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CONSTITUTIONAL LAW, THE POLITICAL PROCESS, AND THE BONDAGE OF DISCIPLINE

*Pamela S. Karlan**

What makes something its own field of study in the legal world? The appearance of casebooks with the right sort of verbiage in the title? The presence of discrete courses in the law school curriculum? The saturation of the Supreme Court's docket? The recognition of a coherent set of important social, economic, and political questions to which the law can contribute?

By any of these measures, regulation of the political process now qualifies. There are two casebooks—one called *The Law of Democracy: Legal Structure of the Political Process*,¹ the other called *Election Law*.² Many law schools offer survey courses about the political process, advanced constitutional law courses that essentially cover the First or Fourteenth Amendment aspects of legal regulation of politics, or seminars that deal with selected topics such as campaign finance regulation or reapportionment.³ For a variety of

* Professor of Law, Stanford Law School. I thank Eben Moglen, Dan Ortiz, Rick Pildes, and Kathleen Sullivan for helping me to think through the ideas in this piece. Over the longer term, Rick and Sam Issacharoff, the other co-authors of SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (1998), also deserve credit for helping me to focus on the broader question of what it means to talk about what the field of study ought to be about. Even further back, Lani Guinier, Jim Blacksher, Gerry Hebert, Ed Still, and the other staff lawyers and cooperating attorneys of the NAACP Legal Defense and Educational Fund have my deepest gratitude for letting me make, as well as write and teach about, the law of the political process.

1. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (1998).

2. DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* (1995).

3. An unsystematic list of schools at which courses have been taught in the last few years includes: Albany, American University, Chicago-Kent, Co-

reasons,⁴ an increasing share of the Supreme Court's dwindling docket seems to involve cases about politics.⁵

But the arrival of casebooks, courses, and law review symposia about the political process is not like the recent arrival of casebooks and courses about cyberspace or telecommunications or ERISA. It cannot be explained primarily as a function of the advent of new technology or the passage of a new statute. Problems regarding democratic rights and political structure preoccupied both the Framers and the authors of Reconstruction; a majority of the constitutional amendments passed since the Bill of Rights involve the political system; many of the principal cases in *The Law of Democracy* are decades old; and pervasive federal legislation dates back at least to the Voting Rights Act of 1965⁶ and the Federal Election Campaign Act of 1974.⁷

lumbia, Cornell, Fordham, Georgetown, Harvard, Indiana, Loyola of Los Angeles, New York University, Nova Southeastern, Pace, Rutgers, Stanford, Tulane, the University of California at Los Angeles, the University of Chicago, the University of Georgia, the University of Miami, the University of Michigan, the University of Mississippi, the University of Texas, the University of Virginia, Washington and Lee, and Yale.

4. See Pamela S. Karlan, *The Supreme Court and Voting Rights: Deja Vu All Over Again?*, VOTING RTS. REV., Summer 1997, at 1 (pointing to the presence of mandatory appellate review of legislative reapportionments plus the explosion of litigation involving claims of racial gerrymandering in the wake of *Shaw v. Reno*, 509 U.S. 630 (1993), as two reasons for this phenomenon).

5. In the current Supreme Court term alone, see, for example, *Hunt v. Cromartie*, 119 S. Ct. 1545 (1999) (reviewing, for the third time, the role of racial considerations in North Carolina's congressional reapportionment); *Rice v. Cayetano*, 119 S. Ct. 1248 (1999) (granting certiorari to consider Hawaii's restriction of the right to vote in elections for the Office of Hawaiian Affairs); *Nixon v. Shrink Missouri Gov't PAC*, 119 S. Ct. 901 (1999) (granting certiorari to consider campaign spending limits); *Reno v. Bossier Parish School Bd.*, 119 S. Ct. 899 (1999) (noting probable jurisdiction to consider the scope of section 5 of the Voting Rights Act); *Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765 (1999) (barring the use of statistical sampling to apportion House seats among the states); *Lopez v. Monterey County*, 119 S. Ct. 693 (1999) (requiring county to seek preclearance of changes in how it elects judges); *Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636 (1999) (striking down state limitations on signature gatherers for initiative petitions).

6. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973-1973bb (1994)).

7. Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-56 (1994)).

Like Molière's M. Jourdain, who had been speaking prose all his life without knowing it,⁸ scholars have routinely been teaching and writing about questions of political participation and electoral structure without treating them as a field of their own. To the extent that legal regulation of the political process is becoming a field in its own right, it is traveling down a path that other subjects have trod before. It is leaving constitutional law's empire. Consider the following two statements from different iterations of the leading constitutional law casebook, written originally by Noel T. Dowling, then by Gerald Gunther, and now by Gunther and Kathleen M. Sullivan:⁹

A restricted treatment of taxation is partly justified by the fact that an increasing number of schools offer a separate course on this subject. By the same token that it is steadily gaining a place of its own (thus evidencing its increasing scope, intricacy, and importance), it is outgrowing a place in the course on Constitutional Law.¹⁰

Over the years, some areas once staples of constitutional law courses have developed such an identity and complexity of their own as to warrant treatment as separate disciplines. What was once the fate of administrative law, for example, has now become appropriate for the constitutional requirements of criminal procedure.¹¹

Seeing how the Dowling-Gunther-Sullivan casebooks have treated questions about political participation and structure sheds light both on the need for thinking about the law of politics¹² as a field in itself and on the relationship between writing and teaching

8. Jean Molière, *Le Bourgeois Gentilhomme*, act 2, scene 4, line 34 (1670).

9. For ease of exposition, I refer to the editions of the book discussed in the text by the number of the edition.

10. NOEL T. DOWLING, *CASES ON AMERICAN CONSTITUTIONAL LAW* vii (1st ed. 1937).

11. GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* xx (9th ed. 1975). For a brief description of the arrival and expatriation of criminal procedure in the Dowling-Gunther casebooks, see Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2001-02 (1998).

12. For reasons explained in Samuel Issacharoff and Richard Pildes's contribution to this symposium, I think the term "election law" sends the wrong message about the scope of the field. See Samuel Issacharoff & Richard H. Pildes, *Not By "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173 (1999).

about the political process and the larger project of constitutional law. My sense is that the emergence of courses like the ones the contributors to this symposium teach is a good thing. But in addition to teaching students how to think about problems related to the political process they may encounter as law clerks, litigators, or policymakers, the major virtue of treating the law of the political process as a coherent subject lies in enabling scholars and students to see connections among the various pieces of constitutional law and statutes that influence how our politics is conducted. It 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.¹³ Just as other aspects of constitutional law cannot be fully understood divorced from the political institutions that produce them, so too our political institutions and practices cannot be understood in a vacuum: they are a piece of constitutional law.

It's not as if the First Edition of the Dowling casebook had to banish taxation to its own course in order to make room for questions about political rights and institutions. Although the preface identified "the regulatory power of government" as the *prima materia* of constitutional law,¹⁴ there was virtually nothing in the book about regulating the political process. For example, the First Edition omitted any discussion of the Supreme Court's evisceration of congressional attempts to enforce the right to vote in *United States v. Cruikshank*¹⁵ and *United States v. Reese*.¹⁶ The only voting-related principal cases were *Nixon v. Condon*¹⁷ and *Grovey v. Townsend*¹⁸—two white primary cases used to illustrate the problem of state action. In the chapter on the Equal Protection Clause, none of the existing voting rights cases were discussed in text. Cases like *Minor v.*

13. For a discussion of the extent to which cross-fertilization has occurred between constitutional law and criminal procedure, see Carol S. Steiker, "First Principles" of Constitutional Criminal Procedure: A Mistake?, 112 HARV. L. REV. 680, 684-85 (1999).

14. DOWLING, *supra* note 10, at vii.

15. 92 U.S. 542 (1876).

16. 92 U.S. 214 (1876). For a discussion of Supreme Court decisions regarding the right to vote from Reconstruction through 1937, see Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 525-42 (1973).

17. 286 U.S. 73 (1932).

18. 295 U.S. 45 (1935).

Happersett,¹⁹ *Giles v. Harris*,²⁰ and *Guinn v. United States*,²¹ which each play a substantial role in *The Law of Democracy*,²² were contained in a single long note.²³

The most interesting feature of the next few editions of Dowling's book was where the scanty discussions of voting rights appeared. The book, like Gaul, came to be divided into three parts—the judicial function, the federal system, and individual rights; it retains them to this day.²⁴ The White Primary Cases, and—more significantly—the notes on *Giles*, were placed in the individual rights section. For reasons that I have explored elsewhere, the implicit decision to treat questions of political participation as ones of individual rights—rather than, say, questions of institutional structure—has important consequences for the way both courts and scholars think about the meaning of democracy.²⁵

So, basically, the book remained, up through the final edition written by Dowling alone, the Sixth.²⁶ Gerald Gunther's arrival on the Seventh Edition, which was published in 1965, coincided with the Reapportionment Revolution and the Voting Rights Act. The

19. 88 U.S. 162 (1875).

20. 189 U.S. 475 (1903).

21. 238 U.S. 347 (1915).

22. See ISSACHAROFF, KARLAN & PILDES, *supra* note 1, at 22-33, 69-77 (excerpting and discussing *Minor*, *Giles*, and *Guinn*).

23. See DOWLING, *supra* note 10, at 1045-46 n.3. For an example of contemporaneous scholarship on an important issue that might have been incorporated into the First Edition, see Zechariah Chafee, Jr., *Congressional Reapportionment*, 42 HARV. L. REV. 1015 (1929).

24. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW ix-xi (13th ed. 1997) (summary of contents, dividing the book into three parts—"The Judicial Function in Constitutional Cases," "The Structure of Government: Nation and States in the Federal Systems," and "Individual Rights").

25. See, e.g., Pamela S. Karlan, *Not By Politics Alone*, 85 VA. L. REV. (forthcoming 1999); Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One-Vote*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207, 210 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

26. See NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW 1077 (6th ed. 1959) (discussing *United States v. Classic*, 313 U.S. 299 (1941), and *Smith v. Allwright*, 321 U.S. 649 (1944), in Chapter 13—"national protection of civil rights"). Interestingly, the book makes relatively little of the fact that *Classic* involved a federally initiated prosecution of ballot fraud in a case without any racial salience while *Smith* involved a private lawsuit by a black plaintiff challenging his exclusion from the all-white Texas Democratic Party primary.

Seventh Edition had far more extensive material about political and electoral structures. And this time, it was dispersed throughout the book. In the part related to the judicial function, a substantial section was devoted to *Baker v. Carr*²⁷ and the cases preceding it, including *Colegrove v. Green*²⁸ and *Gomillion v. Lightfoot*.²⁹ Of even more interest, the second part of the Seventh Edition, which dealt with "the federal system," devoted a substantial portion of the chapter on congressional power to "protection of the franchise."³⁰ This section, perhaps more than any other piece of the book, illustrated the change from *Cases on Constitutional Law*—the title of the Sixth Edition—to *Cases and Materials on Constitutional Law*—the title of the Seventh. The section contained a substantial amount of the legislative history surrounding the Voting Rights Act of 1965,³¹ as well as the entire, detailed text of the 1965 Act. It also raised a variety of issues surrounding the newly ratified Twenty-Fourth Amendment,³² and it presented a range of Supreme Court opinions on issues such as the literacy test and the white primary. Finally, cases involving political structure played a larger role in the book's treatment of individual rights. The book ended with a chapter on "some problems in equal protection," whose final section was devoted to legislative apportionment. This was where the Seventh Edition placed the recently decided *Reynolds v. Sims*,³³ which announced the requirement of "one-person, one-vote."

What to make of the Seventh Edition? Like the Supreme Court, the world of constitutional law was becoming aware that regulation of the political process raised profound questions concerning the permissible extent of judicial review; the relative claims of majorities, minorities, and discrete groups; and the relationship among the courts, Congress, and the states. The interesting thing is how undeveloped the curriculum was, and remains, with respect to the connections among these questions. Although the Supreme Court and

27. 369 U.S. 186 (1962).

28. 328 U.S. 549 (1946).

29. 364 U.S. 339 (1960). See NOEL T. DOWLING & GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 170-84 (7th ed. 1965).

30. DOWLING & GUNTHER, *supra* note 29, at 472-501. When discussing titles of chapters in the text, I have omitted the original capitalization and punctuation for the sake of readability.

31. See *id.* at 473-84.

32. See *id.* at 488.

33. 377 U.S. 533 (1964).

Congress recognized that disenfranchisement and dilution were related to one another, the Seventh Edition separated the issues in order to fit them into an overarching framework unrelated to their operation within the political system.

The first Gunther-only version of *Cases and Materials on Constitutional Law*³⁴—the Ninth Edition—essentially overhauled the book, and with it, the treatment of political issues. The “political question” and “justiciability” materials were moved to the very end of the book, to a new chapter on the “proper conditions for constitutional adjudication.”³⁵ One section of that chapter looked at “non-justiciable ‘political questions,’ ‘judicially discoverable and manageable standards,’ and ‘reapportionment litigation;’”³⁶ it covered the cases from *Baker v. Carr* through *Reynolds v. Sims*—which both involved claims of malapportionment, or quantitative vote dilution—as well as cases like *Gaffney v. Cummings*,³⁷ *Whitcomb v. Chavis*,³⁸ and *White v. Regester*³⁹—which involved the knottier claims of qualitative vote dilution through either gerrymandering or the use of multi-member electoral districts that submerged racially identifiable numerical minorities. It ended with *Gordon v. Lance*,⁴⁰ an undeservingly obscure case about the supermajority voting requirements in bond elections that raises a host of interesting practical and theoretical questions.⁴¹

Although the Ninth Edition substantially expanded the materials devoted to reapportionment—mirroring the explosion of litigation on the topic—this advance was balanced by the disappearance of the extensive materials about the 1965 Act. The legislative history and extensive coverage of the statute itself was replaced with cases concerning the scope of Congress’s enforcement power under section five of the Fourteenth Amendment.⁴² And the treatment of the right to participate was packed into a chapter on “‘the fundamental rights and interests’ strand of the ‘new’ equal protection,” that also

34. GUNTHER, *supra* note 11.

35. *Id.* at 1532-1653.

36. *Id.* at 1617-53.

37. 412 U.S. 735 (1973).

38. 403 U.S. 124 (1971).

39. 412 U.S. 755 (1973).

40. 403 U.S. 1 (1971).

41. See ISSACHAROFF, KARLAN & PILDES, *supra* note 1, at 155-57 (discussing *Gordon*); Guinier & Karlan, *supra* note 25, at 211-13 (same).

42. See GUNTHER, *supra* note 11, at 998.

contained cases about access to the judicial process, the right to travel, and residency restrictions.⁴³ Again, cases about politics were allocated among the parts of the book in order to illustrate more general ideas about constitutional law, rather than attempting to provide a coherent understanding of constitutional and statutory regulation of the political process. That pattern held through the last Gunther-only edition—the Twelfth—in 1991.⁴⁴ The one major change was the appearance of a substantial section on campaign finance in a new chapter entitled “freedom of expression in some special contexts.”⁴⁵

The current edition of the book⁴⁶—the Thirteenth—offers a thorough discussion of the case law about politics. Although the book continues the tripartite structure of earlier editions, roughly seventy-five percent of the materials now fall in the final part, which remains entitled “individual rights.”⁴⁷ With two notable exceptions—*Baker v. Carr*, which is a primary case in Part I’s coverage of issues of justiciability and political questions,⁴⁸ and *U.S. Term Limits, Inc. v. Thornton*,⁴⁹ which concludes the chapter in Part II on questions of federalism-related limits on national power by identifying an “antifederalist revival”⁵⁰—that is where the Thirteenth Edition assigns cases about the political process.

It is interesting to compare the Thirteenth Edition’s treatment of *Baker* and *Thornton* with how we treat the same two cases in *The Law of Democracy*. The Thirteenth Edition devotes roughly thirty-five pages to the two cases, compared to thirty pages in *The Law of Democracy*. But *The Law of Democracy* has far more extensive notes and questions. The real differences show up here.⁵¹ The Thirteenth Edition connects *Baker* with a series of “political question” cases—*Powell v. McCormack*,⁵² *Goldwater v. Carter*,⁵³ and *Nixon v.*

43. *Id.* at 788-809.

44. GERALD GUNTHER, CONSTITUTIONAL LAW (12th ed. 1991).

45. *Id.* at 1357.

46. GUNTHER & SULLIVAN, *supra* note 24.

47. *Id.* at 415-1553.

48. *See id.* at 47-53.

49. 514 U.S. 779 (1995).

50. GUNTHER & SULLIVAN, *supra* note 24, at 115-40.

51. The Thirteenth Edition’s excerpt from *Baker* is seven pages long, while *The Law of Democracy*’s excerpt is 11 pages, but the ratios are reversed for *Thornton*, to which the Thirteenth Edition devotes 25 pages while *The Law of Democracy* spends only 10.

52. 395 U.S. 486 (1969).

53. 444 U.S. 996 (1979).

*United States*⁵⁴—that have very little to do with politics.⁵⁵ Similarly, with respect to *Thornton*, the Thirteenth Edition locates the case within a progression—beginning with *McCulloch v. Maryland*⁵⁶ and culminating in *New York v. United States*,⁵⁷ *United States v. Lopez*,⁵⁸ and *Seminole Tribe v. Florida*⁵⁹—that is concerned primarily with congressional power vis-à-vis the states.⁶⁰

By contrast, while *Baker* and *Thornton* are separated by 500 more pages in *The Law of Democracy* than they are in the Thirteenth Edition,⁶¹ one unifying concern is made quite clear. From the outset, *The Law of Democracy* identifies the question of entrenchment as a central theme in the study of legal regulation of the political process:

Because democratic politics is not autonomous of existing law and institutions, those who control existing arrangements have the capacity to shape, manipulate, and distort democratic processes. Historical experience provides convincing reasons to believe that those who currently hold power will deploy that power to try to preserve their control. Thus, democratic politics constantly confronts the prospect of law being used to freeze existing political arrangements into place Yet there is no way to take the law “out” of democracy. The question, then, is what the law might contribute to mediating or resolving this tension. Can institutional arrangements be developed that both

54. 506 U.S. 224 (1993).

55. Cf. Steve Martin, *Studies in the New Causality*, THE NEW YORKER, Oct. 26 & Nov. 2, 1998, at 108 (facetiously identifying “semantic causality” as the “causality [that] occurs when a word or phrase in the cause is the same as a word or phrase in the effect” and giving the example ““You failed to install my client’s *sink* properly, causing her to *sink* into a depression.””). “Semantic causality” turns out to be a useful concept in describing the Supreme Court’s treatment of the “political question” doctrine in the political arena. Consider *Giles v. Harris*, 189 U.S. 475 (1903), for example, in which Justice Holmes refused to reach the merits of the disenfranchised voters’ claims because “relief from a great political wrong . . . must be given . . . by the legislative and political department of the government of the United States.” *Id.* at 488.

56. 17 U.S. (4 Wheat.) 316 (1819).

57. 505 U.S. 144 (1992).

58. 514 U.S. 549 (1995).

59. 517 U.S. 44 (1996).

60. See GUNTHER & SULLIVAN, *supra* note 24, at 113-14.

61. Roughly seventy pages separate the two cases in the Thirteenth Edition, while roughly 570 pages separate them in *The Law of Democracy*.

reflect the inevitable role of law in shaping democracy and at the same time prevent that role from being manipulated by existing office holders for self-interested aims? That is the other side of the mutual relationship between law and democracy we stress: the need to find techniques and theories that prevent the capture of democratic politics by existing distributions of political power.⁶²

The notes and questions following *Baker* point to the potential process failure identified in Justice Clark's concurrence: there was no way to force the political faction currently in control over the legislature to revisit the allocation of political power.⁶³ Similarly, in the notes and questions following *Thornton*, *The Law of Democracy* suggests that term-limit initiatives reflect the same anti-entrenchment sentiment—this time expressed by the electorate as a whole—that motivated judicial intervention in the reapportionment cases.⁶⁴ The connections *The Law of Democracy* draws to other lines of cases involve, not surprisingly, other aspects of the political process, ranging from campaign finance to political gerrymandering to regulation of political parties.⁶⁵

It's not that those other cases are absent from the Thirteenth Edition. Far from it. All the topics we cover in *The Law of Democracy* are in the Thirteenth Edition, along with at least a summary of virtually all of what we specialists have come to identify as the principal cases. I don't know of any other book that summarizes the various doctrines more encyclopedically. Still, the Thirteenth Edition gives relatively little attention to the connections among these different doctrinal lines. Rather, it uses voting rights and reapportionment problems as illustrations of more general equal protection issues of suspect classification or fundamental rights. Similarly, the campaign finance cases are treated as involving "rights ancillary to freedom of speech."⁶⁶ More generally, precisely because the cases about politics are classified as individual rights cases, the casual reader risks overlooking a central point:

62. ISSACHAROFF, KARLAN & PILDES, *supra* note 1, at 2.

63. *See id.* at 134-35.

64. *See id.* at 705-06 (excerpting an argument from Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 510 (1997)).

65. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 1, at 707-09, 711-12.

66. GUNTHER & SULLIVAN, *supra* note 24, at 1361 (title of Chapter 13).

The kind of democratic politics we have is always and inevitably itself a product of institutional forms and legal structures These institutional structures all limit and define the decisions available through democratic politics itself. In turn, these institutional arrangements are either the inherited product of prior democratic choice or of inertia—or perhaps some combination of the two.⁶⁷

The Law of Democracy has the luxury of treating the law of politics far more deeply than the Thirteenth Edition can. Even though roughly ten percent of the Thirteenth Edition is devoted to legal regulation of the political process, that still amounts to only about 160 pages, less than one-fifth the space used by *The Law of Democracy*. The additional room allows us to include more extensive excerpts from the cases to give readers a better sense of the Court's and the concurring and dissenting justices' reasoning as well as the doctrinal bottom line and to provide historical, social scientific, and comparative perspectives of a kind that is relatively rare in a synoptic book on American constitutional law. *The Law of Democracy*, for example, contains extensive materials on alternatives to the traditional American system of geographically-based electoral districts;⁶⁸ a version of the Alabama literacy test that graphically illustrates how low-level discretion was used to disenfranchise blacks;⁶⁹ lower court decisions to give students a real sense of how Supreme Court decisions get interpreted and applied;⁷⁰ and a case study of the Voting Rights Act's administrative preclearance process⁷¹ that relies on internal Justice Department documents and congressional testimony as well as reported judicial decisions.

Put somewhat differently, the Thirteenth Edition uses the core voting rights cases *centrifugally*—the case analyses spin outward into connections with other aspects of constitutional law—while *The Law of Democracy* uses them *centripetally*—to show the “complex interaction between democratic politics and the formal institutions of

67. See ISSACHAROFF, KARLAN & PILDES, *supra* note 1, at 1-2.

68. See *id.* at 713-85 (chapter on alternative election systems, containing a detailed case study of how such a system operated in Chilton County, Alabama).

69. See *id.* at 98-102.

70. See *id.* at 464-99 (illustrating the interpretation of the test laid out in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for proving racial vote dilution under section 2 of the Voting Rights Act).

71. See *id.* at 336-66.

the state."⁷² Both forms of connection are valuable, but they are different.

Still, it is almost impossible to imagine a synoptic account of constitutional law as it is practiced today—and the Thirteenth Edition is the preeminent example of the genre⁷³—that would *omit* discussion of political participation, reapportionment, campaign finance, or direct democracy the way virtually all constitutional law casebooks now omit real treatment of constitutional criminal procedure. Perhaps it is just my personal bias, but a constitutional law course that covered the fundamental rights strand of strict scrutiny without looking at the right to vote, or state action without at least a nod at the White Primary Cases, or affirmative action without accounting for the *Shaw* cases, or the political question doctrine without mentioning *Baker v. Carr* would seem just loony. Nor do I think that one can do justice to the doctrine of judicial review without at least confronting the questions of process failure and entrenchment that come to the foreground in cases involving political institutions and arrangements. So I see no likelihood that the law of politics will disappear from the conventional constitutional law course in the near future.

What then does it mean to talk about the legal structure of the political process as its own field of study? The law governing politics is a form of applied constitutional law; it involves repeated interactions among statutes and constitutional provisions, courts and legislatures, and state and national governments. Moreover, looking at the statutes, structures, and cases that govern our politics as it is actually conducted may offer a far richer avenue for understanding constitutional law generally than pursuing ever more theoretical and abstract forms of constitutional theory has done.

Reaching for the world, as our lives do,
As all lives do, reaching that we may give
The best of what we are and hold as true:
Always it is by bridges that we live.⁷⁴

The great thing about the law of the political process, at least as it has developed so far, is the opportunities it offers for building

72. *Id.* at 1.

73. Its only real rival is LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988), but Tribe's treatise is now seriously out of date and awaiting a new edition.

74. PHILIP LARKIN, *Bridge for the Living*, in *COLLECTED POEMS* 203-04 (1989).

bridges. Some of those bridges are interdisciplinary: they connect law and legal doctrine to perspectives that political scientists, historians, and sociologists have developed.⁷⁵ Some of the bridges are intradisciplinary, as scholars who began by focusing on relatively narrow issues within, for example, racial vote dilution under the Voting Rights Act, apply insights from their work to other problems in constitutional law or theory, or as scholars in other areas borrow from the themes developed in the case law surrounding politics or the scholarship we produce.⁷⁶ And some of them are quite practical, as professors who study reapportionment or campaign finance find themselves actively involved in litigation that both applies and informs their teaching and scholarship. Perhaps in no other area of constitutional law is there as close a connection between scholarship and practical problems or between scholars and litigators. It would be misfortune indeed if the profusion of scholarship about the legal regulation of the political process led constitutional law scholars to think either that we don't need them, or that they don't need us. Banish plump Jack, and banish all the world.

75. For some recent and instructive examples of interdisciplinary works on minority voting and representation, see KEITH J. BYBEE, *MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION* (1998); J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999); DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* (1997).

76. See, e.g., Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 *STAN. L. REV.* 1365 (1997); John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 *CAL. L. REV.* 1211 (1998).

