of the arguments that have been used to support majority-minority districts being applied to mainstream constitutional law. We can start with the material benefits associated with racial empowerment—the Karlan and Issacharoff argument that success of the black middle class has depended on the vigilance of the black political class. Now think about *Croson*, where the black-majority city council in Richmond created a minority set-aside program, only to have it struck down by the Court for violating the Fourteenth Amendment.<sup>49</sup> If we imagined cities as sites of minority empowerment, however, we might recast the debate over *Croson* much as Issacharoff and Karlan recast the debate over majority-minority electoral districts. It would push us toward a more rough-and-tumble vision of equality than the rights model, one that recognizes the dignity in groups protecting themselves rather than looking to the courts for solace. It would also buttress Justice Marshall’s dissent, which observed that if anyone were familiar with the existence of past discrimination and the need for remedying its present effects, it would be the representatives of the black community in Richmond, the former capital of the Confederacy.<sup>50</sup>

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48. For a fuller exploration of the ideas in the next few paragraphs, see Gerken, *Federalism All the Way Down*, *supra* note 18.

49. *Croson*, 488 U.S. at 477-78, 511.

50. *Id.* at 528-29 (Marshall, J., dissenting).

We could just as easily imagine the other arguments election law scholars have made in the districting context applying outside of elections. We might value governing bodies which turn the tables, allowing blacks and Latinos to enjoy the same sense of efficacy—and deal with the same types of problems—as the usual members of the majority. These institutions would give racial minorities the opportunity to stand in the shoes of the majority. Racial minorities would have a chance to forge a consensus and fend off dissenters, to get something done and compromise more than they would like. Similarly, if Kang's insights apply elsewhere, we might imagine it would be useful to have institutions where blacks and Latinos can spend their time debating the usual stuff of pluralist politics.<sup>51</sup> Or, consistent with the insights of Pildes and Issacharoff, we might think that the influence and control trade-offs that can exist in the elections context exist for other nested governing structures as well.<sup>52</sup> All of these arguments may be relevant to ongoing debates about race and governance in the context of mainstream constitutional law, but they have yet to be fully explored by mainstream constitutional law scholars.

## II. INTELLECTUAL ARBITRAGE ON THE STRUCTURAL SIDE OF CONSTITUTIONAL LAW

Let me give you a few more, necessarily stylized, examples of areas where the sensibilities of an election law scholar might prove useful in the context of constitutional law.<sup>53</sup> Here I will turn from the rights-side of the Constitution to the structural-side and discuss some of the arguments election law scholars could bring to bear on mainstream constitutional debates surrounding the separation of powers and federalism. In each instance, viewing these debates through the lens of politics and partisan competition has usefully complicated the discussion. Here again, while election law scholars certainly do not have exclusive access to these ideas, they so dominate the field that they seem likely to frame our understandings of the debates that dominate conventional constitutional law going forward. Indeed, while no author discussed below has self-consciously cast himself as translating election law's insights into constitutional law, a fair amount of empire building has already occurred in these areas.

### *A. Reframing Separation of Powers and Federalism*

When constitutional scholars talk about the horizontal and vertical diffusion of powers, they typically think in institutional terms. Separation of powers scholars, for instance, talk about the relationship between Congress and the President. Federalism scholars talk about the relationship between the federal

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51. For efforts to apply this argument elsewhere, see Gerken, *Domains of Equal Protection*, *supra* note 18; Gerken, *Second-Order Diversity*, *supra* note 18.

52. See, e.g., Gerken, *Second-Order Diversity*, *supra* note 18, at 1124-42 (making this argument).

53. Here again, I will set aside the merits of individual arguments and simply focus on representative types of ideas that election law scholars might bring to bear on these debates.

government and the states. Much of this scholarship displays a formalist bent; it tends to treat these institutions as if they were unitary actors with static identities across time.

Election law scholars tend to view these institutions differently. Indeed, it is rare to find a formal conception of the state anywhere in election law scholarship. That is because election law scholars see the problem of political lock-up everywhere. Recognizing that political actors do not shed party identities when they take office, election law scholars have long viewed governance as a site for pursuing partisan interests, even as a staging ground for national debates. As a result, election law scholars have long thought that “the State” is best understood as “a constellation of currently existing political and partisan forces.”<sup>54</sup>

Some of the most interesting work in constitutional law has applied this insight to conventional constitutional law debates. Daryl Levinson and Richard Pildes’s article, *Separation of Parties, Not Powers*,<sup>55</sup> is a fine example. The authors argue that it is a mistake to assume that the separation of powers, standing alone, will ensure the Madisonian goal that ambition be made to counter ambition.<sup>56</sup> In our age of cohesive national parties, they argue, Congress and the Presidency must be controlled by different parties for the separation of powers doctrine to have real teeth. Or consider Pildes’s claim—again, deeply informed by his attentiveness to political incentives—that while most separation of powers scholars tend to worry about congressional overreaching, the more serious threat is “the problem of political abdication.”<sup>57</sup>

Federalism doctrine has been a particularly fertile target for applying the insights of election law to mainstream constitutional law. For instance, Larry Kramer was able to reconceptualize the political safeguards of federalism precisely because he was so attentive to the role political parties play in integrating state and national politics. Recognizing that the states and the federal government are not unitary, but are instead an agglomeration of a variety of political forces, Kramer devoted two pieces to showing that one of the most important safeguards of state power is the influence state and national officials have on one another by virtue of their shared party membership.<sup>58</sup> Or consider Ernie Young’s work analogizing state governments to the “shadow governments” found in European systems—sites for the party out of power at the national level

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54. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 653 (1998).

55. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006); see also Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) [hereinafter Levinson, *Empire-Building*].

56. See THE FEDERALIST NO. 51, at 320 (James Madison) (John C. Hamilton ed., 1888).

57. Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 148 (2007).

58. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

to build its “farm team” and develop competing policy objectives.<sup>59</sup> Finally, consider Daryl Levinson’s counterintuitive account of the political incentives that govern state-federal interactions.<sup>60</sup> These and other examples suggest the many ways in which the overlay of politics can complicate existing scholarship on government institutions.<sup>61</sup>

### *B. The Constitution During Times of Emergency*

Here is another example, one drawn from the recent debate over constitutional law during times of emergency. As I noted above, election law scholars tend to think of individual rights in structural terms, and they devote as much time to the second prong of the *Carolene Products* footnote as to the third. Issacharoff and Pildes, who were first to argue that election law cases should be analyzed through a structural rather than a rights-based lens,<sup>62</sup> have recently applied that insight to a long-standing debate over the enforcement of constitutional rights during times of emergency. Although the rights-structure debate has occurred in many areas of constitutional law,<sup>63</sup> constitutional lawyers who have focused on the Constitution during times of trouble have typically rotated around three positions, all of which reflected their rights-oriented sensibilities. The first was the civil libertarian position—that the Constitution applies in undiluted form whether or not there is an emergency.<sup>64</sup> The second is that the Constitution is flexible enough to accommodate wartime activities, a

59. Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1285-87 (2004).

60. Levinson, *Empire-Building*, *supra* note 55, at 938-46.

61. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 499-504 (1991) (discussing the role states play in monitoring federal officials and training the loyal opposition); see also Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 137-38 (2001); Vicki C. Jackson, *Federalism and the Uses and Limits of Law, Printz and Principle?*, 111 HARV. L. REV. 2180, 2221-23 (1998) (noting the usefulness of “direct[ing] political activism and organizing” the states precisely because their borders do not map exactly on to divisive political identities); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 386-88 (depicting local power as a “counterbalance” to political lock-up at the federal level); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) (recognizing the role the local actor plays in promoting international rights and transnational cooperation). This work has also helped scholars move in a comparative direction. See, e.g., Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

62. Issacharoff & Pildes, *supra* note 54, at 646-48.

63. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 231-83 (1998); Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

64. See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

position famously articulated by Justice Frankfurter.<sup>65</sup> On this view, constitutional rights are judicially enforced during times of emergency, but they are enforced in a more flexible fashion.<sup>66</sup> The third, offered by Justice Jackson, is the view that although the President would inevitably transgress constitutional mandates, the Constitution should not bless those transgressions for fear that such judicial decisions would wind up diluting constitutional rights during peacetime.<sup>67</sup> Even if all of these arguments were in some sense about constitutional structure, they remained firmly anchored to a rights-based model.

Pildes and Issacharoff offered something quite different. Speaking in the cadence of election scholars, they offered an institutional account of how the Constitution should work during times of emergency, one that put meat on the bones of Justice Jackson's famous tripartite framework in the *Steel Seizure* case.<sup>68</sup> During times of crisis, they argued, courts should police second-order questions of who decides, not first-order questions involving rights and substance.<sup>69</sup> Thus, for instance, Pildes and Issacharoff argued that courts ought to make the classic move of John Hart Ely<sup>70</sup>—whose ideas continue to dominate the field of election law—and issue democracy-forcing decisions that push the democratic branches (particularly Congress) to act rather than rely on the Court to enforce substantive rights. The goal is the same: to protect individual liberties and place sensible limitations on executive power. But the means they advocated were strikingly different; they depended on an institutional solution rather than a rights-based one. Perhaps it is unsurprising that election scholars, with their institutional sensibilities and attentiveness to the relationship between formal law and informal politics, were the ones to make the most sustained argument in this area.

### C. *The Mismatch Problem*

Let me offer one final example of the type of intellectual arbitrage that might occur if election law scholars wrote more about constitutional law. Election law scholars are acutely aware of the problem of the low-information voter; it is an idea that dominates political science and heavily influences our own work. Much of our work thus deals with a variant of what David Schleicher calls the “mismatch problem,”<sup>71</sup> which arises when we ask voters to perform a

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65. *Korematsu v. United States*, 323 U.S. 214, 224-25 (1944) (Frankfurter, J., concurring).

66. *Id.*

67. *Id.* at 242-48 (Jackson, J., dissenting).

68. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004).

69. *Id.* at 8.

70. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

71. David Schleicher, *What if Europe Held an Election and No One Cared?* 2-11 (George Mason Univ. Law & Econ., Research Paper No. 09-68, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1525015](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525015). It is worth noting that Schleicher's terminology covers

constitutional role without the tools they need to do so. Mismatches typically occur when voters lack the right kind of shorthand to make sensible decisions about ongoing policy debates. I have done some work on how this problem connects to the bread-and-butter election law questions,<sup>72</sup> as have scholars like David Schleicher,<sup>73</sup> Michael Kang,<sup>74</sup> Elizabeth Garrett,<sup>75</sup> and Nathaniel Persily and his co-conspirators Steve Ansolabehere and Joshua Fougere.<sup>76</sup>

In some senses, this scholarship is of a piece with the scholarship I just described. It recognizes that just as we cannot understand “the State” or “Congress” without the lens of politics, so too must we think about the institutional and political structures that frame issues for voters before we are confident that we know what “the People” think.

The problem of the low-information voter pops up in many places in constitutional law.<sup>77</sup> For instance, think about the accountability argument that the Supreme Court found so appealing in several of its most recent federalism decisions, those prohibiting the federal government from “commandeering” state officials and requiring them to carry out federal law. The Court was worried that commandeering would blur the lines of accountability, making it hard for voters to know which government was responsible for which policy.<sup>78</sup> Any election scholar worth her salt would have immediately questioned this kind of argument.

problems other than the one I describe here.

72. See HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009); Heather K. Gerken & Douglas B. Rand, *Creating Better Heuristics in the Presidential Nominating Process: Why a Citizens Assembly Beats out Iowa and New Hampshire*, 125 POL. SCI. Q. (forthcoming 2010).

73. Schleicher, *supra* note 71; see also David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419 (2007).

74. Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141 (2003).

75. See, e.g., Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations*, 85 VA. L. REV. 1533 (1999); Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011 (2003); see also Elizabeth Garrett & Matthew D. McCubbins, *Faith in Reason: Voter Competence and Local Bond Propositions* (USC Keston Inst. for Pub. Finance and Infrastructure Policy, Research Paper No. 07-01, 2007), available at <http://www.usc.edu/schools/sppd/keston/pdf/20070130-faith-in-reason.pdf>.

76. Joshua Fougere et al., *Partisanship, Public Opinion, and Redistricting*, in RACE, REFORM, AND REGULATION OF THE POLITICAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY (Charles et al. eds., 2010).

77. Ilya Somin is one of the rare constitutional law scholars to write in this vein. See, e.g., Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255 (2006); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004); Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY. L. REV. 595 (2003).

78. *Printz v. United States*, 521 U.S. 898, 929-30 (1997); *New York v. United States*, 505 U.S. 144, 168-69 (1992).

We all know that political accountability depends largely on voters' reliance on broadly defined partisan heuristics, not fine-grained policy judgments. Thus, as Neil Siegel and others have concluded, while high-information voters should be able to figure out which government is responsible for what, low-information voters "may be largely beyond judicial or political help on the accountability front."<sup>79</sup>

#### CONCLUSION

Nothing in this paper is meant to imply that election law scholars have a monopoly on these insights; such a statement would be flatly untrue and inconsistent with some of my own examples. But election law scholars are united by a similar sensibility and attracted to a similar set of questions. It may be easier for us to recognize certain kinds of recurring puzzles about the allocation of power, the relationship between formal and informal structures, and the connection between identity and institutions. Think about the first example with which I began. As I noted above, most constitutional law scholars instinctively fold the story of race in the electoral domain into the familiar story they tell about race in constitutional law.<sup>80</sup> Election law scholars do the opposite—they instinctively fold the story of race into their story about the electoral domain. And by focusing on the elections domain rather than on race per se, they end up telling a distinctive tale about equal protection, one that may have resonance outside of that domain.

The examples I offer here suggest that the same may be true of constitutional law more generally. So, returning to my earlier theme, let me close by suggesting that perhaps it is time for the field of election law—which has traveled from a constitutional law outpost to an independent intellectual terrain—to contemplate a bit of empire building of its own.

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79. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1632 (2006).

80. See *supra* text accompanying notes 38-42.